REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

VOLUME VI.

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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, }

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO, JULY TERM, 1840.

Memorandum. — EMERY J. having been employed in trying jury causes in the County of *Washington*, did not hear the arguments of the cases in this County, and took no part in the decisions.

ISAAC ALLARD *vs.* DANIEL LANE.

An acknowledgment upon the back of a mortgage deed, that the condition thereof had been complied with and that all obligations therein had been discharged, under the hand and seal of the mortgagee, is a discharge of the mortgage.

Where the defendant had purchased land of the plaintiff, and had agreed to pay him a part of the consideration therefor when the plaintiff should procure the discharge of a mortgage thereupon; and where the discharge had been procured and entered upon the records three months before the suit; *it was held*, that no special notice of the discharge, or demand of the money, was necessary to be shown before the commencement of the action.

THE action was assumpsit, the writ bearing date *June* 23, 1837, upon the following contract in writing.

"We the six individuals undersigned agree to pay to *Isaac Allard* the sum of five hundred and fifty dollars, (each a sixth part) with interest, provided the said *Isaac* shall discharge the mortgage given by him of a piece of land in *Bristol*, in the county of *Lincoln*, (described) six sixteenths of which he has this day conveyed to us by his warranty deed, the said $550 being a part of the consideration which we have contracted to give therefor; and by his causing the said mortgage to be discharged so as not to have the

same operate to our injury, or incumber our title to the land conveyed to us. *August* 1, 1835." This contract was signed by the defendant and five others.

At the trial, before EMERY J., the defendant called upon the plaintiff to prove a lawful discharge of the mortgage, notice to the defendant of a discharge thereof, and a demand of payment of him, before the bringing of the suit. The plaintiff thereupon offered as evidence of such discharge the following writing indorsed on the back of the mortgage, signed and sealed by the mortgagees, and witnessed. "We hereby certify that the within conditions have been complied with, and all obligations therein are discharged. *Bristol, March* 18, 1837." On the back of the deed was an acknowledgment, and under the discharge was the following certificate. "Recorded in the margin of the record of the within deed. *March* 18, 1837. *Warren Rice, Regr.*" The plaintiff proved that he had paid the amount due upon the mortgage on the day last named, but offered no evidence of notice to the defendant of the payment, nor of the discharge, excepting the record, nor of demand of payment before bringing the suit. The defendant objected that the evidence was incompetent, insufficient and defective. The Judge ruled, that the writing indorsed upon the mortgage, and the recording thereof, were competent and sufficient to prove the payment and discharge of the mortgage, and notice of such payment and discharge to the defendant; and that no demand on the defendant was necessary previously to the bringing of the action. The jury found for the plaintiff.

J. Williamson argued for the defendant, and relied most strongly on the point that notice should have been given to the defendant of the discharge of the mortgage before the commencement of the suit, and a demand made of the money. 1 *Chitty on Pl.* 319; 2 *Saund.* 62; *Hobart* v. *Hilliard*, 11 *Pick.* 143; *Oliver's Pr.* 62; 2 *Stark. Ev.* 91; 1 *Selw. N. P.* 123. The rule is, that when the act is within the knowledge of one party and not of the other, that notice must be given.

The mortgage was not discharged in the manner the law requires. *Stat.* 1821, *c.* 39, § 1.

Here no evidence was produced that this was the true signature

of the mortgagee. It might have been wholly fraudulent. 2 *Mass. R.* 506; 14 *Mass. R.* 296; 4 *Greenl.* 20.

W. G. Crosby, for the plaintiff.

The recording of the discharge is a sufficient notice of it. *Yelverton*, 168; *Com. Dig. Pleader, C.* 75.

The sum became due whenever the mortgage was removed, and no demand prior to the suit was necessary. 1 *Saund.* 33; *Yelv.* 67; 1 *Chitty's Pl.* 322.

The contract only provides, that the mortgage shall be discharged, so as not to operate an injury to the defendant. Here was an acknowledgment that the debt had been paid under seal, and that had been recorded as the statute provides. The defendant could sustain no injury from that mortgage.

The opinion of the Court was drawn up by

WESTON C. J. — The questions, involved in the case before us are, whether the condition of the contract, upon which the plaintiff relies, has been complied with, whether it was necessary for the plaintiff to aver and prove notice of that fact, and whether also he was bound to prove a special demand of payment, prior to the action.

And we are of opinion, that the mortgage, set forth in the condition, has been legally and effectually discharged, by the entry on the mortgage deed. The deed being referred to in that indorsement, it has the same effect, as if it had been recited, or otherwise particularly described. The mortgagees, under their hands and seals, in the presence of a witness, declare the conditions to have been complied with. The deed was to be void, upon the performance of the conditions; and when the mortgagees, by their deed, on the back of that instrument, admit that they have been performed, it must be understood to have been done in all respects, as therein provided. But the entry further expressly discharges the obligation of the deed. If the lawful meaning and intention of parties, clearly expressed, is to be regarded, the mortgage was fully released and discharged.

It is contended, that the performance of the condition, being peculiarly in the knowledge of the plaintiff, he was bound to give notice to the defendant. And there are authorities to this effect;

as, where the act on which the plaintiff's demand arises, is secret and lies only in the plaintiff's mouth, which is one of the illustrations of the rule, put by *Baron Comyns. Com. Dig. Pleader, C.* 73. In this case there was a privity between the defendant, who was the assignee of the mortgagor, and the mortgagees. He could at any time learn from them, whether their lien had been discharged. Besides, the discharge of the mortgage was, on the day it was made, more than three months before the action, entered of record, to give notice to the public generally, and to parties and privies in interest, particularly. If this therefore was one of that class of cases, to which the rule would have applied, if the fact had been peculiarly in the knowledge of the plaintiff, we are of opinion, that the discharge of this mortgage was not a fact of that description.

The amount here claimed was a part of the consideration, agreed to be paid by the defendant, for certain real estate conveyed to him by the plaintiff, which was to be retained, until the latter had removed the incumbrance of the mortgage. A distinction has been taken between a precedent debt or duty, and where the obligation to pay arises altogether from the happening of the condition. In the latter, a precedent request is essential, in the former, it is not. 1 *Saund.* 33. Here the debt existed, but the time of payment was postponed, until a certain condition was performed. That done, the debt became presently due.

None of the points, taken in defence, appear to us to have been sustained. *Exceptions overruled.*

Thomas Tapley *vs.* Richard Smith.

If one man builds a house on land of another by his permission, the house is personal property, and does not pass by the conveyance of the land to a third person, but remains the property of the builder.

If the builder is not prevented from occupying or removing the house, he cannot maintain assumpsit therefor against the grantor of the land.

Assumpsit on an account annexed to the writ, the only item of account being "one half of a dwellinghouse, $400," with the money counts.

At the trial before EMERY, J., it was proved that a house was built upon land of the defendant, by his consent, by one *Porter;* that *Porter* sold and conveyed the house to the plaintiff and defendant jointly by deed; that it was agreed, verbally, that the defendant should convey to the plaintiff, one half of the land on which the house stood; that afterwards the defendant conveyed, in mortgage, the same land to *Johnson*, to secure the payment of a sum due him, the deed being absolute and a writing given back; that *Johnson* never entered into possession under his mortgage, and never knew of the plaintiff in any transaction respecting the mortgage, or the land, or house; that afterwards, the amount due *Johnson* was paid to him by *Carver*, a brother-in-law of the defendant, and *Johnson* thereupon, at the request of the defendant, conveyed the land to *Carver;* and that *Carver* promised *Smith* to re-convey to him, when the amount due was paid. The plaintiff offered no proof that he had been dispossessed of the house, or had been prevented from occupying it, and there was no evidence that the plaintiff or his tenants had occupied it after the deed to *Johnson.* There was a cellar under the house. The plaintiff did not show that he had ever demanded a deed of the land.

The counsel for the defendant requested the Judge to instruct the jury, that if the plaintiff was the owner of one half of the house, that his interest did not pass by the deed to *Johnson;* that the house was personal property, and was still the plaintiff's; that he can sustain no action against the defendant, or if any, he must first prove that he has been deprived of the house, and has made a demand on the defendant for a deed of the land, or for the money received on sale of the house; and that if liable at all, the defendant is only liable in trover, and not in assumpsit.

The Judge instructed the jury that the house was personal property, and consequently, that it would not necessarily pass by *Smith's* deed to *Johnson* and the deed to *Carver;* that when the plaintiff ascertained the fact of the conveyance to *Johnson* and afterwards to *Carver*, he had his election, to consider it as passed or not; that he was not bound to show that he had actually been deprived of the use and occupation of his half of the house, nor was it necessary that he should make any demand on the defendant for a deed of the land or for the money; that although a tort, he might

waive that and maintain assumpsit; that the jury must be satisfied from the evidence whether the plaintiff had been paid for the half of the house; and that he ought to be paid, unless the demand had been paid, or all demands settled between the parties, of which they would judge from the evidence.

The defendant, finding the verdict against him, excepted to the instructions and opinions of the Judge.

Kelley, for the defendant, contended, that the house did not pass by *Smith's* deed to *Johnson*, and that *Johnson* merely passed the title he acquired to *Carver*. The rights of the plaintiff remained the same, as they would if *Smith* had retained the land in his own hands. *Russell* v. *Richards*, 1 *Fairf.* 429. The plaintiff must show that he has received an injury, before he can support an action. *Safford* v. *Annis*, 7 *Greenl.* 168.

The plaintiff should have offered to pay for the land, before any action can be sustained. He was to have the land by paying for it, instead of compelling the defendant to pay for the house.

The house was personal property, and the plaintiff was entitled to his share of it. The defendant has never sold it, nor in any way prevented the plaintiff from having all his rights. There are no torts to waive, and if there had been a conversion by using the house, assumpsit would not lie. *Jones* v. *Hoar*, 5 *Pick.* 285.

W. G. Crosby, for the plaintiff.

There was no necessity for making a tender, or making a demand, prior to the commencement of the suit. Where the party has disabled himself from performing on his part, this is rendered unnecessary. *Newcomb* v. *Brackett*, 16 *Mass. R.* 161; *Clark* v. *Moody*, 17 *Mass. R.* 149; 2 *Stark. Ev.* 95.

Demand and refusal are one mode of showing a conversion. Another is a sale of the property. *Wilson* v. *Reed*, 3 *Johns. R.* 175; *Mesereau* v. *Norton*, 15 *Johns. R.* 179; *Hilborne* v. *Brown*, 3 *Fairf.* 162.

The house was put on the land under a license, and was personal property. *Ricker* v. *Kelly*, 1 *Greenl.* 117; *Kidder* v. *Hunt*, 1 *Pick.* 328.

The plaintiff in this case might waive the tort and bring assumpsit. Where the property has been sold, and the defendant has received payment, assumpsit will lie, whether the payment be re-

ceived in money, notes, or in paying the debts of the defendant. *Gardiner Man'g Co.* v. *Heald*, 5 *Greenl.* 381; *Miller* v. *Miller*, 7 *Pick.* 133; *Miller* v. *Miller*, 9 *Pick.* 34.

The opinion of the Court was drawn up by

WESTON C. J. — The house was personal property, and the plaintiff's interest in it did not pass by the defendant's deed to *Johnson*. The plaintiff's title to the house remained unaffected, that deed notwithstanding. This point was decided in the case of *Russell* v. *Richards et al.* 1 *Fairf.* 429, to which we refer.

It is true, if the defendant had distinctly undertaken to sell the house, and had received his pay for it, the plaintiff might have waived the tort, ratified the sale, and maintained assumpsit for the money. But that fact does not appear. He conveyed to *Johnson* the land, upon which the house stood, as collateral security. That did not carry the plaintiff's half of the house, as it would have done, if it had been the defendant's property. *Johnson* never meddled with the house, and having received his pay, released to *Carver* the appointee and relative of the defendant. The plaintiff has never been interfered with by the defendant in the enjoyment of his property, nor has it been occupied under him, nor has *Carver*, his appointee, ever claimed the house as owner of the land, whether he holds as trustee of the defendant, or in his own right.

As to the parol agreement of the defendant, to convey part of the land to the plaintiff, it gave him no legal rights, being void at law under the statute of frauds. If it had appeared, that the defendant had exercised any ownership over the house, the proper remedy of the plaintiff would have been trover. *Hilborn* v. *Brown et al.* 3 *Fairf.* 162. It was there held, that the building, being personal property, did not pass by the deed; but *Brown*, the grantee, was held liable in trover, not in virtue of his deed, but because he had subsequently converted the building to his own use.

The facts did not, in our opinion, justify the Judge in instructing the jury, that there was a sale at the election of the plaintiff. It does not appear, that any sale of his part of the house was contemplated, either by the defendant or his grantee, or by *Carver*, to whom his grantee released.

Exceptions sustained.

Nathaniel S. Greer *vs.* Amos Greer.

Where the plaintiff conveyed land to the defendant, worth seven hundred dollars, and the defendant made a parol agreement to pay a debt of forty dollars, due from the plaintiff to a third person, and to re-convey the same land to the plaintiff on his indemnifying the defendant for thus assuming to pay the debt; and where the plaintiff fully indemnified the defendant for the payment of the forty dollars; and the defendant again agreed, by parol, to re-convey the land, but afterwards refused to convey it to the plaintiff, and did convey it to another; it was held, that, although no action at law would lie on the agreement, it being void by the statute of frauds, yet, that, upon these facts, an action for money had and received might be maintained.

The action was assumpsit, wherein the plaintiff alleged, that the defendant became surety for him to the amount of $39,07, and that he conveyed to the defendant, for security and indemnity, his farm, worth $700; that he paid the debt for which the defendant was his surety; that the defendant afterwards conveyed the farm to a third person; that he requested the defendant to re-convey the land, and that he wholly refused to convey to the plaintiff, and conveyed the land to a third person. There was also a count for money had and received.

At the trial before Emery J. the plaintiff offered to prove, that, on April 6, 1830, the plaintiff conveyed his farm to the defendant, worth $700, in consideration that he would pay to *Norris* a debt of about $40, due from the plaintiff, it being then agreed, that if plaintiff should indemnify the defendant and save him harmless from the debt to *Norris*, that the defendant should re-convey the farm to the plaintiff; that in *July*, 1836, the parties met at the house of a magistrate for the purpose of making and executing a re-conveyance of the farm, they then agreeing that the plaintiff had fully repaid and indemnified the defendant for the *Norris* debt, and the defendant expressed his willingness to execute a deed to the plaintiff, and it being inconvenient at that time for the magistrate to prepare the deed, the parties separated; that afterwards, the defendant frequently admitted that he had been fully paid and indemnified for the *Norris* debt, and agreed to execute a deed of the land to the plaintiff, and to fulfil the agreement on his part;

that afterwards, *October* 17, 1836, the defendant conveyed the same farm, by deed of warranty, to one *Thomas*, who has since, by process at law, recovered seizin and possession thereof against the plaintiff; that in pursuance of the agreement, the magistrate wrote a deed from the defendant to the plaintiff, from the original deed left for that purpose; and that the defendant came afterwards and took away the old deed, and said that the plaintiff had not behaved well, and he should not execute the new deed. There was no written agreement between the parties. The counsel for the defendant objected to the admission of this evidence or of any part thereof, on account of its not being in writing, and it was for this cause excluded by the Judge. A nonsuit was then entered, by consent, which was to be set aside, if the testimony should have been admitted.

J. Williamson, for the plaintiff, contended: —

1. The plaintiff was entitled to recover back the amount paid on account of the *Norris* debt. The defendant had in his hands property of far greater value than the amount for which he was liable, long before he was repaid by the plaintiff. The defendant has rescinded the parol contract, and must refund the money paid under it by the plaintiff. *Kidder* v. *Hunt*, 1 *Pick.* 328; *Sherburne* v. *Fuller*, 5 *Mass. R.* 133; *Gillet* v. *Maynard*, 5 *Johns. R.* 85; *Lane* v. *Shackford*, 5 *N. H. Rep.* 130; *Thompson* v. *Gould*, 20 *Pick.* 134.

2. The plaintiff is entitled to recover the amount for which the farm was sold by the defendant. The defendant here practised a gross fraud upon the plaintiff, and equity would relieve against it. The action for money had and received is an equitable action, and the plaintiff may recover the amount of money received from the property by the defendant by his fraudulent acts, and which, in equity and good conscience, belongs to the plaintiff. *Boyd* v. *Stone*, 11 *Mass. R.* 342; *Bliss* v. *Thompson*, 4 *Mass. R.* 488; *Fowler* v. *Shearer*, 7 *Mass. R.* 14.

W. G. Crosby, for the defendant, cited and relied upon the following authorities. *Boyd* v. *Stone*, 11 *Mass. R.* 342; *Flint* v. *Sheldon*, 13 *Mass. R.* 443; *Gilpatrick* v. *Sayward*, 5 *Greenl.* 465; *Hale* v. *Jewell*, 7 *Greenl.* 435.

The opinion of the Court was drawn up by

Weston C. J. — The contract, upon which the plaintiff declares, is void by the statute of frauds. Where the party, who would avail himself of this statute, has himself been guilty of fraud, the party injured may often have a remedy in equity, and sometimes at law. There are cases where a court of equity would decree a specific performance, when the estate had not been previously conveyed to a *bona fide* purchaser, without notice. And when it has, a decree might pass against the fraudulent party, to make compensation in damages.

It has been said, that where a court of chancery would decree a specific performance, upon a parol contract for the sale of land, on the ground of fraud, damages might be recovered at law, based upon such fraud, in a proper action; but not assumpsit upon the contract. *Boyd* v. *Stone*, 11 *Mass.* 342. It is however, there stated, that "no instance can be found, in the reports of chancery cases, of a specific performance decreed, where the fraud consisted only of a breach of promise." The facts offered to be proved, present a case of great oppression. Whether any relief could be afforded in chancery, we are not called upon to determine. We are, however, quite clear, upon the authorities, that the plaintiff cannot maintain assumpsit, upon the express contract.

We are further of the opinion, that the plaintiff is entitled to reclaim what he has paid, since the conveyance of the land, upon an assumpsit implied by law. For the liability, undertaken by the defendant for the plaintiff, the latter put property into his hands, far transcending what was wanted for his indemnity. When the defendant, therefore, paid what he had assumed, retaining the property, and being thereby more than reimbursed, he had no further claim upon the plaintiff. The payment, subsequently made by him, was to re-purchase the estate upon the parol contract. It was upon this consideration alone, that the defendant could equitably receive or retain it. These parol contracts, although not legally, are morally binding, and payments made under them cannot be reclaimed, so long as the party receiving is in no fault. But if he repudiates the contract, a right of reclamation, upon the principles of equity and good conscience, accrues to the other party. Here the defendant has repudiated the contract, by depriving himself of

the power of fulfilment. *Richards* v. *Allen*, 17 *Maine R.* 296. Having a second time received of the plaintiff, what he had paid for him, he holds the sum last received for the use of the plaintiff; and to that extent, we are satisfied the action may be maintained, if the case stated can be made out in proof.

Nonsuit set aside.

Silas Stevens *vs.* Jonathan Foss.

The duty of assigning the limits of militia companies was imposed upon the selectmen of towns in their public capacity, and in the discharge of it the selectmen may act by majorities.

For all the purposes connected with the performance of militia service, minority ceases at the age of eighteen.

The father has no power to exonerate or withhold his son, over eighteen and within twenty-one years of age, from the performance of militia duty.

A person between the ages of eighteen and twenty-one, is liable to the penalty incurred by unnecessarily neglecting to appear at a company training.

Error to reverse a judgment in favor of *Foss*, as clerk of a company of militia in *Swanville*, in an action against *Stevens*, a minor above eighteen and under twenty-one years of age, for neglect to perform militia duty at a company training, rendered by a Justice of the Peace.

At the trial, the plaintiff, to prove the limits of the company, offered the doings of the selectmen of *Swanville* assigning limits to the company. The defendant lived within these limits, but he objected that the evidence was incompetent to prove the limits, because the two selectmen acted, when there was a third selectman, qualified to act, who for some cause, not assigned, did not act. The Justice overruled the objection.

The defendant proved by his father, that the defendant was then a minor, aged nineteen years; that he lived at home with his father; and that his father forbid his performing militia duty at the time of the alleged neglect. He then contended, that he was not liable to this action, but that by the statute, if any action was brought, it should have been against his father. This objection was also overruled by the Justice, and judgment rendered against him.

That these objections were overruled, was assigned for causes of error.

Kelley argued for the plaintiff in error: —

1. The power given to the selectmen of towns to define the limits of companies of militia, is a special duty, for a limited time, and wholly independent of their duty as selectmen. The whole number must act, or the proceedings are void. *Commonwealth* v. *Ipswich*, 2 *Pick.* 70; *Damon* v. *Granby*, *ib.* 345; *Jones* v. *Andover*, 9 *Pick.* 146; *Stanwood* v. *Pierce*, 7 *Mass. R.* 458; *Harlow* v. *Pike*, 3 *Greenl.* 438; *Goodwin* v. *Hallowell*, 3 *Fairf.* 271; 2 *East*, 244; 8 *East*, 319; 1 *B. & P.* 236; 3 *T. R.* 592.

2. A minor is never liable for a mere nonfeasance. Here the minor was expressly forbidden by his father to do the duty, and the son was bound to obey him. Minors are not made liable by the statute expressly, and general words are not sufficient. The *st.* 1834, *c.* 121, § 33, provides, that in cases like the present, the parent shall be liable for neglect of militia duty in the son; and it was never intended to give a remedy against both. 2 *Dane*, 499, 500; 3 *Bacon's Abr.* 591, *Infancy*; 1 *Com. on Con.* 150; *st.* 1834, *c.* 121, § 33.

W. G. Crosby, for *Foss*, the original plaintiff, said, there was a distinction between agents acting for the public, and those acting merely as the agents of private persons. In the former case, a majority have power to act, although they cannot in the latter. *Damon* v. *Granby*, 2 *Pick.* 345; *Jones* v. *Andover*, 9 *Pick.* 151; *Towne* v. *Jaquith*, 6 *Mass. R.* 46.

The law provides, that every one over eighteen years of age, not otherwise exempted, shall perform military duty. Minors as such are in no respect exempted. The militia act, § 33, merely gives an additional remedy, and is not a substitute for that previously existing. *Dewey, Pet'r*, 11 *Pick.* 268; *Winslow* v. *Anderson*, 4 *Mass. R.* 376.

The opinion of the Court was drawn up by

Weston C. J. — It has long been held, that the selectmen of towns, being agents for the public, and discharging duties of a political or municipal character, may act by majorities. The distinc-

tion between public and private agents, in this respect, has often been taken and sustained. It received the sanction of the Court in *Damon* v. *Granby*, 2 *Pick.* 345; and in *Jones* v. *Andover*, 9 *Pick.* 146. The duty of assigning the limits of companies, was imposed upon selectmen as such, in their public capacity; and is not to be distinguished from other duties, which regularly appertain to their office.

Eighteen has been fixed as the military age, by the highest legal authority. A father has no power to exonerate or to withhold his minor son, from the performance of this duty. Upon this point, the claim of the public is paramount to the parental rights of the father. The case of *Dewey, Pet'r*, 11 *Pick.* 265, is exactly in point. It was there held, that for all the purposes connected with the performance of military service, the age of maturity is eighteen. It results, that a party of that age, delinquent in the discharge of military duty, is liable to the penalty imposed by law.

Judgment affirmed.

Joseph Whitcomb *vs.* Joseph Higgins, Jr.

The enlistment of a minor under the age of eighteen years, into a company raised at large, is void, and to be regarded as if it had never taken place.

This was a writ of error brought to reverse a judgment of a Justice of the Peace, in favor of *Higgins*, in an action of debt brought against him by *Whitcomb*, as clerk of a company of militia in *Thorndike*, to recover a penalty for neglect to perform militia duty at a company training.

The plaintiff proved the enrolment of *Higgins* in the company, when he arrived at the age of eighteen years, and the other facts necessary to show a *prima facie* case on his part. The defendant then proved, that prior to his arriving at the age of eighteen years, he enlisted as a member of an independent company in *Thorndike*, duly organized, he having been one of the petitioners for the formation of the independent company; that the company, within the bounds of which he resided at the time of his enlistment, contained

over forty effective privates, exclusive of conditional exempts, and two musicians; and that he had continued to do duty in the independent company until the time of the trial. No notice in writing had been given to the commanding officer of the standing company of the enlistment of *Higgins*. It was contended, that notwithstanding the enlistment, the defendant was liable to do duty in the standing company. The Justice overruled the objection, and decided that the enlistment of the defendant, before he arrived at the age of eighteen years, was a valid enlistment, voidable only by himself; and that he was thereby exempted from his liability in the standing company, although no notice had been given of the enlistment in the manner provided by the statute; and rendered judgment for the defendant.

The errors assigned alleged the ruling and decision of the Justice to have been erroneous.

W. G. Crosby, for the plaintiff in error, contended: —

1. The enlistment was void, because no notice was given of the enlistment to the commanding officer of the standing company, as the statute requires. *Stat.* 1824, *c.* 121, § 19.

2. The enlistment was also a nullity, because the defendant was not then eighteen years of age. *Dewey, Pet'r*, 11 *Pick.* 265.

J. Williamson, for the defendant, argued, that the defendant had the power to make the selection of the company in which he chose to perform militia duty, before he arrived at the age of eighteen years. *U. S. militia act*, § 4; *Comm'th* v. *Frost*, 13 *Mass. R.* 491; *Dewey, Pet'r*, 11 *Pick.* 265.

The notice is to be given to the commanding officer of the standing company, only when the private is enrolled and liable to do militia duty therein. Here the private was never liable to do duty in the standing company, and no notice was necessary. *Carter* v. *Carter*, 3 *Fairf.* 285.

The opinion of the Court was drawn up by

Weston C. J. — The right of the defendant in error, to be exempted from military duty in the standing company, depends upon the validity of his enlistment in the independent company. The law has fixed the age of eighteen, as the period when a liabil-

ity to do military duty shall commence. At an earlier age, the physical system is not sufficiently developed, to sustain the hardships and privations of actual service, to which the militia are liable to be subjected, at the call of their country. We are very clear, therefore, that an enlistment under eighteen, should be regarded as a nullity. An independent company, admitting members of a more tender age, would not have that efficiency, which the service requires. They are equally, with other parts of the militia, subject to the paramount law of Congress, which has determined the age, when citizens shall be subject to military duty.

Judgment reversed.

Alexander Martin *vs.* Samuel H. Fales.

The jurisdiction and power of Justices of the Peace, in civil actions, are derived exclusively from statute provisions.

Where a writ has been made returnable before a Justice of the Peace, and duly served, the Justice has no power to act upon it, or to continue and postpone the cause until another day, until the time arrives appointed in the writ.

And if the Justice, before whom the writ is made returnable, does not attend at the time and place of trial, or within a reasonable time after the designated hour, the suit fails, unless continued by some other Justice, under the provisions of *stat.* 1834, *c.* 101.

Whatever may be the effect of an order to continue a cause for trial when the Court is resisted, and prevented by force from attending at the time and place appointed, nothing less than actual resistance or danger can justify a Court of Justice in coming to the conclusion, that the administration of the laws is superseded, and that the course of justice must give way to lawless violence.

An appearance of a defendant at the time and place named without authority of law for an adjournment, under protest, and for the purpose of insisting that any further proceedings would be illegal, cannot revive the process, or be regarded as a waiver of errors.

This was a writ of error, to reverse a judgment of a Justice of the Peace. The original action was brought by *Fales*, as ensign of a company in *Thomaston*, detailed under the provisions of the *stat.* 1837, *c.* 276, to discipline and train the *B* company of militia

in *Camden*, alleged to have had no officers for three months, against *Martin*, for neglect to perform militia duty at a company training. There were twenty-three other suits brought by *Fales* before the same Justice, at the same time and place, for alleged neglects or misconduct at the same training. The writs were made returnable before *James Cochran, Esq.*, at the house of *Daniel Howard*, in *Camden*, where the office of the Justice was alleged to be, on *June* 24, 1839. *Cochran* was a Justice of the Peace for the county, but did not reside within the town of *Camden*, and was not an inhabitant thereof. The twenty-four writs were returned to the Justice on the 18th of *June*, with a request that he would enter them for trial, and they were filed.

On the record returned by the Justice, after a list of the actions, the following entries appear.

"There being great excitement in *Camden* and vicinity in regard to said actions, and being so informed, and believing the information to be correct, that a powerful armed force of some one hundred strong, including the defendants, has been organized for the purpose of resisting the militia laws of the State, and to prevent, by force and violence, the holding of any Court on the twenty-fourth day of *June* instant to try said actions, I the said Justice, having been requested by citizens of the vicinity to do so, do postpone the trial of said actions to the eighth day of *July* next, at ten o'clock in the forenoon, in the belief, that before that time, some measures may be taken, that shall secure the parties a fair trial. And that this postponement shall operate no surprise or injustice to the parties, I have this day caused the following notices and proclamations to be posted up at the place of trial.

Attest, JAMES COCHRAN, Justice of the Peace."

"All actions returnable before me in *Camden*, on the 24th instant, will stand postponed to the 8th day of *July* next, at ten o'clock in the forenoon. Parties and their witnesses will thereof take notice, and govern themselves accordingly.

"JAMES COCHRAN, Just. Peace.

"*June* 22, 1839."

"And said notices remained posted up, at the place of trial, until *July* 8th. JAMES COCHRAN, Just. Peace."

"*Waldo, ss. July* 8th, 1839. — 10 o'clock A. M. The parties appear by their respective counsel, and file the following agreement, to wit, That there may be a full and decisive opinion by the Supreme Judicial Court, on most of the points of objection made or to be made by the defendants, in the prosecutions for military fines of the members of the *B* company of infantry in *Camden;* and in order to save costs, it is hereby agreed, that one of the defendants already served with process, whose case will present the chief points of objection, shall appear before *James Cochran, Esq.*, on the 8th day of *July* instant, and there protesting that he is not liable to answer, because no justice was present at the time and place of trial on the return day of the writ, and that no proper postponement was had; and if overruled on this point, shall proceed to trial; and it shall be the duty of the Justice to note and reduce to writing all legal points of objection made, and state fully, in writing, the testimony, and sign the same, or receive the written objections of the defendants' counsel, and sign the same." The agreement was dated *July* 1, 1839, and further provided for the decision before the Supreme Court, and the disposition of the several actions, and was signed by the counsel of *Fales*, and of the defendants in the twenty-four actions. *Martin's* case was selected for trial.

On the eighth day of *July*, *Martin* appeared, and denied all power, on the part of the Justice, to take further cognizance, or have further jurisdiction over the action, and protested against all farther proceedings therein, and moved, in writing, that the same may be stayed, for the following reasons, being the same afterwards assigned as the first four causes of error.

1. Because said action was not entered by the plaintiff at the time and place at which his writ was returnable.

2. Because the Justice, before whom said writ was returnable, on the 24th of *June*, neglected to appear at the time and place of trial, and open his Court, and organize the same.

3. Because said action was not continued according to the provisions of the *statute*, passed *February* 15, 1834, *c.* 101.

4. Because said defendant had no legal notice of the continuance of said action.

The plaintiff opposed the motion, and offered to prove by numerous witnesses, that from the day of the service of the writs to the 26th of *June*, there had existed so much excitement and open hostility, in regard to said militia suits, in *Camden*, where said actions were returnable, that a Court, to try the actions, could not have been held on the 24th of *June*, with safety to the plaintiff, his witnesses, and the magistrate. The introduction of this evidence was opposed by the defendant. The record states: — "I excluded and rejected the same, and the propriety of the postponement being, in my opinion, a question addressed to my judgment alone, at the time the same was made as stated in the foregoing copy from my records, and the entry of the actions on my docket, and the postponement before the day of trial named in the writs, when by me deemed proper, being in accordance with the long practice of my Court, and, as I believe, in accordance with the usage and practice of most other Justice Courts in this section, I also overruled the defendant's motion."

Other motions to dismiss the action, for other causes, were made by the defendant, and overruled, and many objections were made during the trial, all of which were overruled, and judgment was rendered against the defendant.

Seventeen causes of error were assigned, and were argued by the counsel; but as the judgment was reversed without considering any excepting the first four, the facts and arguments pertinent to the last thirteen causes of error, are not given.

W. H. Codman, for *Martin*.

1. A Justice of the Peace has no jurisdiction in civil actions, unless it is given by statute. As it respects this case, the power of the Justice depends entirely on the *stat.* 1821, *c.* 76. As the plaintiff did not attend Court and enter his action on the return day of the writ, it was a failure to prosecute his action, and the suit is at an end. Same *stat.* § 8.

2. The neglect of the Justice to appear at the time and place appointed and open his court, on the return of the writ, takes away all power of the Justice to do it afterwards. *Statute* before cited; *Howe's Prac.* 198. The Justice has no right to enter an action before the time of trial. The parties may settle the action and it may never go before him.

3. The act of the Justice in continuing the action on the 22d of *June*, two days before the time of trial, was entirely void. Prior to the *statute* of 1834, *c.* 101, there was an entire failure of a Justice Court, if the Justice before whom the writ was returnable, was not present at the time and place appointed in the writ. The Justice has no right to fix upon a different time and place for trial, by proclamation, from that stated in the writ. That statute enables another Justice to appear at that time and place and continue the action. If the Justice selected, had too weak nerves to venture within the town of *Camden* and open his Court, any other Justice within the county would have gone there and have continued it to the eighth of *July*.

4. The defendant was not bound to look about the room for notices. If there was no Justice, he might well suppose there was no Court. Had he seen the paper, it would have been but notice of an illegal and void act, of which the defendant was in no way under the necessity of taking notice.

J. Holmes and *H. C. Lowell*, for *Fales*, contended, that when the writs were served and returned to the Justice, he had jurisdiction of the actions, might enter the same at the request of the counsel for the plaintiff, and that having jurisdiction, the after proceedings in the adjournment of the time, was but the exercise of a sound legal discretion. This may be done as well before the time fixed in the writ for holding the Court, as at that time.

But if there can be doubt about the right in ordinary cases, the extraordinary circumstances attending this case justify the course adopted by the Justice. The defendant, in the original action, was himself one of the armed force organized to resist the laws, and prevent the trial. He cannot take advantage of his own wrong, and set the laws at defiance with impunity. Besides, his appearance and going to trial, on the eighth day of *July*, cures all previous irregularity, if any existed. The Court has the power to protect itself, and to do justice, notwithstanding the forcible resistance of a party and his adherents.

The *statute* of 1834, *c.* 101, has no relation to a case like this. The same difficulty would exist in going there to adjourn the Court, as in going there to hold it.

The opinion of the Court was by

SHEPLEY J. — The jurisdiction and powers of Justices of the Peace, are derived from statute provisions. The statute authorizing them to hear and decide certain civil actions, *c.* 76 § 8, as well as that prescribing the form of writs, provides, that a certain time and place shall be set for the trial; and, by necessary implication, that the Justice and parties shall then and there appear for that purpose; for it prescribes the duty of the Justice, in case the parties do not appear, and determines the consequences which are to follow their neglect so to do. If the plaintiff shall fail to prosecute his suit, the Justice is to award to the party sued his costs. And if the defendant neglects to appear, the charge in the declaration is to be taken to be true, and the Justice is to give judgment against him. The Justice is not authorized to perform any other duty in the case, than to grant the writ and issue subpœnas, at a different time from that set for the trial, either originally or by adjournment. Although the form of the writ requires the officer to return it to the Justice on or before the day of trial, that does not give him the right to do more than preserve his writ until the time arrives, when the law empowers him to act upon it. And if the Justice does not attend at the time and place of trial, or within a reasonable time after the designated hour, the suit fails, except in those cases provided for in the *statute* 1834, *c.* 101. And so the legislative department understood the law, when it made provision by that statute, that, in case of the Justice's inability to attend, another Justice might continue the cause. In the case of *McCarty* v. *McPherson*, 11 *Johns. R.* 407, it was decided, that the failure of the Justice to appear within a reasonable time after the appointed hour, amounted to a discontinuance of the suit.

The phrase, "fail to prosecute," as used in the statute, points out the effect of an omission to appear for the plaintiff; and it is made the duty of the Justice, in such a case, to regard the suit as discontinued, or no longer to be prosecuted, and to award costs to the other party. In *Sprague* v. *Shed*, 9 *Johns. R.* 140, it was decided, that the omission of the plaintiff or any one for him to appear, was a discontinuance of his cause, and that the Justice had no authority to enter judgment for him. The statutes in that State

and in this are not alike, but decisions upon the effect of a neglect to comply with the provisions of law are still applicable.

It does not appear from the record in this case, that the Justice, or the plaintiff, or any one for him, appeared at the time and place of trial; and there was a failure to prosecute the suit, which put an end to all further legal proceedings, unless the extraordinary circumstances, detailed in the record, authorize a different conclusion.

It is contended, that there was an incidental or inherent power in the court to protect itself from insult and danger, in circumstances not contemplated by the law; and that it might adopt the necessary measures to provide against apprehended danger, and continue the cause for trial to a time when the danger would no longer exist. What may be the effect of an order to continue a cause, when the Court is resisted, and by force prevented from attending at the time and place appointed, it is not now necessary to decide. Nothing less than actual resistance or danger, can justify a Court of justice in coming to a conclusion, that the administration of the laws is superseded, and that the course of justice must give way to lawless violence. It were better, if need be, that personal suffering should be endured by the members of a Court, than that the administration of the law should be yielded to an apprehension of danger, not then apparent, and that an undefined and discretionary power, suited, in his judgment, to the occasion, should be exercised by the magistrate, while he omitted to be governed by the rules prescribed by law.

The appearance of the defendant at the time named for an adjournment, cannot revive the process; nor can it be regarded as a waiver of errors; for he appeared under protest, and for the purpose of insisting, that any further proceeding would be illegal.

However desirable to support the proceedings to prevent any one from deriving an advantage by causing excitement, and producing alarm and the apprehension of danger, the Court must regard such an evil as less than any attempt, on its own part, to bend the law to circumstances, affording, at the same time, a precedent for the exercise of power not granted.

It becomes unnecessary to examine the other errors assigned.

Judgment reversed.

Betsey Bradford *vs.* James Paul.

If the mother of a bastard child, after its birth, or after her examination before a magistrate, declare that the accused is not the father of her child, and that another man is, she is not constant in her accusation, and is incompetent to testify in support of her complaint.

The competency of the complainant, as a witness, in a bastardy process, is preliminary in its character, and is to be determined by the Court, and not submitted to the jury.

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

This was a complaint under the bastardy act. The complainant made her declaration before a magistrate, *June* 30, 1837, alleging that the child was begotten on or about *October* 20, 1836, in the house of one *Barak Payson*. The child was born *August* 11, 1837. After the preliminary proof, the complainant herself was offered as a witness. To exclude her, the respondent introduced one *Emily Bradford*, who testified, that the complainant, in *February*, 1838, declared that the respondent was not the father of her child, but that *Charles Smith* was, and told her that she, the complainant, swore her child upon the respondent, because, if she swore it upon *Smith*, the father of the child, he would not marry her, but that the respondent would, or would settle with her; and that the witness was at the house of *Payson* during the whole month of *October*, 1836, and that the complainant was not there that month. The complainant then introduced *Mrs. Bradford* and *Sarah Bradford*, who testified that *Emily Bradford* told them that she, *Emily*, went away from *Payson's* early in *September*, 1836, and did not return there again until late in the following *November*. *Payson* and his wife were called by the respondent, and testified, that *Emily Bradford* was at their house during the whole of the month of *October* of that year, and that the complainant was not there after *September* 3, 1836, until the next *January*.

The counsel for the complainant then moved that the complainant should be introduced and permitted to testify. 1. Because *Emily Bradford* had been discredited in a material part of her testimony, and her statements ought not to render the complainant

incompetent as a witness, but that the testimony of both should be submitted to the jury. 2. Because such declaration, if made, charging any other person with being the father of the child, was made long after the birth of the child, and after the commencement of the prosecution, and therefore would not render her incompetent.

The Judge overruled the motion, and excluded the complainant from testifying. Exceptions were filed by the complainant, the jury finding for the respondent.

J. Williamson argued in support of the positions taken in the Court below, and cited *Drowne* v. *Stinson*, 2 *Mass. R.* 441; *Comm'th* v. *Cole*, 5 *Mass. R.* 517; *Bacon* v. *Harrington*, 5 *Pick.* 63; *Maxwell* v. *Hardy*, 8 *Pick.* 560; *M'Managil* v. *Ross*, 20 *Pick.* 99; *Dennett* v. *Kneeland*, 6 *Greenl.* 460.

W. G. Crosby, for the respondent, said, that it was expressly decided in *M'Managil* v. *Ross*, cited for complainant, that the question whether the complainant was, or was not, competent to testify, was to be decided by the Court, and not by the jury.

At common law, the complainant could not testify. She must bring herself within the statute, and, to do so, must be constant in her accusation, from the time it was made before the magistrate, to the time of trial. The cases cited on the other side, from 8 *Pick.* 560, 2 *Mass. R.* 441, and 6 *Greenl.* 460, were relied upon.

The opinion of the Court was drawn up by

Weston C. J. — In prosecutions under the bastardy act, the mother of the child is an interested party, but is, upon certain conditions, from the necessity of the case, made a competent witness. That she should accuse the party charged, in the time of her travail, before delivery, has been repeatedly held to be one of those conditions. And that she shall continue constant in such accusation, is equally required by the statute. Both are placed upon the same ground, in the leading case of *Drowne* v. *Stimpson*, 2 *Mass.* 441. As one of the prerequisites to her admission as a witness, *Parsons C. J.* there says, "she must have continued constant in her accusation, or at least, it must not appear that she has been inconstant." The same principle is adopted and confirmed in *Maxwell* v. *Hardy*, 8 *Pick.* 561. And it was in that case

held, that the constancy, required to render her competent, must be from the time she has made her accusation in a solemn form, either in the time of her travail, or on oath before the Justice. The question of the competency of a witness, which is preliminary in its character, must, from the necessity of the case, be decided by the Court. And it has been expressly held, that an objection of the kind raised here, forms no exception to the rule. *M'Managil* v. *Ross*, 20 *Pick.* 99.

There was in this case direct proof, that the complainant had not been constant, after her delivery, and after her accusation, made under oath. The witness, by whom her want of constancy was proved, appeared to have made declarations, conflicting with her oath upon another fact, but the truth of her testimony upon this fact, was sustained by others. The Judge was satisfied, that she had not continued constant. And he had a right to decide this fact. It was like the objection of interest to a witness. Whether it exist or not, must be decided by the Court. The burthen of proof is upon him who raises the objection, but whether proved or not, is referred to the Judge. And if it was open to this court to revise his judgment upon this point, we are not prepared to say, that it appears to us, that he decided erroneously.

Exceptions overruled.

Willard Bachelder *& al. vs.* John Heagan.

In an action on the case for an injury to the plaintiffs' land and fences, alleged to have been occasioned by the carelessness of the defendant in setting a fire upon his own land, and negligence in keeping the same, the burthen of proof is upon the plaintiff to show, that the injury was caused by the negligence or misconduct of the defendant.

The action was trespass on the case, to recover damages, alleged to have been done to the plaintiffs' land, and to the fences and growth thereon, by the negligence of the defendant in setting a fire on his own land, near to the land of the plaintiffs, and in not carefully keeping the same.

At the trial before Emery J., evidence was introduced by both

parties. The counsel for the plaintiffs requested the Judge to instruct the jury, that the plaintiffs were entitled to a verdict, if they were satisfied from the evidence, that the damage was occasioned by the defendant's fire, unless he satisfied them, that it was not through negligence or mismanagement on his part. The Judge instructed the jury, that the burthen of proof was upon the plaintiffs to satisfy them, beyond a reasonable doubt, that the damage was occasioned by the defendant's fire, and through the carelessness and negligence of the defendant in keeping the same; such carelessness and negligence being alleged in the plaintiffs' declaration, and it not being contended by the plaintiffs that the fire was wilfully and maliciously set by the defendant. On the return of a verdict for the defendant, the plaintiffs filed exceptions to the ruling of the Judge.

Kelly, for the plaintiffs, contended, that the Judge erred in refusing to give the instruction requested, and that the instruction given was wrong; and cited 2 *Stark. Ev.* 905, 948; *Story on Bailments*, 308, 314, 338, 374; 1 *Greenl.* 135; 13 *Maine R.* 439; 4 *M. & S.* 306; 3 *Bl. Com.* 154; 1 *Esp. R.* 482; 1 *Com. Dig.* 410, 511; 1 *Chitty's Pl.* 69, 70; 2 *Stark. Ev.* 627; 1 *Salk.* 13; *Ancient Char.* 112; 2 *Fairf.* 284.

W. G. Crosby, for the defendant, argued in support of the correctness of the instruction given, and cited 2 *Stark. Ev.* 971; 3 *East*, 192; *Lane* v. *Crombie*, 12 *Pick.* 177; 3 *Stark. Ev.* 1354; 1 *Chitty's Pl.* 37; 8 *Johns. R.* 421; 1 *Mass. R.* 71; *Harris* v. *Rayner*, 8 *Pick.* 541.

The opinion of the Court was by

WESTON C. J. — By the ancient common law, or custom of the realm, if a house took fire, the owner was held answerable for any injury thereby occasioned to others. This was probably founded upon some presumed negligence or carelessness, not susceptible of proof. The hardship of this rule was corrected by the statute of 6 *Anne, c.* 31, which exempted the owner from liability, where the fire was occasioned by accident. The rule does not appear to have been applied to the owner of a field, where a fire may have been kindled. It may frequently be necessary to burn stubble or other matter, which incumbers the ground. It is a lawful act, unless kindled at an improper time, or carelessly managed.

Baron *Comyns* states, that an action of the case lies, at common law, against the owner of a house, which takes fire, by which another is injured, and adds, "so if a fire be kindled in a yard or close, to burn stubble, and by negligence it burns corn in an adjoining close." *Com. Dig. action of the case for negligence, A.* 6.

In *Clark* v. *Foot*, 8 *Johns. R.* 421, it was held, that if *A.* sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of *B.*, his neighbor, no action lies against *A.*, unless there was some negligence or misconduct in him or his servants. And this is a fair illustration of the common law, upon which the action depends. Negligence or misconduct is the gist of the action. And this must be proved. In certain cases, as in actions against innkeepers and common carriers, it is presumed, by the policy of the law, where property is lost which is confided to their care. But in ordinary cases, of which the one before us is not an exception, where the action depends on negligence, the burthen of proof is upon the plaintiff. This is common learning, and applies to all affirmative averments, necessary to maintain an action. The defendant's fire was lawfully kindled on his own land. It is an element, appropriated to many valuable and useful purposes; but which may become destructive from causes, not subject to human control. Hence the fact, that an injury has been done to others, is not in itself evidence of negligence. The party, who avers the fact, is bound to satisfy the jury upon this point, before he can be entitled to a verdict. In our opinion, the direction of the presiding Judge was correct, as to the burthen of proof.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1841.

PHINEHAS DRINKWATER *vs.* PORTLAND MARINE RAILWAY.

Where an act of another State of the Union, incorporating certain persons as a manufacturing company, makes the private property of the stockholders liable for the fulfilment of the contracts of the company, but points out no mode in which this liability may be made available; *if the Courts of other States* are bound to notice and give effect to this remedial provision, the course of proceeding must be regulated by the law of the State, where the remedy is sought to be enforced.

The private property of stockholders, in corporations created after *February* 16, 1836, excepting banking corporations, *is not made subject to attachment on a writ* against the corporation. The creditor must obtain *judgment against the corporation*, before he can have his remedy against stockholders.

ASSUMPSIT to recover the amount of dividends on shares owned by the plaintiff in the corporation.

At the trial before SHEPLEY J. it was proved that the plaintiff owned the shares, that the dividends had been declared, that a demand for them had been made, and payment refused, because they were said to have been under an attachment on a suit instituted by *Davis & Marwick* vs. *The Georgia Lumber Company.* On the back of this writ was an order, signed by the plaintiffs in that suit, directing the officer to attach the property of *Phinehas* Drinkwater and others named, "members of the *Georgia Lumber Company.*" The officer returned on the writ an attachment of the shares of *Drinkwater* in the *Portland Marine Railway.*

The defendants read an act of the State of *Georgia*, incorporating *Stephen Chase* and others, and their associates, as the *Georgia Lumber Company*. This act made the private property of the stockholders liable for all contracts of the corporation, made while they were stockholders, but provided no mode of attaching or taking their property for the debts of the corporation. The defendants also read an act of the legislature of this State, *February* 14, 1837, authorizing the *Georgia Lumber Company*, incorporated by the legislature of *Georgia*, "to establish and keep an office of business within this State, and to employ their surplus capital and funds in any way not inconsistent with the constitution and laws of the *United States*, and of the *State* of *Maine*, and in conformity with their act of incorporation, to an amount not exceeding one hundred thousand dollars." The act also provided, that the *Georgia Lumber Company*, "by their corporate name, may sue and be sued, plead and be impleaded, in any Court of law or equity in this State." This act contained no other provisions. The *stat.* 1836. *c.* 200, § 3, provides, "that in all corporations hereafter created by the legislature, excepting banking corporations, unless otherwise specially provided for in the act of incorporation, the shares of individual stockholders shall be liable for the debts of the corporation. And in case of deficiency of attachable corporate property or estate, the individual property, rights and credits of any stockholder shall be liable, to the amount of his stock, for all debts of the corporation contracted prior to the transfer thereof, for the term of one year after the record of the transfer in the books of the corporation, and for the term of six months after judgment recovered against said corporation, in any suit commenced within the year aforesaid; and the same may be taken in execution on said judgment, in the same manner as if said judgment and execution were against him individually, or said creditor, after said judgment, may have his action on the case against said individual stockholder; but in no case shall the property, rights and credits of said stockholder be taken in execution or attached as aforesaid, beyond the amount of his said stock." The fourth section provides, "that it shall be the duty of the officer having said execution, to appropriate towards the satisfaction thereof, in part or in whole, any corporate property or estate which he can find, and if sufficient cannot

be found, to certify said deficiency on said execution, and to notify the individual stockholder by giving him forty-eight hours previous notice thereof whose property he is about to take; and if said stockholder resides out of the State, said notice shall be given to his agent, if he has any within the State, otherwise to the clerk of said corporation; and if such individual stockholder, his agent or said clerk, on demand of said officer and notice as aforesaid, shall disclose and show to the execution creditor, or officer, attachable corporate property or estate sufficient to satisfy said execution and all fees, his individual property, rights, and credits, shall thereupon be exempt from attachment and execution. And said action on the case shall not be commenced against said stockholder, until demand and notice as aforesaid."

If the plaintiff was, upon the facts, entitled to recover, the defendants were to be defaulted; and if not, a nonsuit was to be entered.

Preble, for the plaintiff.

W. P. Fessenden, for the defendants.

The opinion of the Court was by

Weston C. J. — The third section of the act of *Georgia*, which created the *Georgia Lumber Company*, made the private property of the stockholders liable for the fulfilment of their contracts. In what manner this liability may be made available to those, who may have claims upon the company, the act does not prescribe. Whether the courts of other States are bound to notice and give effect to this remedial provision, may be questionable. But if they are, the course of proceeding must be regulated by the law of the State, where the remedy is sought to be pursued. This must necessarily be governed by the *lex fori*.

The attachment of property, when a suit is instituted, to satisfy the judgment, which may eventually be recovered, is given and regulated by statute. *St.* of 1821, *c.* 60. It has reference, manifestly, to the property of the party defendant in the suit. It does not authorize the attachment of the goods or estate of persons collaterally liable, who are not made parties.

The State of *Maine*, having recognized the corporate existence

of the *Georgia Lumber Company*, and invested it with certain powers, it became thereupon subject to the provisions of the *statute* of 1836, *c.* 200, concerning corporations. By the third section of that statute, individual stockholders are made liable for corporate debts. And their property may be taken on the execution of the judgment creditor, where there is a deficiency of attachable corporate property or estate.

The statute points out no mode, by which this course of proceeding may be made part of the mandate of the execution; but would seem to leave the creditor to act at his peril upon the assumption, that the person, whose property he causes to be seized, is a stockholder. But we are not called upon to decide, in what manner the rights of a creditor, after he has obtained execution, may be enforced against the stockholders; but whether he is justified in attaching their private property before judgment. We find no such authority in our law regulating attachments, nor is it given in any statute to which we have been referred. An amendment of the writ, moved for by the plaintiff's counsel, could not confer it. It could not call into action a power not previously given. It results that the attachment, under which the defendants justify, cannot be sustained.

Defendants defaulted.

HARRIET E. COCHRANE *vs.* ABRAHAM LIBBY.

Where the demandant claimed dower in a tract of land whereof her late husband was in possession, and on which one of his creditors levied an execution as his property during the coverture, and where the tenant showed no title but under such levy; *it was held*, that there was sufficient evidence of a seizin in fee in the husband to maintain the action.

Reputation in the family of the death of the husband, is *prima facie* evidence of the fact in an action for dower.

In such action, if adultery of the demandant be relied upon as a bar to her claim, the tenant is bound to prove the fact affirmatively.

Proof of the second marriage of the demandant within three years of the time of his leaving home, but after there was a reputation in the family of the death of her husband, without showing that he was then alive, does not furnish sufficient evidence that she was guilty of adultery.

THE demandant claimed dower in about ten acres of land in *Westbrook*, as widow of *Joshua Thoms*, formerly her husband. The demandant was married to *Thoms*, *September* 17, 1820. On the last of *December*, 1830, she was married to *James Cochrane*. *Noah Harding* and *Jonathan Morgan* levied their respective executions upon the demanded premises, then in the possession of *Joshua Thoms*, as his property, on *June* 21, 1827, and the tenant claims under these levies. The demandant offered no other evidence to prove a seizin in *Thoms*, and the tenant showed no title but under these levies. *Joshua Thoms* left this part of the country in the beginning of the year 1828, and there was much testimony introduced by the respective parties, all of which was set forth in the report of the case, from which the demandant contended, that she had proved the death of *Thoms* to have taken place long before her second marriage, and from which the tenant inferred, that *Thoms* was still alive, or that the balance of evidence was in support of his inference, and at all events, that he was alive when the second marriage took place. The character of this evidence will sufficiently appear in the instructions to the jury, by EMERY J., who presided at the trial.

The counsel for the tenant contended, at the jury trial, that there was no legal evidence that *Joshua Thoms* was seized of the demanded premises during the coverture, so as to entitle the de-

mandant to dower. The Judge instructed the jury, that there was legal and sufficient evidence of such seizin.

The tenant's counsel also contended, that there was no evidence of the death of *Joshua Thoms*. On this point, the Judge instructed the jury, that it was a question of fact purely, for them to determine. The burthen of proof was on the plaintiff, to give the jury reasonable satisfaction that the said *Joshua* was dead. If she had failed to do it, their verdict must be for the defendant. That the presumption in favor of his being alive, remains, unless from circumstances and evidence a contrary presumption arises; that they would consider his character, health, habits, and intentions, when he left, as made known in evidence; that he was bound, as he professed, south, among strangers; that, after being absent twice before, he had returned; that he said he meant to change his name; that in the fall after he went away, which was in *February* or *March*, a report existed of his death; that in the family he was reputed to be dead; that he was much attached to his children, promised to send aid to them, promised both his brothers to write to them, to one if he lived; that no letter or message from him has been received by any of the family. That the circumstances testified by *Mrs. Paine, Mrs. Osgood* and *Benjamin Thoms*, if believed, the length of time which has elapsed, was all together *prima facie* evidence to raise a presumption of his death. It is liable to be repelled; and they would consider how far it is so, or affected by the testimony of *Nathaniel Thoms*, another brother. The law does not require, that some person is to be produced, to swear, that he or she saw the said *Joshua Thoms* die, or saw him dead.

It was also contended by the tenant, that there was no evidence of the death of *Joshua Thoms* when the demandant married *Cochrane*, and that by marrying him, as she did, it was an act of adultery on her part, whereby she forfeited all right of dower in *Thoms'* estate, if she ever had any. On this point, the Judge instructed the jury, that unless they were satisfied, from the evidence, that said *Joshua* was dead before the plaintiff married *Cochrane*, she certainly had committed adultery by that act; that by the ancient common law, neither adultery nor elopement were a bar to the claim to dower. Elopement is, where a married

woman departs from her husband, and dwells with an adulterer, provided she does so voluntarily; and for this, without reconcilement to the husband, she will lose her dower; that this was the provision of the statute of *Westminster 2d, c.* 34, which was now the law in this State. There could be no pretence of reconciliation in this case, for the husband had never returned since the second marriage. It was anciently holden, that if the relatives of the husband keep him from his wife, so that she does not know what has become of him, and give out that he is dead, and thereupon procure her to release all marriages and interest which she can have in him as her husband, and also persuade her to marry again, which she does, with one who has notice that her first husband is alive, but she herself has no notice of it, though she live in adultery with this man, and though her husband be not out of the realm or beyond the seas, yet because she did not leave her husband voluntarily, as the statute says, but by persuasion of his friends, not knowing of herself but that he was dead, this is no such elopement as will bar her of her dower. The Judge further instructed the jury, that if they were satisfied, that the report of the said *Joshua's* death was previous to the second marriage, fairly made to the friends and connections, and not fabricated for the occasion, but honestly by her and the family believed to be true at the time of said second marriage, the plaintiff could not be considered as having eloped with the adulterer, and would not, by that circumstance alone, forfeit her dower; but that the jury must be satisfied of his death before a verdict could be rendered for the plaintiff; and that the law considered the claim to dower was a favored claim.

The jury returned a verdict for the demandant, which was to be set aside, if the instructions were erroneous.

Longfellow, Sen., for the tenant, argued in support of the propositions contended for at the jury trial, and cited *Stearns on Real Actions*, 279; 1 *Phil. Ev.* 152; 6 *Bingham*, 135.

Preble, for the demandant.

The opinion of the Court was drawn up by

Weston C. J. — The case finds the husband to have been in possession of the land, wherein the demandant claims dower. Certain of his creditors levied upon it as an estate in fee; and such an

estate is now claimed by the tenant, under a title depending upon these levies. In the absence of any conflicting proof, we regard this, as against the tenant, evidence of a seizin in fee of the husband.

The jury have found the death of the husband from competent proof. Reputation, in the family, of his death, is evidence of the fact, *prima facie*. The second marriage of the demandant is relied upon, as evidence of adultery. If this is a bar to her claim, and set up as such, the tenant is bound to prove the fact affirmatively. This he has not done. The second marriage was after there was a reputation, in the family, of the death of the first husband. As the jury have found this fact, her subsequent connection was not adulterous, but lawful.

Judgment on the verdict.

JANE WEEKS *vs.* OLIVE PATTEN.

One cannot take a beneficial interest under a will, and afterwards set up any right or claim of his own, if otherwise legal and well founded, which shall defeat or prevent the full operation of every part of the will.

Therefore, where one accepts and receives a legacy under a will, wherein a devise of certain real estate in which he has an interest in his own right is made to another, such legatee is barred from afterwards setting up or claiming such real estate.

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

The action was assumpsit, to recover for the use and occupation of two sevenths, in common and undivided, of a dwellinghouse, lot, and appurtenances, occupied and improved by the defendant, and situated in *Portland*. The plaintiff proved, that the premises were part of the estate of *Jane Robinson*, deceased; that *Jane Robinson* was married to *Arthur McLellan*, and had by him seven children, of whom the plaintiff and *Arthur McLellan, Jr.* are two; that *Arthur McLellan*, the father, continued to improve the premises, by himself or tenants, until his death, in *March*, 1835; that the defendant has occupied the same since, and being called upon, on the premises, in behalf of the plaintiff, to pay rent to her,

replied, that she was not then prepared, and that it was not then convenient; and that *Arthur McLellan, Jr.*, after his father's death, conveyed his share in the premises to the plaintiff. It appeared, that the defendant claimed no title to the premises, but, after being called on by the plaintiff for rent, had been forbidden by *Thomas McLellan*, another son of *Arthur McLellan*, to pay the rent to any person but to himself, or his order. *Arthur McLellan, Sen.*, died in *March*, 1835, testate, and his will was duly proved and allowed in the Supreme Court of Probate, in *November*, 1836. A copy of this will was in evidence, and the plaintiff admitted, that she had accepted the provision made for her in the will, and that *Arthur McLellan, Jr.* had done the same.

The first item in the will gives *Thomas McLellan* $15,000, and certain shares in incorporated companies. 3. Gives to the plaintiff $15,000. 6. Devises to his son-in-law, *Henry Illsley*, "in trust for my son, *Arthur McLellan, Jr.*, four hundred dollars, to be applied for said Arthur's benefit, one hundred dollars yearly." 8. Gives vessels and other personal property to *T. McLellan* and *H. Illsley*. 9. Devises to *Thomas McLellan*, his heirs and assigns, the premises in the occupation of the defendant before described, with other real estate. 10 and 12. Devises to the plaintiff certain other real estate. 18. Bequeaths and devises to *Thomas McLellan*, all the residue of the estate of the testator. 19. Appoints *T. McLellan*, *H. Illsley*, and *B. Potter*, executors.

The Judge directed a nonsuit, and the plaintiff filed exceptions.

Preble argued for the plaintiff, but cited no authorities.

Adams, for the defendant.

1. No action whatever will lie on account of the real estate in question. The estate was devised to *Thomas McLellan*, and in the same will a large amount of property was given to the plaintiff, and a provision made for *Arthur McLellan*, the younger, and the exceptions state that they have accepted the benefit under the will. They cannot now disturb any of its provisions. *Noyes* v. *Mordaunt*, 2 *Vern.* 581; *Thellusson* v. *Woodford*, 13 *Ves.* 209; *Tibbets* v. *Tibbets*, 19 *Ves.* 656; *Brown* v. *Ricketts*, 3 *Johns. Ch. R.* 553; *Hamblett* v. *Hamblett*, 6 *N. H. Rep.* 333; *Spofford* v. *Manning*, 6 *Paige*, 383; *Allen* v. *Pray*, 3 *Fairf.* 138;

Hyde v. *Baldwin*, 17 *Pick.* 303; *Osgood* v. *Breed*, 12 *Mass. R.* 534; 2 *Conn. R.* 196.

2. But if the plaintiff were entitled to recover a share of the estate in the occupation of the defendant, this action could not be maintained. Assumpsit will not lie to settle disputes concerning the title to real estate. *Codman* v. *Jenkins*, 14 *Mass. R.* 93; *Allen* v. *Thayer*, 17 *Mass.* R. 299; *Wyman* v. *Hook*, 2 *Greenl.* 337; *Boston* v. *Binney*, 11 *Pick.* 1; *Mayo* v. *Fletcher*, 14 *Pick.* 533; 3 *Cowen*, 203; *Peake's Ev.* 291; 3 *Stark. Ev.* 1514; 2 *Com. on Con.* 518; *Cowper*, 218; *Patch* v. *Loring*, 17 *Pick.* 336; *Shumway* v. *Holbrook*, 1 *Pick.* 114; *Porter* v. *Hooper*, 2 *Fairf.* 170.

The opinion of the Court was drawn up by

EMERY J. — It is contended by the defendant, 1st. That no action can be maintained. 2d. If any action can be sustained, assumpsit cannot. The items of the will on which the defendant relies, are the third, sixth, ninth, tenth, twelfth, eighteenth, and nineteenth. The plaintiff claims the benefit of the first and eighth.

The principle, adopted in Courts of Equity, is, that if a person, being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be taken on the terms of giving effect to the whole disposition.

In this case it is manifest, that, independently of the will, young *Arthur* would have been entitled to one seventh, as heir to his mother; and as to a portion of that seventh, the plaintiff would have been entitled, as heir to her brother, had he died, had she not have become the grantee of the whole of it by his conveyance. It is clear, that if young *Arthur* had married, and his wife had survived him, she would have been dowable of that seventh. For a woman shall be endowed of a seizin in law; as where lands or tenements descend to the husband, before entry he hath but a seizin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seizin, as the husband may do of his wife's land. *Co. Lit.* 31. *a.*

But notwithstanding such might have been the result on such a

state of facts, we have to inquire whether, under the circumstances detailed in the case, signed by the counsel, on which the nonsuit was directed, the plaintiff can sustain her action for the rent of that seventh, and for another seventh in her own right, and yet avail herself of what is given to her by the will of her father.

It is in effect insisted, that acceptance binds and operates forfeiture, without reference to intent. If such is the effect of acceptance, though in ignorance that it was not competent to retain both benefits, but that on taking one, the consequence of law was, she and *Arthur* renounced the other, then, by inadvertence, without choice, an estate might be lost. But in all cases of election, the Court is anxions that a party shall not avail himself or herself of both their claims, and is desirous still to secure to him or her the option of either, not to hold them concluded by equivocal acts, performed, perhaps, in ignorance of the value of the funds or property. The rule of the Court is not forfeiture but election.

And if one is bound to elect, he is entitled, first, to ascertain the value of the funds. 1 *Ves. Jr.* 335, *Wake* v. *Wake;* 2 *Ves. Jr.* 371, *Whistler* v. *Webster;* 3 *P. W.* 126, *Hender* v. *Rose.* And for that purpose may sustain a bill to have all necessary accounts taken. 1 *Ves. Jr.* 171, *Butricke* v. *Broadhurst.* An election under a misconception of the extent of the funds, or claims on that elected, is not conclusive. 12 *Ves.* 136, *Kidney* v. *Coussmaker.* Was the plaintiff acting or acquiescing, cognizant of her rights? Did she intend an election? Can she restore the individual, *Thomas McLellan*, who forbids the defendant to pay rent but to him, the one affected by her claim, to the same situation as if her acts had never been performed, or are these inquiries precluded by the lapse of time? 3 *Brow. P. C.* 167, *Bor* v. *Bor et al.;* 14 *Ves.* 341, *Simpson* v. *Vickers;* 2 *Sch. & Lef.* 268. In equity, the question of election, if doubtful, may be sent to a jury. 13 *Johns.* 54, *Winter* v. *Levensaler;* 1 *Swan.* 360 and *note.*

In *Bor* v. *Bor*, 3 *B. P. C.* 167, it was held, that where a testator, making provision for the different branches of his family, gives a fee simple estate to one, and a settled estate to another, imagining that he had power so to do, a tacit condition is implied to be annexed to the devise of the fee simple estate, that the devisee thereof shall permit the settled estate to go according to the

will; and if in that respect he should disappoint the will, what is devised to him shall go to the person so disappointed. It being presumed, that if the testator had known his defect of power to devise the settled estate, he would, out of the estate in his power, have provided for that branch of his family, who was not entitled to the settled estate; and have declared, that no person should enjoy a legacy or devise, who controverted the power as to any benefit given to another.

However salutary and equitable these rules and decisions may be, in a Court of Equity, where these questions are usually decided, and where the grand inquiry would be, whether an election induces an absolute forfeiture, or only imposes an obligation to indemnify the claimant, whom it disappoints? Whether a devisee asserting her rights to property of which the will assumes to dispose, must relinquish the whole of the benefits designed for her and her brother, or so much only as is requisite to compensate by an equivalent, the provisions which she attempts to frustrate; for in that Court a compulsory election will be made between inconsistent claims. Yet we apprehend that there is sufficient already before us to warrant the decision of this case at law.

It is said, that *the rule of election is appropriate to every species of instrument*, whether deed or will, *and to be a rule of law as well* as of equity. And the principal reason why courts of equity are more frequently called upon to consider the subject, particularlarly as to wills, than courts of law, is, that at law, in consequence of the forms of proceeding, the party cannot be put to elect. For in order to *enable a court of law to apply the principle, the party must either be deemed concluded, being bound by* the nature of the instrument, *or must have acted upon it*, in such a manner as to *be deemed concluded by what he has done, that is, to have elected.* 2 *Sch. & Lef.* 456, *Birmingham* v. *Kirwan.* This same rule of election applies to every species of right, and even the right of dower is not protected, more than any other. 3 *Leon.* 272; *Cro. Eliz.* 128, *Gosling* v. *Warburton & Crispe*, not overruled. Upon the principle of the doctrine in the leading cases on this subject — 2 *Vern.* 581, *Noyes & ux.* v. *Mordaunt et al*; 13 *Ves. Jr.* 209, *Thelluson* v. *Woodford*; and in 6 *Cruise Tit.* 38, *ch.* 2; and 12 *Pick.* 146, *Reed* v. *Dickerman* — this court has already acted.

The case of *Allen* v. *Pray*, 3 *Fairf.* 138, was for dower. And it was held, that the claim of dower, being inconsistent with the provisions of the will, which, so far as they were for her benefit, she had not waived, she could not maintain her action.

And in *New-Hampshire*, in *Hamblett* v. *Hamblett*, 6 *N. H. Rep.* 333, it was held, that a party, having received a legacy under a a will, shall not be permitted to contest the validity of that will, without repaying the amount of the legacy, or bringing the money into court, in conformity with the rule adopted in the *English* ecclesiastical court. And it was held to apply, even if the party was a minor when the legacy was received. It is true, that this was an appeal from a decree of the Judge of Probate, approving an instrument as the last will of *David Hamblett*, whereupon a trial was had before a jury, who pronounced in favor of the sanity of the testator. And the appellant moved for a new trial. A motion had been before made by the appellee, and was again renewed for a rule on the appellant to bring into court the legacy which she had received under the will, which presented the matter as a preliminary question. The whole case is a very instructive one. "The rule is asserted to be founded in principles of justice, and seems to be sound law. And it is further said, that, in ordinary cases, when a party seeks to repudiate a will as insufficient, he must do so wholly and entirely, by refusing, until it has been established, to receive the benefit of it; or if any thing has been received, by returning it to the executor, or placing it in the custody of the court, that the executor may have it, in case the judgment should be against the validity of the will."

The case of *Hyde* v. *Baldwin*, 17 *Pick.* 303, cited by the defendant's counsel, was a bill in equity to redeem a mortgage. It was held, that whether the plaintiff's right to redeem had or had not been extinguished by a foreclosure or release in the lifetime of the testator, yet, that the testator intended to remove all doubt, by requiring a release of all claims against his estate, and that the plaintiff's release, in general terms, referring to the will, must be construed to embrace this right to redeem; and further, that the plaintiff, *by having accepted a beneficial interest under the will*, had barred himself from setting up a claim which would defeat the full operation of the will.

Severe commentaries are often made on the seeming injustice of parents, in their last wills, as to the distribution of property among their children. Yet, perhaps, it may with safety be affirmed, that, generally, no person so well understands the real deserts of children respectively, as their parents. The irrepressible strength of paternal affection prompts them to equalize their bounty. But the manner in which that bounty shall be best brought to bear upon the permanent interest of the child, is usually most successfully indicated by the sagacity of the parent in looking profoundly into the character of the child, and providing against contingencies with almost a prophetic perception. True indeed it is, that occurrences, subsequent to the death of the testator, may shew the inefficacy of his best intended safeguards. But acting upon what he knows, and sees, and feels, could he tell all which moves him in his arrangements for the welfare of his family, he might be able to satisfy the most incredulous, of the justice of his designs.

Even if we could reform the will in this case, the grounds upon which we should do so, should we attempt to engage in so unwelcome a service, are not before us. No inventory or the result of settled accounts in the Probate office, is made part of the case. The will we have. In the argument it has been said, by the plaintiff's counsel, that on the face of the will, it bears strong marks of practice on an old broken down man, and that the plaintiff has incomparably short of her distributive share, and *Arthur, Jr.* is to be cut off with four hundred dollars, given in trust to *H. Illsley*, to pay one hundred dollars yearly, from the paternal inheritance, and from that which descended to him from his mother. As the will *is proved*, we must take it *that no practice was improperly exercised on the mind of the testator*. Have we now before us the evidence that *Arthur, Jr.* and the plaintiff, for the purpose of this case, have accepted the provisions for them under the will? It is most distinctly admitted.

There possibly may be some foundation for the remarks of the plaintiff's counsel. Still, we know not what was heretofore bestowed by the testator, if any thing, on the plaintiff or on her husband, or what had before been done for *Arthur*, the son, or what were the reasons upon which the testator ordered the distribution of the estate. He certainly exercised only the freedom, which by

law every other citizen could exercise with regard to the estate with which Providence had blessed him. The mere fact, that there may be some inequality in amount, is very far from impugning the just impartiality or wisdom of the dispositions of the will.

There is no suggestion of fraud or practice to induce the acceptance, by *Arthur* or the plaintiff, of those provisions. Some years have elapsed since that acceptance. We have nothing upon which we can conjecture ignorance of the value of the property by either. And under these circumstances, according to adjudged cases on subjects of this description, we must consider that the *plaintiff has elected to abide by* the provision of the will, that *Arthur* has done the same, and that the plaintiff, coming in under him, must be deemed to have notice of his situation, and is bound by his election. 5 *Ves. Jr.* 445, *Long* v. *Long*. And that they are barred from their claim of the property, against the provisions of the will, which would defeat its full operation.

Exceptions overruled.

Albert Marwick & *al. vs.* The Georgia Lumber Company.

To exclude a witness from testifying, on the ground of interest, it must appear, that he has a legal and certain interest, in the event of the suit, or in the record. All other matters of influence affect the credit only.

The expression of a hope of future benefit from a result of the suit in favor of the party calling him, by a witness, who at the same time asserts that he has no legal claim, does not exclude him from testifying.

A witness, upon the *voire dire*, may be examined respecting the contents of written contracts or records not produced; but if produced, they may be examined; and if it appears thereby, that he is interested, he is incompetent to testify.

The assignment by a stockholder of his stock in an incorporated company to his creditor, the proceeds to go to the payment of a debt for which he is still liable, does not render him a competent witness for the company.

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

The action was covenant broken. The defendants offered, as a witness, *William Cutter*, who, being inquired of by the plaintiffs, as to any interest he might have in the event of the suit, answered, under oath, that he had no interest; that he had formerly owned stock in the company; that being indebted, he had assigned, by an absolute transfer, his stock to a creditor, the proceeds of the stock to be applied, so far as they would go, toward paying the debt; that no part of the debt had been cancelled or discharged, but that he was still liable personally; that the stock formerly owned by him had been forfeited for nonpayment of an assessment, and had actually been sold as forfeited, by the secretary of the corporation, he, said *Cutter*, being present at the sale; that he did not consider himself as now having any interest; that he did not know that his assignees had relinquished their claim to the stock; and on being asked, whether he did not expect to receive benefit from the stock, at some future time, he answered, that he hoped to, but had no legal claim; that he sold his stock before the contract in question in this case was made. He was inquired of by the defendants, whether the sale of forfeited stock was not, by the regulations, and by a law of the company, to be made by the secretary. This question was objected to by the plaintiffs, and the Judge refused to allow it to be put. The Judge ruled, that the witness was interested, and could not be permitted to testify. The by-laws of the company had been introduced by the plaintiffs, and are referred to as part of the exceptions, but are not found in the papers which came into the possession of the Reporter. They are stated sufficiently in the opinion of the Court.

Other questions were presented in the exceptions, and were argued by the counsel in this Court, but as no opinion was given upon them, they are omitted.

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

Preble, for the defendants, contended, that *Cutter* was improperly rejected as a witness, but cited no authorities on this point.

S. Fessenden and *W. P. Fessenden*, for the plaintiffs, contended that *Cutter* was rightly rejected; and cited 1 *Mass. R.* 239; 5 *Johns. R.* 411; *ib.* 256; 2 *Pick.* 240; 1 *Car. & P.*

253; 2 *Stark. Ev.* 746; 1 *Campb.* 37; 1 *Coxe*, 46; 1 *Dallas*, 62; 2 *Dallas*, 50; 2 *Cowen*, 526; 6 *Greenl.* 364.

The opinion of the Court was drawn up by

SHEPLEY J. — The corporation offered *William Cutter* as a witness, and he was excluded on the ground of interest. The proof of his interest was made on his examination upon the *voire dire*. He stated an assignment of his stock in the corporation as security for a debt, but that did not discharge his interest. He further stated, that his stock had been forfeited for neglect to pay an assessment, and had been sold by the secretary, he being present at the sale, and that he did not consider himself as having now any interest. On being asked if he did not expect to receive benefit from the stock at some future time, he answered, that he hoped to, but had no legal claim. The counsel for the plaintiffs contend, that his statement was not the best evidence to prove the forfeiture and sale, and that the defendants, who called him as a witness, should prove these facts by their records. A like question arose, in the case of *Miller* v. *The Mariners' Church*, 7 *Greenl.* 51, and it was decided, that on the *voire dire* parol evidence might legally be received, of the contents of written contracts or records not produced; and that if produced they might be examined. It is also insisted, that, upon examining the by-laws, which had been already introduced, there does not appear to have been a legal forfeiture and sale of the shares. The difficulty, that prevents one's yielding to this position, is, that while the witness states the forfeiture and sale, it does not there appear to have been illegal. It is true, that in the by-laws, the secretary is not authorized to sell, and that it is at the option of the directors to enforce a forfeiture or not for neglect to pay; and yet it may be true, that the directors have elected to enforce the forfeiture, and that the secretary has been empowered to sell. These facts could not be expected to appear from the by-laws. They might be proved by the records, but they were not produced, and the witness was not interrogated respecting these matters. And under such circumstances, there is nothing to contradict the statements of the witness or to prove him incorrect, when he states that they were forfeited and sold. And being sold in his presence, and, so far as appears,

without objection from him, the Court cannot presume that the sale was illegal and void.

Does the expression of a hope of future benefit, at the same time asserting that he had no legal claim, exclude him? In *Fotheringham* v. *Greenwood*, 1 *Stra.* 129, *Pratt C. J.* held, that "if a witness thinks himself interested, though in strictness of law he is not, yet he ought not to be sworn." And it is said in the report of that case, that the case of *Chapman* was mentioned, where *Parker C. J.* rejected a witness "who owned himself to be under an honorary, though not under a binding engagement to pay the costs." And in *Trelawney* v. *Thomas*, 1 *H. Bl.* 307, *Lord Loughborough* and *Mr. Justice Gould*, refer to the case in *Strange* with approbation.

In *Rex* v. *Rudd*, *Leach Cro. Cas.* 154, *Mrs. Perreau*, whose husband was under sentence of death, being offered as a witness, stated on the *voire dire*, that if the prisoner was found guilty, "she supposed it would be the means of procuring *Mr. Perreau's* pardon;" and she was admitted to testify. In *Pederson* v. *Stoffles*, 1 *Campb.* 144, the witness said he considered himself bound, in honor, to indemnify the party calling him, and was admitted. The same rule was adhered to in *Parker* v. *Whitby*, 1 *Turn. & Russ.* 366. In the case of the *Drie Gebroeders*, 5 *Rob.* 344, *note (a)*, the witness stated, that he knew, that he had, by a release, divested himself of all legal claim; but he expected, should the party succeed in the cause, he would be liberal, and suffer him to receive his share of the capture; and the testimony was admitted. In the case of the *Amitie*, mentioned in the same note, the statement of the witness was, "he cannot say, that he is not interested, inasmuch as he conceives he will be *entitled* to share, if his vessel was pronounced a joint captor, though he had signed a release." *Sir William Scott* rejected the testimony, observing, "I have always understood the distinction in these courts to be, that if the witness says only, that he expects to share from the bounty of the captors, he is not disqualified or rendered incompetent. But if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent, however erroneous that opinion may be."

In the case of *Plumb* v. *Whiting*, 4 *Mass. R.* 518, *Parsons*

C. J. says, if a witness would testify under the impression of an interest, which he honestly believes that he has, in the event of the suit, he cannot be sworn; for the effect on his mind must be the same, whether his interest arises from a legal contract or from a gratuitous promise, on which he confidently relies." In the *Union Bank* v. *Knapp*, 3 *Pick.* 96, a witness, who had made a mistake which occasioned the suit, said, "he did not know whether he was accountable to the bank or not; and that if this money should be lost, he would sell his house, or any thing else, if required by the bank," was admitted. And *Putnam J.*, in delivering the opinion, says, "the witness was under a mistaken notion, that he was bound in honor to compensate for his innocent mistake, but such an opinion does not disqualify a witness. It must be a direct interest, which is to render a witness incompetent."

In the case of *Skillinger* v. *Bolt*, 1 *Conn. R.* 147, a witness having been released, said he expected to pay the judgment, if the plaintiff recovered; and the Court decided, that he was properly excluded. In *Smith* v. *Downs*, 6 *Conn. R.* 365, a witness, who said, he was not bound, but considered himself under an honorary obligation to pay part of the judgment, if the plaintiff recovered, was admitted. The Court examine the question fully, and come to the conclusion, that nothing but a direct interest in the event of the suit or in the record, should exclude a witness.

In the *State* v. *Clark*, 2 *Tyler*, 277, it was decided, that a witness, who thought himself interested, when he was not, was competent.

In *Lansingburg* v. *Willard*, 8 *Johns. R.* 428, it was said, if a witness declares himself interested on the side of the party, who calls him, he ought not to be sworn, though in strictness he is not interested. In the case of *Gilpin* v. *Vincent*, 9 *Johns. R.* 219, the witness said, he could not say, that he would not contribute to the costs of the suit, in case the plaintiff failed; that if the plaintiff in such case should ask him, he thought he should give something, as he usually did in such cases, although he was in no way bound to do it. The Court say, it did not amount to even an honorary obligation, "and it has been ruled, that even such an obligation does not go to the competency of the witness." In *Stockham* v. *Jones*, 10 *Johns. R.* 21, it is said, "the incompe-

tency of a witness must be confined to a legal fixed interest in the event of the suit." And such appears to be the established rule in that State. *Williams* v. *Matthews*, 3 *Cow.* 252; *Moore* v. *Hitchcock*, 4 *Wend.* 292.

In *McVeaugh* v. *Goods*, 1 *Dallas*, 62, the witness stated, that he assisted in seizing the goods, and expected some compensation from the informer, if they should be condemned, but not otherwise; and his testimony was excluded. In *Innis* v. *Miller*, 2 *Dallas*, 50, it is said, if a creditor "acknowledges an expectation, that he shall be benefitted by the fate of the cause, he is sensible of a positive interest, that must give a bias to his mind"; and the witness was excluded. It appears now to be the settled rule in *Pennsylvania*, that nothing but a legal interest in the event of the suit, or in the record, can exclude a witness. *Henry* v. *Morgan*, 2 *Bin.* 497; *Long* v. *Baillie*, 4 *S. & R.* 226.

In *Virginia* and *Kentucky*, the rule may be, that a witness, who believes himself interested, though he is not, is incompetent. *Richardson* v. *Hunt*, 2 *Munf.* 148; *Senteney* v. *Overton*, 4 *Bibb*, 445.

In *Maryland*, the like rule prevails, where the witness so appears on the *voire dire*, but if the interest be shewn by other proof, and it appears to the court that the witness is not interested, he may be examined, though he thinks he is interested. *Peter* v. *Beall*, 4 *Har. & McHen.* 342.

There are many cases, in which a witness may have a strong bias operating to favor the party calling him, as where he is interested in the same question, or is similarly situated and exposed, or is under the ties of blood connected with the hope of gain, or is a creditor, when a recovery may materially contribute to the means of payment. In some of these cases, the witness was not regarded as competent, before it was settled by the case of *Bent* v. *Baker*, 3 *T. R.* 27, that the witness must have an interest in the event of the suit, to exclude him. *Lord Mansfield* had before declared, that a rule might be derived from preceding cases, that interest should go to the competency, while influence should go to the credit, of the witness. *Abrahams* v. *Bunn*, 4 *Burr.* 2251. There is no distinction in principle between an influence, arising from an interest in the question, or from relationship, and one de-

rived from an honorary obligation, a hope of benefit, or a belief of interest when no actual interest exists. If the competency of a witness may depend upon his stating an honorary obligation, or a belief of interest, or a hope of gain, he can deprive any party of his testimony at his pleasure. There is no rule so plain and satisfactory, as that stated by *Lord Mansfield*, and since found to be more and more satisfactory by a longer and larger experience. It will be perceived, that, in some of the States, where an influence on the mind was allowed to exclude the witness, the more recent decisions have adopted the rule, which is now more generally received, and ought to be regarded here, that, to exclude a witness, it must appear, that he has a certain legal interest in the event of the suit or in the record. And that all other matters of influence affect the credit only.

Upon a new trial, the testimony may not be the same on the other points presented in the case, and there would be little of benefit in the expression of an opinion upon them at this time.

Exceptions sustained, and new trial granted.

BARRETT POTTER, JUDGE, *vs.* CYRUS CUMMINGS *& al.*

An action cannot be maintained against an administrator, on his probate bond, for not accounting for money lost by his neglect or misconduct, until after he has been cited by the Judge of Probate, to render his account thereof.

When an administrator of an insolvent estate has tendered to a creditor the amount of the dividend decreed to be paid to him, he has performed his duty; and an action on the probate bond cannot be maintained for the benefit of such creditor, although the administrator may have neglected to pay the money thus tendered into Court.

DEBT upon a bond given to the Judge of Probate, by *Cummings*, on being appointed administrator of the estate of *John Stevens*, deceased. There was an indorsement upon the back of the writ, stating, that the action was brought for the benefit of *Robert Leighton*, but it was not stated *in the writ*, that the suit was brought in the name of the Judge of Probate for the benefit of *Leighton*, and for this cause the defendants moved that the writ

be abated. The plaintiff asked leave to amend his writ, by inserting, after the name of the Judge of Probate, the words, *who sues this action for the benefit of Robert Leighton, of, &c. a creditor of the estate of John Stevens, the defendant Cummings' intestate.* The estate of *Stevens* had been rendered insolvent, and the commissioners had allowed a demand in favor of *Leighton. Cummings* had settled in the Probate Court one administration account, in which he had credited, among other sums, six dollars, received of one *Prince*, and the balance of the account had been distributed among the creditors, of which *Leighton's* dividend was $11,30. The administrator had claimed a sum of money as due to the intestate from *Prince*, which the latter refused to pay, and they, by parol agreement, left to two men to say how the settlement should be made, and they awarded by parol that *Prince* should pay forty-three dollars. *Prince* refused instantly to pay the amount, unless compelled to do so by a lawsuit. The administrator consulted with creditors of the estate, holding more than half the amount of the claims, and, by their advice, compromised with *Prince*, by receiving the six dollars credited in the account. *Leighton* was not consulted in relation to the compromise. On *August* 18, 1838, *Leighton* demanded of *Cummings* his dividend on the estate of *Stevens*, and also his distributive share of the balance alleged to have been due from *Prince* to the intestate, above the six dollars. *Cummings* refused to pay the latter, but offered to pay the dividend by an order on a third person. *Leighton* did not object to the mode of payment, but refused to receive the dividend, unless the whole sum claimed was paid. On the 20th of the same *August*, *Cummings* tendered to *Leighton* the full amount of his dividend, but has never brought the money into Court. Afterwards, *Leighton* caused this suit to be brought. The administrator had not been cited into the Probate Court, to settle any account, or to account for any further sum for the claim on *Prince.* The present suit was instituted by *Leighton* without the consent of the Judge of Probate. The case was submitted for the opinion of the Court upon the facts.

Codman & Fox, for the plaintiff.

The administrator had sufficient authority to refer the demand against *Prince*. *Bean* v. *Farnham*, 6 *Pick.* 269. This estab-

lished it as a demand due to the estate, and the administrator, having discharged it, is accountable for the amount.

Neglecting to account for this amount in his account, settled afterwards, was unfaithful administration, and there was no necessity for a citation. *Paine J.* v. *Fox*, 16 *Mass. R.* 129.

The tender was wholly immaterial, as the money was not brought into Court. Neglecting to pay the dividend, when demanded, was a breach of the bond.

Adams, for the defendants.

The administrator has accounted for all he received. His compromising a questionable demand, with the advice of many of the creditors, where if successful in the suit, nothing would be left above the expenses, and where failure would take away the little property already received, cannot be considered unfaithful administration.

But if the amount of the award be assets, no suit can be maintained on the bond, until after the administrator has been cited into the Probate Court to render his account. The administrator is not required to render a second account until after a citation. *Hooker* v. *Bancroft*, 4 *Pick.* 50. He should, therefore, in this case, have been cited to account, before bringing a suit. *St.* 1821, *c.* 51, § 72; *Paine J.* v. *Fox*, 16 *Mass. R.* 129; *Nelson* v. *Jacques*, 1 *Greenl.* 139; *Potter J.* v. *Titcomb*, 7 *Greenl.* 302; *Fuller J.* v. *Young*, 1 *Fairf.* 365; *Paine J.* v. *Stone*, 10 *Pick.* 75. If any action could be maintained on the bond, it should be by the Judge of Probate, for the benefit of all parties interested. *Barton J.* v. *White*, 21 *Pick.* 58.

The demand for the dividend was not legal, because it was coupled with a demand for another sum, to which he had no right. 14 *Mass. R.* 428; 1 *Esp. R.* 115. The first tender under the circumstances was sufficient. *Peake's N. P. Cases*, 88, 180.

The second tender was clearly good. It was not necessary to bring the money into court, for the action is not for that sum, but for the penalty of the bond.

The opinion of the Court was drawn up by

Shepley J. — One of the creditors of the late *John Stevens*, upon whose estate the defendant, *Cummings*, is administrator,

claims to recover, in this suit, his share of a sum of money, alleged to have been due to the intestate from *John Prince*. A small part of this sum was collected, the administrator having made a compromise and relinquished the remainder. If in this he conducted unfaithfully, he may be required to account for the amount relinquished. He is, however, entitled by statute, *c.* 51, § 72, to be heard before the Probate Court, and to have a decision there, in a manner the least expensive, whether he should or not so account. And he must be cited, to allow him that privilege, before a suit, requiring him to answer elsewhere, can be maintained upon his official bond. *Potter J.* v. *Titcomb*, 7 *Greenl.* 321.

The estate is insolvent, and a dividend had been decreed to be paid to the party interested in this suit. This amount was tendered, before the action was brought, but it is insisted, that the tender was ineffectual because it was not kept good by bringing the money into Court. There can be no forfeiture of an official bond, without proof of a dereliction of duty. And in such case, judgment would be rendered for the penalty, while execution would issue only for the amount of damage proved. And the party may not be informed of the particular default charged, until it would be too late to bring money into Court. The party recovers damages for an injury suffered, although a debt due may be the measure of damages. The same rule does not prevail in such a case, as in the case of a single bond or contract between party and party, where the tender must be kept good, by bringing the money into Court. When an administrator has tendered the amount decreed to be paid to the person entitled to it, he has performed his duty; and there is neither neglect of duty nor breach of the bond. It is sufficient for him, that the plaintiff fails to shew any forfeiture of the bond, when the action was brought.

As the action could not be maintained upon the merits, if the amendment were allowed, it is unnecessary to decide upon it.

Plaintiff nonsuit.

JOSEPH CURRIER *vs.* LUTHER BRACKETT.

If a person, as sheriff, appoints another a deputy sheriff under him, this is to be regarded as sufficient proof, that they stood in the relation of sheriff and deputy, in an action against the former for the default of the latter, as his deputy.

Where it is proved, that an officer, who had collected money on an execution, on being inquired of by an agent of the creditor, why he had not sent the money, promised to send it to the creditor immediately, a jury may properly find, from such evidence, that a demand of the money had been made.

If a deponent states, that he read to the defendant an extract of a letter from the plaintiff to himself, and gives a copy of the extract, and also gives the reply of the defendant thereto, and no objection is made at the time of the taking, the deposition is admissible in evidence.

THIS was an action of the case, for the neglect of *Charles Hapgood* as a deputy of the defendant, who was alleged to have been the late sheriff of the county of *Washington*, in not paying over the amount of an execution in the plaintiff's favor, against *The Proprietors of the Calais Temperance House*, the writ having been sued out *July* 28, 1838, wherein the amount and thirty *per cent.* interest were claimed. The plaintiff read a copy of the judgment described in the declaration, and proved, that an execution, duly issued thereon, was sent to *Hapgood* by mail, *October* 16, 1837, and that letters passed from *Portland*, from whence the letter was sent, to *Calais*, where *Hapgood* resided, in the usual course of the mail, in two days. The plaintiff offered in evidence the copy of the record of the appointment and qualification of *Charles Hapgood* as a deputy sheriff of the defendant, certified by the clerk of the judicial courts in the county of *Washington*, which was objected to by the defendant's counsel, unless it was proved that the defendant was sheriff of that county. The objection was overruled by EMERY J., presiding at the trial, and the evidence was admitted. The plaintiff offered the deposition of *G. W. McLellan*, to the admission of which the defendant's counsel objected, so far as relates to the extract of a letter from the plaintiff's counsel, and the statement respecting the same, as the original letter was the only proper evidence. No objection appeared to have been made, at the

taking of the deposition, and the Judge overruled the objection, and admitted the deposition. *McLellan* stated, that on *June* 15, 1838, he received a letter from *Codman & Fox*, the plaintiff's attorneys in the suit against the *Calais Temperance House*, in which they said to him, "if you see *Charles Hapgood*, late deputy sheriff, we wish you to inquire of him why he has not forwarded to us the money by him collected on execution, *Currier* v. *Calais Temperance House*"; that on the next day he called on *Hapgood*, and read to him that part of the letter quoted above; that *Hapgood* replied, that he had collected the money and would send it to them immediately; that afterwards, in the latter part of the same month, he met *Hapgood* in the street, who informed the deponent, that he was going west, and would see *Codman & Fox*, and pay over the money to them, or settle the execution with them; that he had no authority to receive the money or to receipt for the same, unless the extract of the letter might be regarded as giving him the authority; that he did not demand the money of *Hapgood*, but would have received it, had it been offered to him, and have taken upon himself the risk of forwarding it, and of procuring a discharge for *Hapgood;* and that no offer was made to pay over the money to him on a proper demand. The deponent annexed to his deposition a letter, which he stated was in the handwriting of *Hapgood*, of which a copy follows. "*Calais, May* 4, 1838. *Messrs. Codman & Fox*: Gent. The execution *Joseph Currier* v. *Pro. Calais Temperance House*, is collected. If you will allow me to pay it over to *Ch. Bradbury*, or remit it, by mail, in current bank bills in this place, I will endeavor to do it per order. Yours, with respect, *Cha's Hapgood.*" The plaintiff proved a notice from his counsel, *Codman & Fox*, to the counsel of the defendant, to produce at the trial "an original letter from *Codman & Fox*, written to *Charles Hapgood*, sometime in the month of *May*, 1838, wherein said *Hapgood* is directed to remit to us, by return of mail, the amount of the execution *Currier* v. *Proprietors of Calais Temperance House*, collected by him as deputy sheriff, in bills of banks current in the city of *Portland*, and of as large size as was possible for him to obtain." No such letter was produced. *Mr. Codman*, one of the plaintiff's counsel

and one of his attorneys in the suit against the *Temperance House*, testified, that he had written several letters to *Hapgood*, prior to *May* 1, 1838, and that he received the letter from *Hapgood*, dated *May* 4, 1838, annexed to *McLellan's* deposition, and that to this, immediately after receiving it, he replied, requesting *Hapgood* to forward the amount of the execution, exclusively of change, to the witness, in as large bills as he conveniently could get, which were current at *Portland*, taking evidence of his enclosing and depositing the same in the post office at *Calais*, and that he put the letter into the post office at *Portland*, directed to *Hapgood*, at *Calais*.

On this evidence, the defendant's counsel requested the Judge to direct a nonsuit. This was declined. They then requested the Judge to instruct the jury, that it was necessary for the plaintiff to prove a demand on *Hapgood* for the money before the commencement of the action, and that the putting the letter in the post office at *Portland*, directed to said *Hapgood*, as testified by said *Codman*, was not legal evidence of a demand. The Judge declined so to instruct the jury, and did instruct them, that if from the evidence, they were satisfied that said *Hapgood* received the execution from said *Codman & Fox*, the attorneys of the plaintiff, and had collected the money; and that afterwards, said *Hapgood* received the letter, directing him to forward the amount in the manner stated by the witness, *Codman*; it was a sufficient demand to enable the plaintiff to maintain his action for the amount of his debt and costs of the execution, exclusive of change, and the thirty *per cent.* interest, unless they were satisfied, that he had complied with the directions of the plaintiff's attorney, or was unable so to do, of which, from the facts detailed in *McLellan's* deposition, they would judge; that as the plaintiff sought for a penalty, the burthen of proof was upon him to satisfy them that he was entitled to it beyond any reasonable doubt; that though a demand was necessary to be made, by the plaintiff, of the money from *Hapgood*, before action brought, it was not necessary to make use of the word demand to effect a compliance with the same; and that the application by *McLellan* to *Hapgood* was not a sufficient demand.

If the rulings or instructions were erroneous, the verdict for the plaintiff was to be set aside.

Longfellow, Sen., for the defendant.

1. There was no legal evidence that the defendant was sheriff. Better evidence existed. The certificate of the Secretary of State is better evidence of his appointment, than the mere certificate of the clerk of the court, that *Hapgood* had been appointed his deputy.

2. The portion of *McLellan's* deposition, objected to at the trial, was improperly admitted. The letter should have been annexed. But if a copy would answer, the whole should have been copied, and not a mere extract given.

3. There was no evidence of any demand on the officer for the money. Where a penalty is demanded, strict proof must be made. Putting a letter into the post office is no demand, and had the letter reached the officer, he was not bound to have sent the money. *McLellan* made none. If there was proof that the deputy sheriff agreed to send the money, that was not a part of his official duty, and the sheriff is not liable for a neglect to perform such promise. But if the action can be sustained, the penalty of thirty *per cent.* cannot be recovered. *Bulfinch* v. *Balch*, 8 *Greenl.* 133. There was no conflicting evidence, and whether a demand was proved, or not, is a question to be decided by the Court.

Fox, for the plaintiff.

The Court officially take notice who is sheriff. 3 *Dane*, 61. The law requires, that the commission of the deputy sheriff should be recorded, and the copy from the record is evidence of the appointment. *St.* 1839, *c.* 445, § 7. Having appointed *Hapgood* a deputy under him, he cannot deny that he is sheriff.

The defendant attended at the taking of the deposition, and made no objection to the testimony. Had objection been then made, the letter would have been annexed, and it is now too late to make it.

The deputy sheriff admitted, that he had been requested to pay over the money, and he agreed to do it in the way which best suited his convenience; and this is sufficient evidence of a demand. *Wakefield* v. *Lithgow*, 3 *Mass. R.* 249. The demand here was

made by the attorney of the plaintiff, and he has authority to make it. It is not necessary to tender a discharge, but it is sufficient to give one when the money is paid. And the plaintiff is entitled to the thirty *per cent.* interest. *Thompson* v. *Brown,* 17 *Pick.* 462.

The opinion of the Court was prepared by

WESTON C. J. — The defendant acted as sheriff *de facto.* Of this, his appointment of *Hapgood,* as his deputy, under his hand and seal, is evidence. It ought, in the absence of all opposing testimony, to be regarded as sufficient proof, that *Hapgood* stood in the relation of his deputy, he assuming to act, and in fact acting, as the sheriff of *Washington.*

The jury have found, that *Hapgood* received *Mr. Codman's* letter, directing in what manner the money should be forwarded. The fact, that it was put into the post office, to be sent in due course of mail, together with *McLellan's* deposition, justifies this finding. That deposition is not objectionable. The letter, therein referred to, was mere inducement to the declarations of *Hapgood.* No objection was made by the counsel for the defendant, at the time of taking the deposition. If then made, it might have been removed by annexing the letter.

The case of *Wakefield* v. *Lithgow,* 3 *Mass. R.* 249, is an authority in point to show, that there has been a sufficient demand. Indeed, this is a stronger case, for by *McLellan's* deposition it appears, that *Hapgood* promised to send the money immediately, thus waiving all objection to the form of the demand, as well as to any hazard or trouble, this course of proceeding might occasion him.

Judgment on the verdict.

William Bradbury *vs.* Inhabitants of Falmouth.

In an action against a town, to recover damages for an injury alleged to have been caused by a defect in a highway, if the question, whether the town had, or had not, notice of the defect, is not, in every case, one of fact to a jury, it belongs to the *jury*, and not to the *Court*, to determine, whether the town is chargeable with notice, when no actual notice to any inhabitant of the town, is proved, and is to be established only by implication and inference from other facts.

Exceptions from the District Court for the Western District, Whitman J. presiding.

This was an action on the case, brought to recover damages for an injury done to the plaintiff's horse by defects in a road within that town. The plaintiff proved, that his horse sustained an injury, when passing over a public highway, *June* 24, 1837, within the town of *Falmouth*, leading from *Portland* into the country, and much travelled. To prove a defect in the highway, and constructive notice to the town, the plaintiff produced, as a witness, *J. Buxton*, who testified, that in passing the road on the evening of the 23d of the same *June*, he saw a hole between two rocks in the travelled part of the road, shaped somewhat like a jewsharp, sufficiently large to admit the foot and leg of a horse. The horse was injured by getting his foot into that hole the next day. The plaintiff also called *I. True*, who testified, that on the morning of the day on which the accident happened, in passing with a loaded team, one of his oxen stepped his foot into the hole, which was a foot deep and fifteen inches wide, and that if he had been travelling up instead of down, there would have been great danger of catching the foot of the ox or horse which might step in it. The hole was between two large flat rocks, which formed the cover of a culvert in the road. Neither the plaintiff, nor either of the witnesses, were inhabitants of *Falmouth*, and there was no positive evidence, that the hole existed prior to the day before the accident. The defendants proved, that the place where the accident happened, was near the line of the town, towards *Cumberland*, and that there was no dwellinghouse on that road, in *Falmouth*, within one half or three fourths of a mile, and no one lived on that road,

between that place and the line of the town of *Cumberland*. No notice of the defect in the road, to any inhabitant of *Falmouth*, before the accident, was actually proved.

Upon this evidence, the counsel for the plaintiff contended, that what was legal notice, was a question of law upon the facts proved; and that there was constructive notice to the town, from the facts proved.

The Judge ruled, that what was notice, was a question of fact, to be decided by the jury, whether they were satisfied, on the whole evidence, that the town had reasonable notice of the defect in the road. The jury returned a verdict for the defendants, finding that they "did not have notice, as the plaintiff in his writ has declared." The plaintiff filed exceptions.

Fessenden & Deblois, for the plaintiff, contended, that this was a question to be decided by the Court. It was to determine whether, upon the undisputed facts, the town had reasonable notice of the defect in the highway. Were it not so, no uniform rule could be established, and every jury would have its own opinion, and make its own law. *Tindall* v. *Brown*, 1 *T. R.* 167; *Bryden* v. *Bryden*, 11 *Johns. R.* 187; *Bayley on Bills*, 223; *Darbishire* v. *Parker*, 6 *East*, 3; *Hussey* v. *Freeman*, 10 *Mass. R.* 84; *Willes*, 204; *Co. Lit.* 56 *b*; *Atwood* v. *Clark*, 2 *Greenl.* 249; *Davis* v. *Thompson*, 1 *Shepl.* 209; *Currier* v. *Earle*, *ib.* 216; *Belfast Academy* v. *Salmond*, 2 *Fairf.* 109; *Springer* v. *Bowdoinham*, 7 *Greenl.* 442; *Ellis* v. *Paige*, 1 *Pick.* 43. Nor is there any ground for saying, that the jury decided the law rightly, and therefore there should not be a new trial. The notice was sufficient to render the town liable. *Lobdell* v. *New Bedford*, 1 *Mass. R.* 153.

Preble, argued for the defendants.

The opinion of the Court was drawn up by

Weston C. J. — In certain cases, principally of a commercial character, what is, or is not, reasonable notice, has been held to be a question of law. This has been so established, from the convenience and necessity, in such cases, of a general rule. It may admit of serious doubt, whether notice to a town, of a defect in the highway, is not, in every case, a question of fact to a jury. But

here no actual notice, to any inhabitant of the town, was proved. It could be established only by implication, or inference, from other facts. In such a case, whatever may be said of others, we are well satisfied, that it belongs to the jury to determine, whether the town is chargeable with notice.

Exceptions overruled.

THE STATE *vs.* ISAAC STURDIVANT.

To maintain an *indictment* for the obstruction of a "town and private way," it must be shown, that such way was laid out and established, pursuant to the statute provisions. Proof of a user as such for twenty years or more, is not sufficient.

THE indictment alleged, "that there is now, and long before, and at the time of the obstruction and nuisance herein after mentioned, there was a town and private way in the town and city of *Portland*, leading," &c. "which said town and private way is, and for a long time past, has been, known by the name of *Lime Street*, for all the inhabitants and citizens of said town and city to go, return, pass and repass in and along the same, at their will and pleasure," and that *Sturdivant* had created a nuisance in that street, by erecting and continuing a fence therein. At the trial before SHEPLEY J., there was testimony tending to prove, that the street had been travelled and used as a street, for more than twenty years before *Sturdivant* removed his fence more westerly into the street.

The jury were instructed, that if they were satisfied, from the testimony, that the street had been so travelled and used as a street, for more than twenty successive years before the removal of the fence, that it thereby became a public street, whether so laid out or not, and that the defendant could not afterward legally remove the fence into the street.

There was some testimony tending to prove, that the street had been dug up and extended easterly so as to be the occasion of throwing down the fence of the defendant for a portion of the dis-

tance where it had been removed more westerly than it formerly stood, but it did not appear by whose authority this was done. The counsel for the defendant contended, that if the incumbrance or nuisance had been abated since the finding of the indictment, it could no longer be maintained. The jury were instructed, that no such question could arise for their consideration, unless they were satisfied, from the testimony, that the whole of the incumbrance which existed at the time of finding the indictment, had been abated or removed, and that it had been done by some one having competent authority. The verdict of guilty was to be set aside, if the jury were erroneously instructed.

A. Haines, for *Sturdivant*, contended:

That the first instruction of the Judge to the jury was erroneous. The indictment is for erecting a nuisance on a town and private way. The authorities clearly show, that a *grant* of a *public highway*, may be presumed by user by the public for twenty years, and that a *record* of the establishment of a *public highway*, may be presumed by user by the public for more than twenty years, but that neither *grant* nor *prescription* is to be presumed by any user whatever, in favor of *a town or private way*. If the charge in the indictment had been, the erecting of a nuisance upon a *public highway*, the instruction would have been correct; but being applied to erecting a nuisance upon a town or private way, it is erroneous. *Com.* v. *Newbury*, 2 *Pick.* 51; *Com.* v. *Low*, 3 *Pick.* 408; *Howard* v. *Hutchinson*, 1 *Fairf.* 335; *Dennett* v. *Hopkinson*, 2 *Shepl.* 341; *Stedman* v. *Southbridge*, 17 *Pick.* 162. Our statute being a transcript of that of *Massachusetts*, the decisions there are equally applicable here.

The acquisition, by a town, of a right of way by grant, or by such user as presumes a grant, creates a mere *private way*, and a nuisance on a *private way*, so created, is not indictable. *Com.* v. *Low*, 3 *Pick.* 408. The town ways and private ways contemplated by the twenty-sixth section of the *stat.* of 1821, *c.* 118, concerning highways, are town ways and private ways laid out agreeably to the provisions of the ninth section of the same statute.

Longfellow, City Solicitor, for the *State*, said, that the points

now raised, were not made at the trial. There was an attempt to show a laying out of the street by law, and failing in that, testimony, to show a way by prescription, was introduced and admitted. No reference was made to the indictment, and the distinction now set up was not then taken.

There is, however, no ground for the distinction. The regular laying out of a highway or town way, may be presumed from its having been used as such for twenty years. *Gayetty* v. *Bethune*, 14 *Mass. R.* 49. The way is public for the use of all travelers, and not a mere personal privilege of the inhabitants of *Portland*. This has been so held by our own Court. The case *Todd* v. *Rome*, 2 *Greenl.* 55, decides, that proof of the user of a town road for twenty years, is sufficient for the jury to presume, that a road was laid out, and to subject the town to all the legal consequences attendant upon injuries occasioned by obstructions therein, for which the town is responsible. The *Com.* v. *Newbury* is merely the case of an obstruction of a foot path acquired by certain individuals by prescription; the mere violation of an individual right.

Wherever a public way is obstructed, whether town or county, an indictment lies; but where it is the infraction of a mere private right, it does not. *Stedman* v. *Southbridge*, 17 *Pick.* 162.

Daveis, for *Sturdivant*, replied.

The opinion of the Court was drawn up by

Weston C. J. — The defendant is charged with having obstructed a certain town or private way, in the city of *Portland*, described in the indictment, over and through which, it is there alleged, all the inhabitants of that city have a right to pass. The point taken at the trial, relative to the abatement of the nuisance, and its effect, is not insisted on by the counsel. The remaining question is, whether there was competent proof of the existence of the way set forth in the indictment. The mode of locating ways of this description, is provided by the *statute* of 1821, *c.* 118, § 9. The same mode existed in the statute laws of *Massachusetts*, prior to the separation. It having been proved at the trial, that the way had been used, as such, for more than twenty years, if located in pursuance of the statute, it must have been under the

statute of *Massachusetts*. As, however, in this particular, the one is a transcript of the other, both must receive the same construction.

The existence of a public highway, may be proved by a user of twenty years; but it has been decided, in *Massachusetts*, that a town or private way cannot be thus proved. A strong intimation to this effect is given by *Parker C. J.*, speaking for a majority of the Court, *Putnam J.* dissenting, in the *Com.* v. *Newbury*, 2 *Pick.* 51. But in the case of the *Com.* v. *Low*, 3 *Pick.* 408, the point was directly decided, without any dissenting opinion, although *Putnam J.* was present. It was there held, that a town may become seized of a way by grant, prescription, or reservation, or from long continued occupation, from which a grant may be presumed. But it was further held, that if such a way be obstructed, no indictment will lie for the obstruction, nor will the town be liable to punishment for neglecting to repair it. But the point directly decided was, that a town way could only be established in the statute mode, and was not proved by evidence of user. By which is to be understood, such a town way as the town is bound to repair, an obstruction to which is an indictable offence.

A *dictum* of *Shaw C. J.* in *Stedman* v. *Southbridge*, 17 *Pick.* 162, may seem to have a different bearing, but may be reconciled, by referring his intimation to a right of way, which, according to the former opinion, a town might acquire, for neglecting or obstructing which, however, it was held no indictment would lie. In the case last cited, which was a civil action, the town was held liable, not upon the averment that it was a town way, but upon an averment in another count, that it was a road, which was held to mean a public highway. We do not, therefore, regard that case as impairing the authority of the *Com.* v. *Low*. There is no reason, which could sustain that decision, which does not apply with equal force in this State. The laws of both States have a common source, and they have not been changed here by the legislative power. And upon the whole, we perceive no just reason why we should come to a different conclusion. The existence of the way alleged, not having been established by competent proof, the verdict is set aside and a new trial granted.

Albert Valentine *vs.* Otis True.

The removal of a member of an independent company, beyond the limits of the brigade to which the company belongs, for a temporary purpose, does not subject him to the performance of militia duty in the place of such temporary residence.

This was a writ of error to reverse a judgment of a Justice of the Peace, in an action of debt, brought by *True*, as clerk of a company of militia in *Poland*, for the non-appearance of *Valentine* at a company training. The facts are given in the opinion of the Court. The judgment was, that *Valentine* should pay a fine and costs.

The errors assigned were — 1. That *Valentine* was a member of a light infantry company in *Westbrook*, and a sergeant and clerk thereof, and not liable to do militia duty in *Poland*. 2. That the evidence proved conclusively, that *Valentine* was an inhabitant of *Westbrook*, and was only absent therefrom for temporary purposes, and therefore he was not liable to enrolment, or to do duty, in the company of which *True* was clerk. 3. The general error.

Codman, for the plaintiff in error, contended: —

1. *Valentine* was not liable to do duty in the company of militia of which the original plaintiff was clerk, inasmuch as he was a regularly enlisted member of, and sergeant and clerk in, the light infantry company of *Westbrook*, in the same division of the militia of this State, but not in the same brigade. He cited *U. S. st.* 1792; *Com.* v. *Cummings*, 16 *Mass. R.* 194, and argued that the case was not in point, and had been overruled. *Com.* v. *Thaxter*, 11 *Mass. R.* 386; *Com.* v. *Walker*, 4 *Mass. R.* 556; *Com.* v. *Clark*, 11 *Mass. R.* 239; *Com.* v. *Swan*, 1 *Pick.* 194; *st.* 1834, § 19, § 6, § 44, *art.* 13, 14; *Gallup, ex parte*, 1 *Pick.* 463; *Webber, Pet.* 3 *Pick.* 265; *Munyan* v. *Coburn*, 8 *Pick.* 431, 2*d Ed. note*; *Cutter* v. *Tole*, 3 *Greenl.* 42.

2. *Valentine* had not lost his residence in *Westbrook* and gained one in *Poland*, so far as to be liable to be enrolled in the standing company of militia in the latter town.

This involves two questions, one of law, and the other of fact.

In considering the question of law, it was said, that residence within the limits of a company, by one enrolled on the muster roll, is a material fact to be proved. *Whitman* v. *Sanborn*, 8 *Greenl.* 310; *Gould* v. *Hutchins*, 1 *Fairf.* 145. A person having a temporary residence, for a special purpose, at the place where he is not domiciled, is not liable to be enrolled in the militia. *Com.* v. *Swan*, 1 *Pick.* 194; *Hill* v. *Fuller*, 2 *Shepl.* 121; *Com.* v. *Walker*, before cited; 7 *Greenl.* 501; *Lincoln* v. *Hapgood*, 11 *Mass. R.* 350; *Granby* v. *Amherst*, 7 *Mass. R.* 1; *Knox* v. *Waldoborough*, 3 *Greenl.* 455; *Hampden* v. *Fairfield*, *ib.* 436.

The plaintiff in error was entitled to six months, within which to equip himself, before being called upon to perform militia duty. *Haynes* v. *Jenks*, 2 *Pick.* 172.

Dunn, for the original plaintiff, contended, that the question arising under the first error, was settled in his favor by the case *Com.* v. *Cummings*, 16 *Mass. R.* 194. Moving out of the brigade is, in itself, leaving the light infantry company. *St.* 1834, § 19.

The testimony in the case does not show a temporary residence in *Poland*, but a permanent one. A man is liable to do militia duty only where he resides. The case shows he did not do duty in *Westbrook*, when called upon here; and if it did, he has no right to elect where he will perform his militia service, but the place is fixed by law, where he resides. *Hill* v. *Fuller*, 2 *Shepl.* 121; *Haynes* v. *Jenks*, 2 *Pick.* 172.

The opinion of the Court was drawn up by

Emery J. — If the plaintiff in error was liable to appear and do duty at the company training in *Poland* on the 11th day of *September*, A. D. 1838, as set forth in the writ, there is no error in the judgment of the justice, because it is admitted that *True*, the clerk, had, on his part, complied with the requisitions of law necessary to charge him. The ground on which the plaintiff in error expects exemption from the penalty, is his allegation, that during the whole of the year 1838, he was an acting member of a company of light infantry in *Westbrook*, in this county, and a sergeant and clerk therein, and an inhabitant of said *Westbrook*, having left there only for temporary purposes.

That light infantry company was organized in 1819, under an

order in Council of the *Commonwealth* of *Massachusetts*, of *February* 11th, 1819, and was to be raised within the limits of the regiment at *Westbrook*. This company was commanded by *Nathan Barker*, whose commission was dated 23d *May*, 1834.

The said *Valentine* was proved to be a sergeant and clerk of said company during the year 1838, and had not been discharged; had done duty in said *Barker's* company on four different times, during the season of that year, but was excused, by the captain, at the regular training and muster.

Said *Barker* testified, that on the 2d *January*, 1839, said *Valentine* was still an acting member of his company, and clerk of it, and that he considered him an inhabitant of *Westbrook;* his name was on the list of voters there at the annual election in *September*, 1838; he was an unmarried man; when he left *Westbrook*, he said he was going to *Poland*, but should return to *Westbrook* after residing a few months at *Poland;* and that by the defendant's brother in law he was told, that the original defendant had a chest at *Westbrook*, from which he took papers the *Saturday* previous.

The enlistment on which the defendant's name was entered, was in evidence, together with the warrant appointing him sergeant and clerk. The last time said *Valentine* did duty in said light infantry company, was on the 16th *August*, 1838; and *William Cox* testified, that said *Valentine* was an inhabitant of *Westbrook*, and had ever been, so far as he could judge from his acts and declarations.

Opposed to this evidence, was *Seth C. Lane*, who testified, that he knew the original defendant; that he lives at *Mechanics' Falls*, between *Poland* and *Minot;* that he keeps a store there, but whether as owner or clerk he did not know; that there were two names on the sign, but he did not know whether the defendant's was one of them, or not; that defendant came there about the 20th of *June*, 1838, as he said, and that he resided *about* three months in *Poland*, and then went over to *Minot*.

The magistrate, on this evidence, adjudged, that as the defendant had removed to a great distance from the limits within which the company of light infantry at *Westbrook* was raised, and out of the brigade, he could not be discharged from his liability to do military duty in *Poland*, on account of his enlistment in said light

infantry; and that the defendant was *so far an inhabitant of Poland as to be liable to do military duty in that place.*

That there are no authorities giving color for the conclusion to which the magistrate arrived, would be far too strong to assert. The cases relied on by the counsel for the original plaintiff, may fairly be introduced by him, in the hope that they may sustain the decision.

But according to our judgment, the facts disclosed do not warrant that decision. The weight of the evidence is, that the original defendant was absent from *Westbrook* for a temporary purpose. The most decisive evidence of his holding himself a member of the light infantry in *Westbrook*, is his doing duty therein four times that season, and the last time on the 16th of *August*, 1838. He had not removed out of the division, even for a temporary purpose. In *Commonwealth* v. *Walker*, 4 *Mass. R.* 556, by *Parsons C. J.* it is said, that temporary absence, on lawful business, might lawfully excuse him from doing duty in the company during such absence, but his name might still have continued on the roll. And in the present instance, the defendant's name is on the enlistment, and so far from claiming to be excused, he continued to perform duty to the 16th *August*, 1838.

There is therefore a defect of evidence that *Valentine* left *Westbrook* without an intention of returning. He was not an inhabitant of *Poland*, liable to do military duty in that place. His being at *Poland* for a temporary purpose, was not such a removal out of the brigade as would subject him to the penalty for which judgment has been rendered against him.

That judgment must therefore be reversed.

Silas Dillingham *& al. vs.* Randolph A. L. Codman.

In *scire facias* against the indorser of a writ, the return of an officer of an arrest of the body of the original plaintiff, on an execution for costs, and of his liberation therefrom by giving the bond required by the poor debtor acts of 1835 and 1836, does not furnish even *prima facie* evidence of the inability of the original plaintiff, as the giving of the bond may operate merely as an extension of the time of payment.

Scire facias against the defendant, as indorser of a writ, sued out against the present plaintiffs in favor of one *Coffin*, described as of *Orono*, in the county of *Penobscot*, wherein they recovered judgment against *Coffin* for their costs. The defendant demurred to the declaration, and the plaintiffs joined in demurrer. The writ of *scire facias* recites the judgment and execution, and states that it was given to an officer of the county where *Coffin* lived, who made the following return thereon. "*Penobscot, ss. January* 12, 1838. For want of property of the within named debtor, or his body to be found within my precinct, I return this execution in no part satisfied. *R. S. Jackson, Dep. Sh'ff.*" The declaration then alleges, that the present plaintiff sued out an *alias* execution against *Coffin*, and gave it to a deputy sheriff of the county of *Washington*, who made the following return thereon. "*Washington, ss. March* 2d, 1838. By virtue hereof, and for want of property, I arrested the body of the within named *Coffin*, and at the same time he tendered me the bond which is hereunto annexed. *Bradbury Collins, D'y Sh'ff.*" The declaration sets forth the condition of the bond, and says, that the conditions remain wholly unperformed, and that the judgment remains wholly unsatisfied. More than six months had elapsed, after the date of the bond, before the present suit was brought.

Codman, pro se, in his argument, cited *Ruggles* v. *Ives*, 6 *Mass. R.* 494; *Magee* v. *Barber*, 14 *Pick.* 212; *Palister* v. *Little*, 6 *Greenl.* 350; *St.* 1836, *c.* 245, § 5 and 6; *Harkness* v. *Farley*, 2 *Fairf.* 491; *Miller* v. *Washburn*, 11 *Mass. R.* 411; *Howe* v. *Codman*, 4 *Greenl.* 79.

W. P. Fessenden argued for the plaintiff, and cited the same

authorities cited for the defendant, and *Chase* v. *Gilman*, 3 *Shepl.* 64.

The opinion of the Court was drawn up by

WESTON C. J. — To charge the defendant as indorser, the avoidance or inability of the original plaintiff must be shown. If the return on the original execution might have been evidence of avoidance, it is obviated by the return on the *alias*, which shows, that he had not avoided; but that his body was arrested thereon. The question then is, whether his inability is sufficiently averred in the declaration.

As the law formerly stood, the arrest and commitment of the body was sufficient evidence of inability. But an arrest, and a liberation therefrom on giving bond, as is set forth in the declaration, is not *prima facie* evidence of inability. It operates as an extension of credit, of which debtors, having the command of means, practically avail themselves. The condition of the bond assumes, that property may be disclosed, and thus become known, and made available to the creditor. Or if the condition of the bond is forfeited, as is averred in this case, the creditor has an ample remedy, as well as adequate security, upon that instrument. The forfeiture of the bond, rather implies the existence, than the want of property. If the debtor could have legally taken the poor debtor's oath, it may fairly be presumed he would have done so, and thereby have liberated both himself and his sureties from the obligation of the bond. It does not appear to us, either that the avoidance or inability of the original plaintiff, is sufficiently averred in the declaration.

Declaration adjudged bad.

Charles Johnson *& al. vs.* Abraham Anderson *& al.*

A grant of land bounded on a highway, carries the fee in the highway to the centre of it, if the grantor at the time owned to the centre, and there be no words to show a contrary intent.

Trespass *quare clausum* for cutting grass. The parties agreed upon a statement of facts, from which it appeared, that the land on which the grass was cut, was formerly the property of one *Brown*, and that while owned by him, a road was legally laid out over the land in controversy. After this, *Brown* conveyed the land on one side of the road to the plaintiffs, and on the other to the defendants, bounding both of them on the road. Subsequently the road was legally discontinued. The other facts appear in the opinion of the Court.

Fessenden & Deblois, for the plaintiff, contended, that the respective grantees of *Brown* took to the centre of the road. But if the respective grants were limited by the side of the traveled path, the case shows that the defendant cut grass over the traveled path, on the plaintiff's side. *Lunt* v. *Holland*, 14 *Mass. R.* 149; *King* v. *King*, 7 *Mass. R.* 496; 3 *Kent*, 433; *Jackson* v. *Hathaway*, 15 *Johns. R.* 447; *Peck* v. *Smith*, 1 *Conn. R.* 103; *Tyler* v. *Hammond*, 11 *Pick.* 193.

W. P. Fessenden, for the defendant, contended, that the grant in this instance excludes the traveled part of the road; it bounds them on a certain specific line, the side of the traveled path. Where the language excludes the road, as here, the road does not pass. *Tyler* v. *Hammond*, 11 *Pick.* 193. Running the line upon the traveled path, excludes it. The case does not show that the cutting was beyond the traveled path.

The opinion of the Court was drawn up by

Shepley J. — The case states, that the "road was legally laid out"; and that "the cutting was exclusively on the land so laid out as a road, and was on the half of the road nearest the plaintiffs' land, as well as on that nearest the defendants." The only conclusion, which can be fairly drawn from such an agreed

statement, is, that the grass was cut over the whole space formerly included in the road.

The question is then presented, whether the title of the plaintiffs extended to the centre of the road, as it existed at the time of the conveyances. This highway was laid out through the land of *Ezra Brown*, who afterward, in the year 1810, conveyed to the plaintiffs that part of his land on the westerly side of it, describing it as "bginning on the westerly side of the county road", "thence running northerly, touching the said westerly side of said road, forty rods." Then the line of boundary leaves the westerly side of the road, and after describing the other bounds returns to the first mentioned bound.

In the year 1824, *Brown* conveyed to *John Gerrish*, from whom the defendants derive their title, the land on the eastern side of the highway, describing it as "beginning on the county road," and thence extending the line of boundary from it, and describing the other limits, it returns "to the county road aforesaid, thence on the said road to the bounds first mentioned." These conveyances bounded the grantees upon a highway legally established and used. If the same language had been used in bounding them upon a stream of water, there could be no doubt, that the title of each grantee would extend to the centre of the stream. Could the grantor, after these conveyances, contemplate, that he was to continue to be the owner of the land over which the road was laid, and that he might, subject to the public rights, cut away or protect at his pleasure the trees, and remove the earth and manure, that might be useful? Could the grantees have imagined, that they had not these rights, usually belonging to the owners of the adjoining land? The effect of admitting the principle, that a conveyance, bounding on a highway, does not extend to the centre of it, would deprive the owners of farms without, and the owners of house lots within, our villages and cities, of the power of improving or ornamenting that part of the way adjoining these lands and not used by the public, and of protecting ornamental trees and useful erections already existing. Such results are as undesirable for the public benefit, as they would be alarming to the owners of house lots adjoining public highways and streets. A principle,

which would produce them, should not be admitted but upon the clearest and best authority.

The freehold and profits of a way, that leadeth to the fields, are in him, that hath land next adjoining. 1 *Rol. Abr.* 392. The trees in a highway generally belong to the proprietors of the soil *ex utraque parte*. *Com. Dig. Chimin. A.* 2. In the case of *Stevens* v. *Whistler*, 11 *East*, 51, the Court appears to have acted upon the rule as one established, that the owner of lands on the side of a highway, was the owner of the soil of that half of the way adjoining his land. In *Headlam* v. *Hedley*, 1 *Holt*, 463, Mr Justice *Bayley* admits the presumption of law to be, that the property of the soil in a highway belongs to the owners of the adjoining lands.

In *Peck* v. *Smith*, 1 *Conn. R.* 103, *Reeve C. J.* says, "the next inquiry is, will the purchasers on each side of the highway have a property in the highway? I answer, yes; and they own each to the centre of the road". There can be no doubt, that in conveyances adjoining highways, as well as in those adjoining rivers, the description may be such as to exclude the way. And such the Court considered the descriptions in the case of *Jackson* v. *Hathaway*, 15 *Johns. R.* 447. *Platt J.*, in delivering the opinion, says, "where a farm is bounded along a highway, or upon a highway, or running to a highway, there is reason to intend, that the parties meant the middle of the highway; but in this case, the terms of the description necessarily exclude the highway." The rule was stated in conformity with these authorities, by *Kent*, before the decision in the case of *Tyler* v. *Hammond*, 11 *Pick.* 193, and that does not appear to have at all shaken his confidence in its accuracy. 3 *Kent*, 433, 3*d Ed.*

The rule appears to be both reasonable and satisfactorily established. Whether it would be properly applied to large squares, or to ways reserved, but not legally laid out or used, it is not now necessary to determine.

Judgment for the plaintiff, according to agreement.

JOSHUA GOWER, JR. *vs.* JAMES EMERY *& al.*

A counsellor at law is bound to disclose by whom he was employed in the management of a cause, and that he was instructed by one person to follow the directions of another in the prosecution of the business, although the knowledge was acquired by confidential consultations as counsel and clients.

A promise of indemnity to an agent, is implied from his employment as such.

If an agent, by order of his principal, commits a trespass upon the property of another, acting *bona fide* without suspicion of wrong, he has a claim for reimbursement from his principal, for all damages he sustains thereby.

If an officer, by direction of the creditor or party in interest, attaches goods in the possession of the debtor, the law implies a promise to indemnify the officer for any damage suffered in consequence of such acts.

ASSUMPSIT against *Emery*, *Stimpson*, and *Buxton*, on an alleged promise to indemnify the plaintiff for attaching, as deputy sheriff, a stock of goods, in the possession of one *Lawrence*, as his property, on a writ against him in favor of *Emery* and *Stimpson*. *Emery* was defaulted.

J. D. Kinsman, counsellor at law, was called by the plaintiff, and testified, that *Buxton* and *Stimpson* came to *Portland* with the writ, just before the goods were attached; that *Stimpson* called on him for professional advice; that he went with him to the lodgings of *Buxton*, and was there introduced to *Buxton;* and that he was called upon by and consulted with them professionally, as a lawyer. The counsel for the defendants here objected to the witness testifying to any communications made to him by *Buxton* and *Stimpson*, or either of them, on the ground, that he was not permitted, on legal principles, to disclose any such communications, made to him by *Buxton* and *Stimpson* in the course of professional consultation. The report states, that EMERY J., before whom the trial was, for the purposes of this trial, considering that the witness might disclose who employed him, overruled the objection and permitted him to testify. *Mr. Kinsman* then testified to facts tending to show, that *Gower* was jointly employed by *Buxton*, *Stimpson*, and *Emery*, and acted by their order. The testi-

mony is sufficiently stated in the opinion of the Court. There was a motion made for a new trial for a verdict against evidence; and the whole testimony given in the case is found at length in the report. It seems that one *Allen* brought an action against the sheriff, for the misdoings of the plaintiff in making the attachment, and prevailed. That action was defended by *Stimpson*, and it was in evidence, that *Buxton* gave orders to follow *Stimpson's* directions in relation to the business.

The counsel for the defendants contended, that if no express promise of indemnity was proved, the law would not raise one from the facts proved; and that if the jury were satisfied, that the attachment of the goods was made in pursuance of the orders of *Stimpson*, then *Buxton* was not liable in this action, because one partner could not bind his copartner by any agreement to indemnify an officer for committing a trespass upon the property of a third person, even when the act, proved to be a trespass, was supposed to be legal, as when the property attached was in possession of, and was honestly believed to belong to, the defendant in that suit.

The jury, amongst other things, were instructed, that officers are subject to the directions of those who seek redress by civil suits; that if a creditor shows property to an officer and directs him to attach it on a legal precept, and the officer neglects or refuses to take it, thinking it is not the debtor's property, he is liable to the creditor for damages for not taking it, if the property actually belongs to the debtor; that the officer may require an indemnifying bond before making the attachment, or if he is satisfied with the responsibility of those who employ him, he may proceed; he is the mere agent, executing a duty in due course of law; that no one ought to direct another to do a wrong, and he who does a wrong, knowing it to be such, cannot recover indemnity against one who directs him to do it; that questions of the nicest character often arise as to the legal ownership of property, and may vary the rights and duties and responsibilities of attaching officers; that in this case, *Lawrence* being in possession of the goods, this fact was, of itself, *prima facie* evidence of ownership in himself; that it was contended, strenuously, that *Buxton* was really interested in the suit in which the goods were attached, and if he had a mere

collateral interest in the suit, and voluntarily gave directions to make the attachment, or to follow the directions of *Stimpson*, then he is liable to the plaintiff, the same as if he had been actually named in, and a party to, the bond or writ; that if the plaintiff failed to give them satisfactory evidence of the interest of *Buxton* in the matter, and of his direction to attach the goods, or to follow the directions of *Stimpson*, their verdict should be in favor of *Buxton;* that if one person employ another to do an act which, at the time, is not, by the one employed, known to be wrong, the former is bound to indemnify the latter, and save him harmless from any damage or injury which may result from the performance of such act; that if he acted in good faith, the law will imply a promise to indemnify on the part of the principal; and that if they were satisfied, that, in truth, the plaintiff had a bond of indemnity from persons other than *Buxton*, and that it was only an afterthought to seek a remedy against him, because believed to be the most responsible, the defence was complete as to *Buxton*, and the verdict should be for him. On the subject of damages, the jury were instructed, that if they found for the plaintiff, he was entitled to recover the amount recovered by *Allen* against the sheriff and paid by the plaintiff, deducting the amount received from the sale of the goods by consent of the defendants.

The verdict for the plaintiff was taken, subject to the opinion of the Court.

Codman & Fox, argued for the defendants, citing 8 *Mass. R.* 370; *Foster* v. *Hall*, 12 *Pick.* 189; and *Chapin* v. *Lapham*, 20 *Pick.* 472.

Fessenden & Deblois, argued for the plaintiff, citing 1 *Stark. Ev.* 104; 2 *Stark. Ev.* from 395 to 399; 1 *Phillips*, 110; *Cowper*, 845; 2 *Barn. & Cr.* 745; *Johnson* v. *Daverne*, 19 *Johns. R.* 135; *Brandt* v. *Kline*, 17 *Johns. R.* 335; *Holbrook* v. *Holbrook*, 3 *Shepl.* 9; *Kip* v. *Bridgham*, 6 *Johns. R.* 158; *Blasdale* v. *Babcock*, 1 *Johns. R.* 517; *Chase* v. *Stevens*, 2 *Fairf.* 128; *Weld* v. *Green*, 1 *Fairf.* 20; *Bond* v. *Ward*, 7 *Mass. R.* 123; *Perley* v. *Foster*, 9 *Mass. R.* 112; *Rogers* v. *Sumner*, 16 *Pick.* 387; *Canada* v. *Southwick*, *ib.* 559; *Marsh* v. *Gold*, 2 *Pick.* 285; *Boyden* v. *Moore*, 11 *Pick.* 362; *Van Cleef* v. *Fleet*, 15

Johns. R. 147; *Wilmington* v. *Burlington*, 4 *Pick.* 174; *Story on Agency*, § 339 *and notes*; *Powell* v. *Newburgh*, 19 *Johns. R.* 284; *Coventry* v. *Barton*, 17 *Johns. R.* 142; *Adamson* v. *Jarvis*, 4 *Bingh.* 66; *Phelps* v. *Campbell*, 1 *Pick.* 58.

The opinion of the Court was by

WESTON C. J. — The privilege of a client, in regard to confidential communications, made by him to his counsel, was fully investigated and discussed, in *Foster* v. *Hall*, 12 *Pick.* 89. It cannot be necessary to go over the same ground. We refer to that case, and the authorities there cited, as presenting a fair and full elucidation of the doctrine. It is there said, that the privilege, although extended to all cases, where the advice of counsel is sought, whether in reference to a suit contemplated or pending, or not, ought to be strictly construed; as it has a tendency to prevent a full disclosure of the truth.

Thus the attorney is bound to disclose facts, coming to his knowledge in consequence of his employment, not of the nature of confidential communications. As the execution of a deed, especially if he witnessed it, the identity or handwriting of his client; the fact that he made oath to an answer in chancery, and all other facts, not within the range of professional confidence. *Doe* v. *Andrews*, *Cowper*, 846; *Hurd* v. *Moring*, 1 *Carr. & P.* 372. The objection, made by the counsel for the defendant, to the testimony of *Mr. Kinsman*, we understand to have been overruled by the presiding Judge, so far as to permit him to testify, by whom he was employed.

We cannot regard this as matter of professional confidence, at least unless counsel is apprized, or has reason to believe, that his client desires that this fact should be concealed. No such inference is to be drawn from the testimony of the witness. The defendant, *Buxton*, made no intimation of a wish not to be known in the business. He solicited no advice, tending to produce such an impression, upon the mind of the witness. When the counsel delivered the writ to the officer, a fact finally brought to his recollection, the officer might well have inquired, as some controversy as to the property was apprehended, by whom he was to consider himself employed. An answer truly made to this inquiry, would

be no breach of the privilege of his client. It would disclose his principal to a party having a right to know, in a matter neither communicated as a secret, nor of a character, requiring any reserve on his part. The fact, that he was employed by *Buxton*, and was directed by him to follow the orders of *Stimpson*, might, without any violation of confidence, so far as we can discern, be made known to the officer, and was, in our judgment, testimony legally admissible.

The evidence in the case was of a character, which might satisfy the jury, that *Buxton* had an interest in the subject matter of the suit, upon which the goods were attached. The jury, having found that interest, and *Buxton* having ordered the goods to be attached, the plaintiff, in obeying his orders, acted as his agent. In such case, a promise of indemnity is implied, upon the principles of natural justice. Had the order been to do a known wrong, no such promise would have been implied; nor would, in such case, an express promise or covenant have been legally binding.

But if an agent, by order of his principal, commits a trespass upon the property of another, acting *bona fide*, without any suspicion of wrong, he has a claim for reimbursement upon his principal, for all the damages he sustains thereby. *Story on Agency*, § 339, and the cases there cited. Goods in the possession of a debtor, are apparently subject to the attachment of his creditor. But if the officer has reason to believe, that any controversy may arise in relation to the title, he may require, that the creditor shall show or point out the goods, and may insist upon an indemnity. *Bond* v. *Ward*, 7 *Mass. R.* 123. And such contracts of indemnity are enforced at law. When implied, from the direction of the creditor, or party in interest, the officer is equally entitled to be reimbursed for any damage he may have sustained.

The defendant, *Buxton*, has been charged, together with the other defendant, who was the plaintiff of record in the suit, upon which the goods were attached. It does not appear, that *Buxton* claimed to be interested, or to have a right to interfere, to the exclusion of the nominal plaintiffs. The implication rather is, that he was interested in connection with them. The other defendant has been defaulted; and we perceive no legal objection to their joint liability. It does not appear to us, that there is any error in

the instructions of the Judge, or in the measure of damages, of which the defendants have a right to complain. And the motion to set aside the verdict, as against the weight of evidence, is overruled.

Judgment on the verdict.

John C. Gore *vs.* Moses Mason, Jr.

Where real estate is conveyed to trustees to be held, by written agreement under seal, for the benefit of stockholders, and the company is divided into shares, to be transferred by certificates in a mode pointed out; the transfer of shares is a sufficient consideration for a written promise to pay a sum of money therefor, although it results, that the project fails, and the shares purchased prove of no value.

And if the agreement provides, that the shares shall be transferred by the trustees, and that the transfer shall be made by certificates signed by the trustees, president and treasurer, and there is no president or treasurer, the transfer is sufficient if signed by the trustees.

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

Assumpsit on an instrument, of which the following is a copy: "*Memo.* Due to *John C. Gore* seven hundred ten dollars for seventy-one shares in the *Androscoggin Canal and Mill Company. Moses Mason, Jr. Washington, January* 10, 1836."

Prior to the execution of the paper, certain lands had been conveyed in trust to *E. Crehore, J. L. Sibley* and *F. O. J. Smith*, for the benefit of an association, called the *Androscoggin Canal and Mill Company.* Articles of agreement were entered into by the trustees and stockholders, and the property was to be divided into shares, and made transferable, similar to stock in incorporated companies. The principal portion of the land purchased was mortgaged back to the original owners, and, not being paid for, the mortgagees had entered to foreclose. Before the trial, the whole undertaking had been abandoned, and the shares had become worthless. The facts in the case sufficiently appear in the opinion of the Court.

At the trial, the counsel for the defendant contended, that there was no consideration for the memorandum, or if there was, it had failed, either wholly or in part. The Judge ruled, that there was a sufficient consideration; that there was no such failure of consideration as would constitute a defence; and that the jury could make no apportionment on the ground of a partial failure of consideration.

The jury returned a verdict for the plaintiff, and the defendant filed exceptions.

W. P. Fessenden, argued for the defendant, citing *Stevens* v. *McIntire*, 2 *Shepl.* 14.

Fessenden & Deblois, argued for the plaintiff, and cited 12 *Mass. R.* 115; 8 *Mass. R.* 200; 10 *Mass. R.* 236; 6 *Mass. R.* 58; 15 *Mass. R.* 85; 3 *Mass. R.* 1; 10 *Mass. R.* 279; *ib.* 415; 3 *Pick.* 92; 5 *Pick.* 384; 7 *Mass. R.* 14; 2 *Wheat.* 13; 2 *Greenl.* 390; *Bayley on Bills*, 537; 2 *Campb.* 346; 15 *Mass. R.* 171; 1 *Greenl.* 352; 2 *Taunt.* 2; 1 *T. R.* 133; *Cro. Eliz.* 70; 2 *Fairf.* 381; 3 *Fairf.* 218.

The opinion of the Court was afterwards drawn up by

WESTON C. J. — The only objection interposed, to the recovery of the plaintiff, upon the memorandum set forth in the declaration, is the want of consideration, or a failure of consideration, in whole or in part. The consideration expressed in the memorandum, which is dated *January* tenth, 1836, is seventy-one shares in the *Androscoggin Canal and Mill Company*. In pursuance of this purchase, the defendant received from the trustees, a new certificate of stock, dated *January* twenty-second, 1836.

This was done prior to the act, by which the company was incorporated, which passed *March* fifteenth, 1836. The nature of the association, the principles upon which it was to be conducted, and the rights and liabilities of the stockholders, at the time the defendant purchased, depended upon the indenture of three parts, dated *September* fifth, 1835, which is made part of the case. That instrument is drawn with great care and precision; disclosing clearly the object of the association, and the manner in which the contemplated enterprise was intended to be carried into effect. It

was a period, remarkably fruitful in schemes and projects, from which great private emolument, as well as public improvement, was sanguinely anticipated.

It appears from the evidence, that the defendant was apprized of the movement at an early period; and was employed by the association to make purchases and transact business, as their agent. It further appears, that prior to his becoming interested as a stockholder, the association had expended very considerable sums of money, and that certain property had been conveyed, as had been provided for in the indenture, to the trustees named therein. Every thing was fairly and openly conducted; and no indication of fraud or imposition appears any where in the case. Under these circumstances, we perceive no reason, why the stock of the association was not a fair and lawful article of sale in the market. The purchaser, taking his chance of gain, as a consequence assumed the hazard of loss. He might re-sell at an advance, or if the scheme proved successful, it might turn out to be a profitable investment.

On the other hand, the expenditures might greatly exceed the estimates. Hopes of profit might be disappointed. The means of the stockholders might fail; and new associates might not be found, to go on with the enterprise. These were hazards, which the defendant, as a prudent purchaser, should have considered; but whether he did so or not, he must abide the consequences of a bargain fairly made. It is no defence to his promise to pay the consideration, that the project has failed, and the property purchased proved unavailable.

It is insisted, that the certificate of stock, received by the defendant, does not pursue the form given in the indenture. We think it does in substance, which is all that instrument required. It is headed *Androscoggin Canal and Mill Company*, instead of *Association*, but the terms have the same meaning. It is inferrable, from the form in the indenture, that the certificate would be signed by the president, but it does not appear that the association had such an officer. So, also, it would seem from the form, that the certificate should have the signature of the treasurer. As the indenture provides, that one of the trustees should be the treasurer, and all the trustees have signed, this has been substantially com-

plied with. The indenture confers on the trustees the power of issuing certificates of stock. This power they have exercised in this case; and the terms used, are in accordance with the form prescribed.

In our opinion, no want or failure of consideration has been made to appear.

Exceptions overruled.

SEBA SMITH *vs.* ALEXANDER H. PUTNEY.

Where a bill of sale of chattels was made, and at the same time and place a mortgage bill of sale thereof was given back to secure the purchase money, and the papers were executed and delivered in the room in which the chattels then were in view of the parties, but no formal delivery was proved; and where the mortgagor went into possession of the property, and it was afterwards attached on a writ against him; it was held, in a suit against the attaching officer, that there was a sufficient delivery to the mortgagee.

After a verdict is read in Court, and before it is affirmed, the presiding Judge may rightfully inquire of the jury, upon what principles their verdict is founded.

In an action of trespass *de bonis asportatis* against an officer for attaching and removing the property of the plaintiff, in a suit against a third person, the measure of damages is the value of the property, as it was at the time of the taking.

TRESPASS *de bonis asportatis* for taking and carrying a printing press, types, and articles used in a printing office, particularly described in the writ. The defendant justified the taking as a deputy sheriff, on the 16th day of *June*, 1837, on a writ in favor of *Francis O. J. Smith*, for an alleged libel upon him, published in the *Portland Daily Courier*, *June* 15, 1837, against *E. G. Waterhouse*, alleging the property to have been, at the time of the taking, in *Waterhouse*. The property was proved to have been taken by the defendant, as a deputy sheriff, by the written order of *F. O. J. Smith*, the plaintiff in that suit. The whole evidence at the trial before EMERY J., is given in the report of the case, from which it appears, that the property in dispute had belonged to *Seba Smith*, and had been used in printing a paper, called the

Portland Daily Courier and *Weekly Courier*; that on the twelfth day of *May*, 1837, the plaintiff, for the consideration of eight hundred dollars, sold out the right to publish the paper, and the press, types and printing apparatus, being the same described in the declaration, to *E. G. Waterhouse*, and gave a bill of sale thereof, and that at the same time *Waterhouse* made a mortgage bill of sale of the property back to the plaintiff, to secure notes for the purchase money, one half to be paid in one year, and the other half in two years; that the papers were actually delivered, three or four days after their date, in the printing office where the articles were; but no formal delivery by one to the other was proved. The plaintiff and *Waterhouse* had, to that time, been partners in publishing the paper, and a notice of the dissolution was published, dated *May* 12, 1837. Afterwards, the paper was published by *Waterhouse*, who had the possession and use of the property, and the plaintiff had a room in the printing office, where he sometimes did business. From the plaintiff's testimony, it appeared, that *Waterhouse* had not the necessary means to purchase printing materials, and that the publication of the paper was suspended, from the time of the attachment of the plaintiff to the third of *July* following. There was testimony introduced on both sides in relation to the value of the articles taken and removed by the defendant.

The counsel for the defendant contended, that the plaintiff had proved no title to the property attached, because he had not made or offered any proof that there was any delivery of the property by *Waterhouse* to the plaintiff, under the mortgage bill of sale, nor any delivery of any part or portion thereof in token of the whole, but that the contrary appeared to be the fact; that *Waterhouse*, immediately on the execution and delivery of the papers, went into and maintained, entire possession and control of said property, and thereby perfected his title thereto, and remaining in possession of the same until the time of the attachment, the said *Putney* was justified in taking the same by virtue of the aforesaid precept. And further, that the bill of sale, and the delivery under the same, perfected the title of *Waterhouse*, and that inasmuch as said *Waterhouse*, from the time of the exchange of said papers, up to the time of said attachment, without any agreement that he should so do, remained in the possession of the property, there was

the legal *prima facie* evidence of fraud, which the plaintiff had not attempted to contradict or control, and that therefore, under these circumstances, said pretended title, of said *Smith*, was legally fraudulent as against attachments at the suits of others against *Waterhouse*, and that, on this ground, the officer was justified. On the subject of damages, the defendant's counsel contended, that in the form of the action, sued out by the plaintiff, the actual value of the goods at the time of the taking, was the measure of damages, unconnected with any establishment or employment in which said goods were used at said time, and that said damages could not be enhanced by any difficulty or injury said *Waterhouse* might be called to encounter from poverty or otherwise, in procuring another similar establishment; and that in no view of the law, had the jury any right to swell said damages in behalf of the plaintiff, by reason of any injury *Waterhouse*, under any circumstances, might sustain. And further, that in no event was the plaintiff entitled to a sum beyond the amount secured by the mortgage bill of sale, and interest on the same, that being the extent of the interest the plaintiff had in the property.

The Judge directed the jury, that if from the evidence they were satisfied, that the agreement for sale was fairly and honestly made on the twelfth of *May*, and that *Waterhouse* then assumed the control of the property with the plaintiff's assent, with the understanding of the parties that he might still collect and receive his debts in the office; and if they believed, that within the four days afterward, the bill of sale and the mortgage deed and notes, were executed and delivered by the parties respectively, at the same time in the office where the property was within their view and control, though the papers were dated on the twelfth of *May*, a few days before they were actually delivered, it must be deemed as one transaction, taking effect from the delivery of the deeds, and that the arrangement adopted was a sufficient delivery, both parties being there present, to vest the property in the plaintiff in mortgage, if there was no other objection. As to the suggestion of its being legally fraudulent, the jury were instructed, that fraud is not to be presumed, but it might be presumed from circumstances. And if those in evidence convinced them that the arrangement was made with a design to delay, or defeat, or de-

fraud creditors, the jury would consider it void against creditors, and that the officer would be justified, by his precept, in making attachment, and the verdict should be in his favor. As to the damage, if they found for the plaintiff, they should give him the value of the property mortgaged and taken by the officer, as it was then situated, at the time of the taking.

After the verdict was read, but before it was affirmed, on inquiry at the request of the defendant's counsel, the jury stated, that "they found the actual value of the property taken, to be the amount of the notes and interest, eight hundred and twenty-four dollars, and that what is over that amount, to make up the nine hundred dollars, they considered damages of cost the plaintiff had been put to." The plaintiff's counsel objected to this inquiry being made. If the instructions were erroneous, a new trial was to be granted.

The defendant filed a motion for a new trial, because the damages were excessive, and because the verdict was against law and evidence, and influenced by political hatred.

S. Fessenden & Deblois, argued in support of the positions taken for the defendant at the jury trial; and cited *Flagg* v. *Dryden*, 7 *Pick.* 52; *Penniman* v. *Hartshorn*, 13 *Mass. R.* 87; *Shumway* v. *Rutter*, 7 *Pick.* 56; *Young* v. *Austin*, 6 *Pick.* 280; *Lanfear* v. *Sumner*, 17 *Mass. R.* 110; *Rice* v. *Austin*, 17 *Mass. R.* 197; *Badlam* v. *Tucker*, 1 *Pick.* 389; 1 *Taunt.* 318; *Ward* v. *Sumner*, 5 *Pick.* 59; *Homes* v. *Crane*, 2 *Pick.* 607; *Carrington* v. *Smith*, 8 *Pick.* 419; *Bonsey* v. *Amee*, 8 *Pick.* 236; 4 *M. & S.* 240; *Sturtevant* v. *Ballard*, 9 *Johns. R.* 337; *Lunt* v. *Whitaker*, 1 *Fairf.* 310; *Wheeler* v. *Train*, 3 *Pick.* 255; *Brinley* v. *Spring*, 7 *Greenl.* 241; *Bartlett* v. *Williams*, 1 *Pick.* 288; *Cobb* v. *Haskell*, 2 *Shepl.* 303; 1 *M. & S.* 335; *Barrow* v. *Paxton*, 5 *Johns. R.* 258; *Quincy* v. *Tilton*, 5 *Greenl.* 277. As to the measure of damages, they cited *Daggett* v. *Adams*, 1 *Greenl.* 198; *Woodham* v. *Gelston*, 1 *Johns. R.* 134; *Soule* v. *White*, 2 *Shepl.* 436; 3 *Stark. Ev.* 1453. As to the right to inquire of the jury, they cited *Hix* v. *Drury*, 5 *Pick.* 296; *Pierce* v. *Woodward*, 6 *Pick.* 206; *Little* v. *Larrabee*, 2 *Greenl.* 37.

Preble, argued for the plaintiff, and cited *Brinley* v. *Spring*,

7 *Greenl.* 241; *Bissell* v. *Hopkins*, 3 *Cowen*, 166, *and note, and cases cited*; *Meserve* v. *Dyer*, 4 *Greenl.* 52; *Howe* v. *Ward*, 4 *Greenl.* 195; *Haskell* v. *Greeley*, 3 *Greenl.* 425; *Holbrook* v. *Baker*, 5 *Greenl.* 309; *Tidd's Pr.* 391; *Forbes* v. *Parker*, 16 *Pick.* 462.

The opinion of the Court was drawn up by

Emery J. — The direction of the Judge, as to the execution and delivery of the mortgage, in our judgment, is completely sustained by the cases in 7 *Greenl.* 241, *Brinley et al.* v. *Spring*; 3 *Cowen*, 166, *Bissel* v. *Hopkins*; 15 *Maine R.* 373, *Ingraham* v. *Martin*.

The Court consider that the inquiry made of the jury was correct. It would seem to be a necessary step, in order to prevent injustice, and to enable the Court, in a sensible and proper manner, to determine whether the verdict be conformable to legal principles, provided the inquiry be made at the time of giving in the verdict. *Hix* v. *Drury*, 5 *Pick.* 296; *Pierce* v. *Woodward*, 6 *Pick.* 206; *Little* v. *Larrabee*, 2 *Greenl.* 37.

The disclosure being rightfully made by the jury, the most important question is, whether there is brought before the Court sufficient to warrant judgment on the verdict, which is for nine hundred dollars. The jury stated, that "they found the actual value of the property taken, to be the amount of the notes and interest, eight hundred and twenty-four dollars, and that what is over that amount to make up the nine hundred dollars, they considered damages of costs the plaintiff had been put to." The jury were directed, if they found a verdict for the plaintiff, that they should give him the value of the property mortgaged, and taken by the officer, as it was then situated, at the time of taking. We consider that this was the proper instruction, by which the jury should have been governed. The verdict is therefore wrong, and must be set aside, unless the plaintiff will release the excess between the eight hundred and twenty-four, and nine hundred, dollars.

The Inhabitants of Standish *vs.* The Inhabitants of Gray.

A writ of error lies to the Court of Common Pleas, where the proceedings are first instituted before a Justice of the Peace, to remove a pauper to the place of his settlement, under the *st.* of 1821, *c.* 122, § 15, for the relief of the poor.

A settlement is gained in a town, under that statute, by the residence of a person therein, capable of gaining a settlement, for the space of five years together, without receiving supplies as a pauper within the time — although prior to the expiration of the five years, the inhabitants of that town, by their overseers, had made a complaint to a Justice of the Peace, to cause the removal of the alleged pauper to the place of his settlement, and a warrant had issued thereon, and had been served upon the town where his settlement then was.

This was a writ of error to reverse the proceedings on a complaint for the removal of *William Strickland* and *Mary Strickland*, as paupers, from *Standish* to *Gray*. The complaint and warrant were dated *April* 27, 1838, and was duly served upon the town of *Gray*, *April* 28, 1838. The trial before the Justice took place on *May* 31, 1838, who adjudged, that the alleged paupers were, through age and infirmity, likely to become chargeable to the town of *Standish;* that their legal settlement was in *Gray;* and that they should be removed to *Gray*. From this judgment the inhabitants of *Gray* appealed. On the twelfth of *April*, 1838, the overseers of the poor of the town of *Gray* wrote a letter, signed by them, to the overseers of *Standish*, in these terms. "*Gray*, *April* 12, 1838. *Messrs. Overseers of the Poor of the town of Standish.* We received a letter from you, by due course of mail, dated *April* 4, 1838, stating that a *William Strickland* and wife, inhabitants of our town, are very aged people and have no means of supporting themselves, and requesting that we shall make provision for their removal to our town. In answer, we would say to you, that we think it unnecessary to disturb them at present. We are willing to acknowledge them to be inhabitants of the town of *Gray*, without regard to their having lived in *Standish* for more than five years."

The record of the trial in the Court of Common Pleas, states, that "The only question presented in this Court resulted from the following facts, viz. It appeared that the said *William* and *Mary Strickland* had resided in said town of *Standish*, without receiving any supplies as paupers, for the period of five years, which expired a few days prior to the hearing and adjudication by and before the justice, but which period of five years did not expire until several weeks after the date of said complaint and warrant, and the service of the same upon the inhabitants of *Gray*. That is, that at the said time of hearing and adjudication, by the said justice, the said *William* and *Mary* had resided in the town of *Standish*, for the period of five years and a few days, but that at the time of the date of the complaint and warrant, and the service of the same upon the town of *Gray*, they had not resided in said *Standish* for the period of five years." WHITMAN C. J. was of opinion, that the legal settlement of *William* and *Mary Strickland* was in *Standish*, and denied an order for their removal to *Gray*.

Swasey, for *Standish*, contended, that the letter from the overseers of *Gray*, acknowledging the settlement of *Strickland* to be in *Gray*, estops that town from denying that the settlement was there. *Belfast* v. *Leominster*, 1 *Pick.* 123.

The case is to be determined upon the state of facts existing at the time the process was commenced. *State* v. *Fryeburg*, 3 *Shepl.* 405.

Fessenden & Deblois, for *Gray*, insisted, that the proper remedy, if any there be, is by *certiorari*, and not by writ of error. *Shirley* v. *Lunenburg*, 11 *Mass. R.* 379.

The overseers have no authority to bind the town. If the person resides within a town for five successive years, without receiving supplies as a pauper, under any circumstances, he thereby gains a settlement. There is no exception in the statute. These statutes are to be construed strictly and peremptorily, and the only inquiry is, whether the case is within the statute or not. *Seekonk* v. *Attleborough*, 7 *Pick.* 155; *Ware* v. *Wilbraham*, 4 *Pick.* 45; *Orange* v. *Sudbury*, 10 *Pick.* 22; *Canaan* v. *Bloomfield*, 3 *Greenl.* 172; *Dixmont* v. *Biddeford*, *ib.* 205; *Wiscasset* v. *Waldoborough*, *ib.* 388; *Hallowell* v. *Saco*, 5 *Greenl.* 143; *Rich-*

mond v. *Lisbon*, 3 *Shepl.* 434; *Raymond* v. *Harrison*, 2 *Fairf.* 190; *Standish* v. *Windham*, 1 *Fairf.* 97.

The opinion of the Court was drawn up by

WESTON C. J. — It is objected, by the counsel for the defendants in error, that this process does not lie, when the proceedings are first instituted before a justice of the peace, but that in such case, the judgment of the Common Pleas must be final and definitive. By the *statute* of 1821, *c.* 122, § 16, a writ of error is allowed, in favor of the aggrieved party, to the Common Pleas, "in all their adjudications in the premises," which appears to us to embrace also cases under the preceding section, which provides for complaints before a justice.

But in our judgment, the defendants in error had a legal defence to the complaint before the justice, at the time of his adjudication. The parties, which it was the object of that process to remove, had then acquired a legal settlement in *Standish*, from a residence there for the space of five years together, without having received, from any town, directly or indirectly, any supplies as paupers. The previous inception of these proceedings, is not made an exception to a settlement under this mode. This statute has uniformly received a strict construction, of which very strong cases have been cited for the defendants. To acquire rights, or to avoid liabilities under the pauper laws, the conditions, upon which the right or the immunity depends, must be consummated. It is not enough, that a town has done all in its power, and that such consummation has been defeated by the providence of GOD, or inevitable accident. *Ware* v. *Wilbraham*, 4 *Pick.* 45; *Seekonk* v. *Attleborough*, 7 *Pick.* 155.

A cause of complaint may exist, when made, but it may be discharged, or may cease to operate, at the time of trial. Matter, arising during the pendency of a suit, may become available in defence. Hence, pleas averring facts, happening *puis darrein continuance*, are legally admissible. In a suit at law, there must not only be a cause of action, when brought, but it must exist at the time of trial. If the plaintiff subsequently receive payment, or give a release, his action is defeated. Here the complaint was

defeated, by the liability, which the law had, before trial, fixed and imposed upon the complainants.

The letter of the 12th of *April*, 1838, from the overseers of *Gray*, acknowledges the settlement of the paupers in their town, "without regard to their having lived in *Standish* for more than five years." This has reference to the period then past, and admits, what turns out to be true, that their settlement had not been changed upon that ground. It does not waive any right to set up a settlement there, which might subsequently attach, and cannot be enforced against *Gray*, beyond its terms. They may have further intended, by this letter, to put *Standish* unfairly off their guard. But if this was designed, it was not successful, for *Standish* preferred their complaint in a few days afterwards.

In our opinion, the error relied upon, in this case, has not been well assigned.

Judgment affirmed.

ALBERT SMITH *vs.* DEXTER E. WADLEIGH *& al.*

Where goods, attached by a deputy of the marshal of the district, are left in the hands of receipters, who give their written promise to deliver the property on demand, to any officer authorized to receive the same; an action for a breach of such contract, may be maintained, by the marshal, in his own name.

THE action was assumpsit on a receipt for a quantity of board logs, attached by *Jonathan Burr*, a deputy of the plaintiff, then *United States* marshal for the *Maine* district, as the property of *William Lewis*, on a writ against him. The receipt was signed by *Wadleigh, Bigelow, Brown*, and *Lewis*, by which they agreed to keep the property "free of expense, and deliver the same, on demand, to any officer authorized to receive the same, in like good order as when seized." The execution was duly issued and delivered to the plaintiff, then marshal, within thirty days from the day on which judgment was rendered in the action. The property was demanded by the plaintiff, within thirty days from the rendition of

judgment. The circumstances attending the demand, are stated in the opinion of the Court.

At the trial before EMERY J., the defendants objected, that no action could be maintained on the receipt, in the name of the plaintiff, but only in the name of *Jonathan Burr*, and moved that the plaintiff be nonsuited. The Judge ruled, that the action was properly brought in the name of the plaintiff, and declined to direct a nonsuit. The defendants then requested the Judge to direct the jury, that if they believed that *Brown*, one of the defendants, told the plaintiff that the property, mentioned in the paper, was in the same place where it was when attached, and requested him to take it, and he believed the property was in fact there, the plaintiff had no right to rest satisfied with the answer afterwards given by *Wadleigh*, but it was his duty, in order to maintain his action against *Brown*, to ascertain, that the property was not in the place where it was when attached, and where *Brown* described it to be. The Judge declined giving this instruction, but instructed the jury, to consider the whole evidence in the case, and that from it they would decide, whether all the property attached was within the power of the plaintiff to obtain on his demand of it; that he was not obliged to accept a part of it only; and that from what he was informed by one of the receipters, he had a right to believe he could not obtain the whole, and that it was the duty of the receipters to deliver it to him.

A verdict was returned for the plaintiff, and the defendants filed exceptions.

W. P. Fessenden, argued for the defendants, citing 1 *Com. Dig.* 309, *Day's Ed., note by Day;* and *Knap* v. *Sprague*, 9 *Mass. R.* 258.

Fessenden & Deblois, argued for the plaintiff, and cited *Watson* v. *Todd*, 5 *Mass. R.* 271; *Grinnell* v. *Phillips*, 1 *Mass. R.* 530; *Quincy* v. *Hall*, 1 *Pick.* 357; *Baker* v. *Fuller*, 21 *Pick.* 318; *Waterman* v. *Robinson*, 5 *Mass. R.* 303; 1 *Com. on Con.* 26; *Cabot* v. *Haskins*, 3 *Pick.* 83; *Felton* v. *Dickerson*, 10 *Mass. R.* 287; 1 *B. & P.* 102; 3 *B. & P.* 149; *Watson* v. *Cambridge*, 15 *Mass. R.* 286; *Arnold* v. *Lyman*, 17 *Mass. R.* 400; 3 *Cranch*, 492; *Schermerhorn* v. *Vanderheyden*, 1 *Johns. R.*

140; *Lent* v. *Padelford*, 10 *Mass. R.* 230; *Hinkley* v. *Fowler*, 3 *Shepl.* 285; *Bradbury* v. *Taylor*, 8 *Greenl.* 130; *Holbrook* v. *Holbrook*, 3 *Shepl.* 9; *Quincy* v. *Tilton*, 5 *Greenl.* 297; *Cobb* v. *Haskell*, 2 *Shepl.* 303; *Jenney* v. *Rodman*, 16 *Mass. R.* 464; *Jewett* v. *Warren*, 12 *Mass.* R. 300.

The opinion of the Court was drawn up by

WESTON C. J. — The direct promise made by the defendants, upon the receipt of the property attached, was, to re-deliver it to any officer, authorized to receive it. The plaintiff, at the time of the demand proved in the case, was the officer entitled to receive the property; and brings himself, therefore, within the express terms of the contract.

But it is insisted, that the consideration for the promise, moved from *Burr*, the deputy marshal; and that he is the promisee named. The defendants made the promise to him in his official capacity. They received the property from him in the same capacity; and their whole engagement is based upon proceedings, in which *Burr* acted as the plaintiff's deputy. That deputy sheriffs are the servants of the sheriff, and that he may interfere, and control all attachments, where disputes arise, is declared by the Court, in *Perley* v. *Foster*, 9 *Mass. R.* 112. And by the same case it was held, that the receipter was the mere keeper for the officer, in whom the special property continued. In *Watson et al.* v. *Todd et al.*, 5 *Mass. R.* 271, *Parsons C. J.* says, that deputies "are all servants of the sheriff, and the possession of any deputy, by virtue of an attachment, is the possession of the sheriff."

In legal contemplation, then, the defendants received the property of the marshal, through his servant and deputy, *Burr;* and the contract, in its legal effect, becomes available to the marshal, if he elects to prosecute in his own name. It constitutes no legal objection to this course of proceeding, that the deputy might also have maintained the action. Cases are not uncommon, where an action may be brought, either by the party, legally or beneficially interested, or by him, to whom a promise is directly made. *Arnold et al.* v. *Lyman*, 17 *Mass. R.* 400.

This point has been directly decided, upon full consideration, in

Davis v. *Miller*, 1 *Vermont R.* 9. The Court there held, that the sheriff, as the principal and superior of the department, may acquire rights, growing out of other transactions than the performance of acts strictly official. And that, "in the common case of a bailment, by a deputy sheriff, of property attached by him, to a person knowing the situation of the property, and undertaking merely to restore it on demand, the sheriff may claim to have made the bailment himself, through the medium of his servant," and may maintain an action thereon, in his own name. And in *Baker* v. *Fuller*, 21 *Pick.* 319, the plaintiff, as sheriff, sustained an action against the defendant, as receipter of property, attached and delivered to him by a deputy of the plaintiff. That case is not distinguishable, in principle, from the one before us.

We are of opinion, that the objection taken to the maintenance of the action, in the name of the plaintiff, is not legally sustained.

A demand upon one of the receipters, might have been sufficient. *Holbrook et al.* v. *Holbrook*, 15 *Maine R.* 9. But here a demand was made upon all. It thereupon became their duty to have re-delivered the property attached, according to their contract. What was said by *Brown*, did not amount to this. The other defendants, when the property was demanded, at the place where it was attached, neither re-delivered it, nor made any offer or movement to do so; but *Wadleigh*, one of them, in the presence of the others, declared that they had disposed of it. The facts in the case fully warrant the instructions of the Judge, and the finding of the jury.

Judgment on the verdict.

MAINE BANK *vs.* JOHN W. SMITH.

Where it is the usual practice of a bank to retain their promissory notes, and those left for collection in the bank, at the time demand of payment is made upon the maker, if he resides in the same city or town, and such usage is known to the maker and indorser of a note, a demand may be sufficient, although the note remains in the bank, instead of being taken with him by the person making the demand.

If a mortgage be assigned, in writing, by the indorser of a note, as collateral security for the payment thereof, parol evidence is inadmissible, to show that the indorser was discharged from his liability upon the note, by such assignment.

If a promissory note be indorsed for the benefit of the maker, and a mortgage is made by the maker to the indorser for his indemnity, but no benefit is derived, by him from the mortgage a demand upon the maker is not excused, in order to charge the indorser.

ASSUMPSIT against the defendant, as indorser of three promissory notes, of which, one was dated *May* 5, 1836, given by *William McLellan* to the defendant, and indorsed by him and by *J. W. Appleton*, for $1200, payable in sixty days; another dated *May* 14, 1836, for $250, payable in sixty days, given by *McLellan* to the defendant, and by him indorsed; and the third dated *June* 9, 1836, for $75, payable on demand, made by *McLellan*, payable to *Smith*, the defendant, and indorsed by him.

At the trial before SHEPLEY J., after the proof of certain facts by the respective parties, of which a sufficient statement appears in the opinion of the Court, it was agreed, that if upon the facts, or such part of them as are legal testimony, the plaintiffs were entitled to recover, the defendant should be defaulted; and if not so entitled, the plaintiffs should become nonsuit.

Preble and *Deblois*, argued for the defendant, and cited *Whittier* v. *Graffam*, 3 *Greenl.* 82; *Shed* v. *Brett*, 1 *Pick.* 404; *Freeman* v. *Boynton*, 7 *Mass. R.* 483; *Story on Agency*, § 114, 52, 53; *Minor* v. *Bank of Alexandria*, 1 *Peters*, 70; *Bank U. States* v. *Dandridge*, 12 *Wheat.* 64; 4 *Serg't & R.* 317; 5 *B. & P.* 247; 7 *Cranch*, 299; 16 *East*, 6; *Farley* v. *Thompson*, 15 *Mass. R.* 18; *Thorn* v. *Rice*, 15 *Maine R.* 263.

J. Adams and *Daveis*, for the plaintiffs, contended, that it was wholly unnecessary for the messenger to carry the note with him, in this case, because the usage of the bank had long been, not to do so, and the maker and indorser of the notes in question, were conusant of this usage. The demand and notice, in all other respects, were according to the general principles of law. This was an excepted case. *Green* v. *Darling*, 15 *Maine Rep.* 141; *New England Bank* v. *Lewis*, 2 *Pick.* 125; *Ireland* v. *Kip*, 10 *Johns. R.* 490; *Same parties*, 11 *Johns. R.* 231; *Bayley on Bills, (P. & S. Ed.)* 273 and *notes; Wentworth* v. *Clapp*, 11 *Mass. R.* 87, and *note; Jones* v. *Fales*, 4 *Mass. R.* 245; *Lincoln & Ken. Bank* v. *Page*, 9 *Mass. R.* 155; *City Bank* v. *Cutter*, 3 *Pick.* 414; *Renner* v. *Bank of Columbia*, 9 *Wheat.* 581; *Bank of Washington* v. *Triplett*, 1 *Peters*, 35; *Boston Bank* v. *Hodges*, 9 *Pick.* 420.

There was no necessity for any demand and notice, because the maker of the note had indemnified the defendant by a mortgage to him. *Mead* v. *Small*, 2 *Greenl.* 207.

The testimony of the declarations of *Newhall*, the president of the bank, is inadmissible, to show that the defendant was discharged, made, as they were, at a different time from the making of the contract, because the declarations of a stockholder or director of a corporation, are inadmissible, when not a part of the transaction. *Polleys* v. *Ocean Ins. Co.*, 2 *Shepl.* 141; *Ruby* v. *Abyssinian Society*, 3 *Shepl.* 306. And because it is varying a contract in writing, by parol evidence. 7 *Greenl.* 421.

The opinion of the Court — Emery J. being interested, and therefore taking no part in the decision — was prepared by

Shepley J. — A written notice, demanding payment of the two notes first named, was sent, at the proper time, to the dwellinghouse of the maker, but the notes remained in the bank. The residence of the maker was in the city. The plaintiffs were permitted to introduce evidence, that such was the invariable usage of the bank, respecting inland bills and notes; and that the maker and the defendant had done business at the bank. The counsel for the defendant objected to the introduction of this testimony, and denied, that it could have any legal effect to charge him.

In the case of *Jones* v. *Fales*, 4 *Mass. R.* 244, testimony, to prove the usage, was admitted, not, as it was said, "to establish new law, but to prove, that the defendant had waived a condition, implied by law for his benefit." And a demand, upon one resident in the city, without the note, and on the first day of grace, was held sufficient to authorize a recovery against an indorser accustomed to do business at the bank. The like doctrine was asserted in the cases of *Widgery* v. *Munroe*, 6 *Mass. R.* 449; *Weld* v. *Gorham*, 10 *Mass. R.* 366; and *Blanchard* v. *Hilliard*, 11 *Mass. R.* 85. In the case of the *Lincoln & Kennebec Bank* v. *Page*, 9 *Mass. R.* 155, *Sewall C. J.* states the doctrine more broadly, as applicable alike to banks and to individuals. He says, "The usages adopted by individuals concerned in any course of business; for instance, in the negotiation of promissory notes by loans obtained and renewed at banks, become, as to those parties, rules, by which their contracts are to be construed; and in any circumstance, not ascertained by express stipulation, and especially as to privileges depending on legal implication and construction, and understood to be reserved for the particular benefit of the individual, what is known, among the parties, to be usual in their course of business, is to be taken as consented to, and to have the same effect as if inserted in their contracts." In *Shove* v. *Wiley*, 18 *Pick.* 558, it is said, that parties conversant of the custom of the bank, by transacting business there may be presumed to assent to it. Formerly, goldsmiths' notes constituted a part of the common currency of *England*, and certain usages as to the time of their presentment, were received as binding upon those interested in them. These appear to have given place to the checks of private bankers, and certain usages in like manner prevailed, and were received as binding upon those interested in them. The law in relation to bills of exchange, arose out of the custom of merchants. Very many of the rules now recognized as rules of law relating to notes as well as bills, had their origin in usage. Days of grace were "the mere creatures of usage," the number of them, and when the usual number is to be allowed, the last falling on a sacred or a holiday, and whether, and in what cases, presentment must be made during the business hours of the day, all these matters are determined by rules, which had their origin in usage.

Tassel v. *Lewis*, *Ld. Raym.* 743; *Renner* v. *Bank of Columbia*, 9 *Wheat.* 582; *City Bank* v. *Cutter*, 3 *Pick.* 414. In the case of the *Bank of Washington* v. *Triplett*, 1 *Peters*, 34, Chief Justice *Marshall* says, "the maker of a negotiable paper may fairly be presumed to be acquainted with the customary law, which governs the paper at his place of residence." In *Whitwell* v. *Johnson*, 17 *Mass. R.* 449, it is said, "if there has been such a demand as the maker was bound by, so that he had no right to refuse payment; it is not easy to see how it concerns the indorser, whether the legal forms had been complied with or waived by the promissor"; and an indorser, not acquainted with the usage, was held liable upon a demand binding upon the maker. In the case of *Tredick* v. *Wendell*, 1 *N. H. Rep.* 80, where the note was in a bank, a few rods from the residence of the maker, the Court held, that a demand without the note, and without any proof of usage, was a compliance "with the spirit of the rule" requiring a demand to charge the indorser. Most of the decisions in *Massachusetts*, respecting the effect of usage, in making a demand upon the maker, resident in the same place with the bank, without the note, were made while *Maine* was a part of that State, and some of them upon it as existing in institutions in this part of the State; and they must have become known to most persons dealing with them, and such persons may be presumed to intend to be governed by them. To decide now, that such usage is to have no effect upon the contract, would be to introduce a rule of decision, probably not contemplated by the parties, or supposed to be binding upon them. To deny that usage could have an influence upon the rights of parties to negotiable paper, would be to strike a blow at the foundation, upon which, much of the law, relating to such paper, rests. The case finds, that these notes were renewals of former notes, signed by the same parties, and discounted by the plaintiffs, and they must therefore have been made with the intention to have them collected by the bank. This, together with the fact, that they had done business with the bank, would authorize the conclusion, in the absence of all contradictory proof, that the usage was known to them, and that they had acquiesced in it, and had presented these notes, after a like demand and notice upon the former ones.

It is insisted, in the argument for the plaintiffs, that they are entitled to recover upon the third note, without proof of any demand, because the defendant took a mortgage of certain estate, as security for indorsing these and other notes. It appears, however, in the case, that he derived no benefit from it, and in such a case, a demand is not excused.

The defendant contends, that he was discharged, upon assigning this mortgage to the plaintiffs, and he has exhibited parol evidence to prove it. The mortgaged premises are declared to be assigned "as collateral security for the payment of the within named notes endorsed by me." The legal effect would be, to make the estate conveyed, collateral to the personal liability of all the parties to the notes. And even if it could be considered as collateral to the liability of the maker only, the defendant would not thereby be discharged. There is nothing in the assignment, or in the obligation given by the president of the bank to the defendant, indicating a different intention. And to allow proof to be made, that part of the agreement was for a discharge of the defendant, would be to add to, and vary the effect of, the written agreements. It is said, in the case of *Kain* v. *Old*, 2 *B. & C.* 627, that "if the contract be in the end reduced into writing, nothing, which is not found in the writing, can be considered as part of the contract." And admitting, that the president of the bank was its legal agent, his declarations are to be received, only while in the discharge of the duties of that agency; and when he has performed an act, he cannot qualify it by his declarations made after it has been completed. *Haven* v. *Brown*, 7 *Greenl.* 421. The declarations of the president, "that the transfer of the mortgage was in consideration of exonerating *Mr. Smith*," cannot, therefore, be legally received.

The plaintiffs are entitled to judgment on the two notes first named, but not upon the last one.

Defendant defaulted.

Mercy Noyes *vs.* Ephraim Sturdivant.

The bond contemplated by the *st.* 1821, *c.* 36, § 3, is one which acts directly upon the title, requiring, upon certain terms, a conveyance of it. A bond, therefore, for the support of the mortgagee, the performance of which is secured by the mortgage, is not within that provision of the statute.

The possession of the mortgagor and of his grantees, is the possession of the mortgagee, and the former cannot disseize the latter.

A witness who states, that he expects to get his pay from this suit, and has no other means of obtaining payment, is to be considered but as a creditor testifying for his debtor, and is a *competent* witness.

Exceptions from the District Court, Whitman J. presiding.

This was a writ of entry on a mortgage. The facts in the case sufficiently appear in the opinion of the Court. The verdict was for the demandant, and the tenant excepted.

Daveis, argued for the tenant, and, on the point, that the mortgage was not good against the tenant, because the defeasance was not recorded, cited *st.* 1821, *c.* 36, § 3; 4 *Kent*, 141; *Fuller* v. *Pratt*, 1 *Fairf.* 197; *Newhall* v. *Pierce*, 5 *Pick.* 450; *Whittick* v. *Kane*, 1 *Paige*, 202; *Grimstone* v. *Carter*, 3 *Paige*, 421; *Dey* v. *Dunham*, 2 *Johns. Ch. R.* 182; *Kelleran* v. *Brown*, 4 *Mass. R.* 445; 1 *Co. Inst.* 236; 2 *Black. Com.* 327; 4 *Dane*, 153; *Sheph. Touch.* 381; *Green* v. *Thomas*, 2 *Fairf.* 318; *Erskine* v. *Townsend*, 2 *Mass. R.* 493. On the point, that the demandant was not seized within twenty years, he cited 2 *H. & McHen.* 9; *Collins* v. *Torrey*, 7 *Johns. R.* 278; *Jackson* v. *Wood*, 12 *Johns. R.* 242; *Jackson* v. *Pratt*, 10 *Johns. R.* 381; *Poignard* v. *Smith*, 8 *Pick.* 272.

Longfellow, Sen., for the demandant, contended, that the bond given in this case was not a defeasance. The deed is a mortgage on its face, to secure the performance of the condition of the bond. There is no more necessity for recording it, than to record notes secured by a mortgage. The tenant had notice that there was a mortgage, for his title is under the sale of the equity of redemption.

There can be no disseizin of the mortgagee by the mortgagor, or those claiming under him. *Perkins* v. *Pitts*, 11 *Mass. R.* 125; *Wellington* v. *Gale*, 7 *Mass. R.* 138; *Gould* v. *Newman*,

6 *Mass. R.* 239; *Porter* v. *Millett*, 9 *Mass. R.* 101. The witness was competent. *Ely* v. *Forward*, 7 *Mass. R.* 25; *Phillips* v. *Bridge*, 11 *Mass. R.* 242; *Bean* v. *Bean*, 12 *Mass. R.* 20; *Seaver* v. *Bradley*, 6 *Greenl.* 60.

The opinion of the Court was drawn up by

SHEPLEY J. — On the twenty-eighth day of *January*, 1818, *David Spear* conveyed the premises to *Moses Noyes* and *Mercy*, his wife, in mortgage, to secure performance of the condition of a bond made by him to them, obliging him to maintain each of them during life. The equity of *Spear* was seized and sold on execution, and was purchased by the defendant. *Moses Noyes* had deceased; and the plaintiff brought this suit upon the mortgage, having failed to obtain a support from *Spear*. The bond had not been recorded, and the first point made in the argument for the defendant, is, that it comes within the description of a "bond, deed, or other instrument of defeasance," named in the *statute* 1821, *c.* 36, § 3, which provides, that the title to an estate in the possession of any other person than the original party to such bond, deed, or instrument, shall not be defeated or incumbered by it, if not recorded. The bond contemplated by the statute, is one which acts directly upon the title, requiring, on certain terms, a conveyance of it. The bond, in this case, does not provide for a conveyance of the estate. The title is acted upon, only by the mortgage deed, which contains the defeasance or provision for the defeat of the title of the grantee. If the deed had been absolute and not conditional, and the bond had required, on certain conditions, a reconveyance, it would have come within the provisions of the statute.

The second objection is, that the plaintiff did not prove a seizin within twenty years. The possession of the mortgagor and of his grantees, is the possession of the mortgagee; for the grantees purchase with a knowledge of the title, and when claiming under a deed, they are presumed to do so according to the title.

The third objection is, that *Elizabeth Maxy* was not a competent witness. She had supported the plaintiff, and stated, that she expected to get her pay from this suit, and had no other means of payment. It does not appear that the claim had been assigned

to her, or that she had any legal interest in it. Her position was that of a creditor, testifying for his debtor, who had no other means of payment, and expecting to obtain payment out of the property to be recovered. This might, and probably would, occasion a strong bias on the mind of the witness, but it was not a legal interest in the event of a suit.

Exceptions overruled.

CHARLES PEABLES *vs.* GEORGE HANNAFORD *& al.*

In this State, the legislature may regulate fisheries, which, by the common law, would be private property.

Where a statute provides, that a brook, on which a mill has been erected, shall be kept open and free for the passage of fish "from the fifth day of *May* to the fifth day of *July* in each year," the owner of the mill is entitled to the full use of the water until the *sixth* day of *May*.

The act to regulate the taking of fish in *Alewive Brook*, in *Cape Elizabeth*, (*spec. stat.* 1839, *c.* 557,) does not authorize the fish committee to enter upon the lands of others and remove obstructions to the passage of fish up and down the brook, prior to the *sixth* day of *May*, in each year.

TRESPASS *quare clausum*, for breaking up the plaintiff's dam and floom in *Cape Elizabeth*.

At the trial before SHEPLEY J., it appeared, that the plaintiff was the owner of a farm in that town, through which ran *Alewive Brook*, across which he had a dam on his own land, and a grain mill, worked by the head of water thus raised; that fish, called alewives, had formerly passed up the brook above the dam, in large numbers; that for about twelve years preceding the time of trial, the passage of the fish up the brook above the dam, had been prevented by it; that the defendants, *Hannaford* and *Davis*, with one *Dyer*, were chosen a fish committee for that town, for the year 1839; that *Hannaford* and *Davis* were sworn, but that *Dyer* was not, and did not act; that on the third day of *May*, 1839, *Hannaford* and *Davis*, with the other defendants as their servants, having previously requested the plaintiff to open a passage for the fish, which he declined, entered upon the plaintiff's

land, and removed so much of the dam as would open a passage way for the fish to go up the brook above the dam, doing no more damage than was necessary for that purpose. The defendants read in evidence from the *Province* laws, the *act* of 1741, *c.* 6, and an act of the *State* of *Maine*, approved *March* 23, 1839, (*Special Laws c.* 557.) The act provides for the appointment of a fish committee by the town, and also, that "it shall be the duty of said committee to remove all incumbrances from said brook, and cause it to be kept open and free for the passage of alewives and other fish up and down the said brook, from the sea to the *Great Pond*, so called, in said town, from the fifth day of *May* to the fifth day of *July*, in each year."

By consent of parties, the jury were directed to find a verdict for the plaintiffs for the amount of the injury sustained, on which judgment was to be rendered, if the defendants were not, by law, justified in their acts, as a fish committee under the law. And if they were justified, the verdict was to be set aside and a nonsuit entered.

The case was submitted on the briefs of the counsel.

Codman & Fox, for the defendants.

The owner of land holds under the limitation, that the government have the right to regulate the passage of fish up and down streams running through the land. *Stoughton* v. *Baker*, 4 *Mass. R.* 527; *Cottrill* v. *Myrick*, 3 *Fairf.* 223.

The defendants acted in accordance with the provisions of the act of 1839. They had a right to remove any incumbrances to the passage of fish, a reasonable time prior to the fifth day of *May*. On that day the fish were to run clear of obstruction, the whole extent of the brook, and it would be impossible to clear the whole distance in one day. The authority given in the statute, implies the power to do all things necessary to carry it into execution.

Fessenden & Deblois, for the plaintiff, made five points, and urged each one as a sufficient ground to show, that the justification set up was ineffectual as a protection to them. That relating to the ground of the decision, was: —

That the defendants entered and committed the acts of trespass, on the third of *May*, and the statute, under which they set up

their justification, if constitutional, does not authorize the removal of obstructions to the passage of fish until the sixth of *May*. The committee had no power to act on the fifth of *May*, that day being excluded. 6 *Dane*, *c.* 196, *art.* 5, § 18; 12 *Mod.* 13; 3 *Caines' R.* 250; 2 *Dougl.* 463. This being clearly an act in derogation of private right, is to be strictly construed. 2 *Bos. & P.* 496; 4 *Mass. R.* 146; 6 *Bac. Ab.* 392; 1 *Strange*, 258; 4 *Mass. R.* 471; 15 *Mass. R.* 205. The entry on the third of *May* was clearly a trespass.

The opinion of the Court was by

SHEPLEY J. — In this State, the legislature may regulate fisheries, which by the common law would be private property. The *act* of 23d of *March*, 1839, *c.* 557 of the private acts, would have fully authorized the defendants to open a passage for the fish, if they had acted in conformity to its provisions. The plaintiff being the owner of the estate, was entitled to the exclusive and uninterrupted enjoyment of it, except so far as his rights were restricted, by that act, for the public good. The committee were required to remove all incumbrances from the brook, and cause it to be kept open and free for the passage of fish "from the fifth day of *May* to the fifth day of *July* in each year." The word *from* being a word of exclusion, the plaintiff was entitled to the full use of the water until the sixth of *May*. Any entry upon his land, or interference with his rights before that time was unauthorized. It is said, that the defendants were obliged to commence as early as the third of *May*, in order to have a free passage opened by the time required; but the facts reported do not authorize such a conclusion.

The passage appears to have been opened on the first attempt, without much difficulty, and three days before they were authorized to interpose. For this the act affords them no justification, and there must be

Judgment on the verdict.

President, &c. Oriental Bank *vs.* Samuel W. Freeze *& al.*

Although the constitution of this State carefully guards the right of private property, and provides, that it shall not be taken from any one, unless the public exigencies require it, yet it does not prohibit the legislature from passing such laws as act retrospectively, not on the right of property or obligation of the contract, but only upon the remedy which the laws afford to protect or enforce them.

The legislature have power to take away by statute what was given by statute, except vested rights.

When a party, by statute provisions, becomes entitled to recover a judgment, in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount which may be recovered, does not become vested until after judgment.

The *stat.* 1839, *c.* 366, "for the relief of sureties on poor debtors' bonds, in certain cases," is constitutional.

This case came before the Court on a statement of facts. The action was debt on a jail bond, dated *June* 18, 1838, given by *S. W. & J. Freese*, as principals, and by *R. W. Freese*, as surety, to the plaintiffs. The condition of the bond recited, that *S. W. & J. Freese* had been arrested on an execution issued on a judgment in favor of the plaintiffs, a corporation established by the laws of *Massachusetts* to do business in the city of *Boston*, at the Court of Common Pleas for the county of *Penobscot*, at the *March* Term, 1838, for $86,95, debt, and $8,70, costs, against the principals in the bond, and was in the usual form of such bonds. On *October* 1, 1838, the debtors made application to a justice of the peace for the county of *Penobscot*, requesting him to cite the plaintiffs to appear before two justices of the peace and of the quorum, at a place stated, on *October* 20, 1838, to attend to the disclosure of the debtors, &c. On this application, notice was given to the attorneys of the creditors, in this State. No notice was given on the application of the jail-keeper. At the time and place appointed, the debtors appeared before the justices named in the notice, and such proceedings were had, that the justices certified that, having examined the notice and return, and having found them to be correct, they, after due caution, administered the

poor debtors' oath to the debtors, and issued their certificate of discharge. This certificate was duly filed with the jailer of the county of *Penobscot*.

The parties agreed, that if, on the facts, the Court should be of opinion, that the plaintiffs are entitled to recover, judgment was to be rendered for the plaintiffs, with legal damages and costs; and if not, the plaintiffs were to become nonsuit.

The case was submitted for the opinion of the Court, on the briefs of the counsel.

Fessenden & Deblois, for the plaintiffs.

The provisions of the statutes of 1835, *c.* 195, and of 1836, *c.* 245, were not complied with by the debtors, and there was consequently a breach of the bond declared on, and the plaintiffs are entitled to recover, as damages, the amount of the execution, and costs, and fees, and costs of commitment, with twenty-five *per cent.* interest.

"Where the only notice to the creditor was issued by a magistrate, on the application of the debtor, without any from the prison-keeper, the justices have no jurisdiction or power to administer the oath, and their doings are illegal and void." *Knight* v. *Norton*, 3 *Shepl.* 337.

The statute is peremptory, that in all cases where there has been a breach of the condition of the bond, taken under the provisions of that statute, the measure of damages shall be "the amount of the execution, and fees, and costs of commitment, with interest thereon at twenty-five *per cent.*" Nothing intervenes, unless operation is given to the *statute* of 1839, *c.* 366. This statute is retrospective, and intended to be so, and cuts off the right to a verdict and judgment for those sums, unless the damages should amount thereto. The breach of the bond was prior to the passing of this act.

A retrospective statute is inoperative and absolutely void, and the intention of the legislature to make it retrospective, cannot alter the case, or make it operative or valid. *Dash* v. *Van Kleeck*, 7 *Johns. R.* 477, cited with marked approbation in *Hastings* v. *Lane*, 3 *Shepl.* 134; 2 *Mod.* 310; 2 *Insti.* 292; 2 *Lev.* 227; 4 *Burr.* 2460; 1 *Bay*, 179; 3 *Dall.* 386; 2 *Cranch*, 272; 6 *Bac. Ab.* 370; 1 *Bl. Com.* 44; *Co. Litt.* 360, *(a)*; *Blan-*

chard v. *Russell*, 13 *Mass. R.* 17; *Call* v. *Hagger*, 8 *Mass. R.* 423; *Story's Com. on Con.* § 712; *Betts* v. *Bagley*, 12 *Pick.* 572; *Lewis* v. *Webb*, 3 *Greenl.* 326; *Bowdoinham* v. *Richmond*, 6 *Greenl.* 112; *Durham* v. *Lewiston*, 4 *Greenl.* 140; *Somerset* v. *Dighton*, 12 *Mass. R.* 385.

Codman & Fox, for the defendants.

Our defence depends upon the constitutionality of the *st.* 1839, *c.* 366. The effect of this statute, is simply pointing out a mode of notifying the creditor, and adopting it as valid, except that the plaintiff may recover any damages he has sustained by a breach of the bond, which damages shall be assessed by the jury. The statute allows the party to recover all damages sustained. It is only changing the remedy, and does not destroy the right of action, and is constitutional. *Baxter* v. *Taber*, 4 *Mass. R.* 361; *Walter* v. *Bacon*, 8 *Mass. R.* 468; *Patterson* v. *Philbrook*, 9 *Mass. R.* 153; *Holbrook* v. *Phinney*, 4 *Mass R.* 566; *Bacon* v. *Callender*, 6 *Mass. R.* 303; *Potter* v. *Sturdivant*, 4 *Greenl.* 158; *Thayer* v. *Seavey*, 2 *Fairf.* 284; *Wellington & al. Pet.*, 16 *Pick.* 95.

The opinion of the Court was drawn up by

Shepley J. — The plaintiffs insist, that the *act* of 1839, *c.* 366, ought not to receive such a construction as to affect their rights in this suit. In *Hastings* v. *Lane*, 15 *Maine R.* 134, it was stated to be a settled rule of construction, that a statute should not have a retrospective operation, unless the intention to have it so operate is clearly expressed. In the *act* of 1839, such intention is clearly expressed, and it must operate upon the claim asserted by the plaintiffs, unless there be some constitutional objection to it. The counsel for the plaintiffs contend, that the legislature cannot rightfully pass a law, which operates retrospectively, and that such a law is inoperative. It has been decided, that the clause in the constitution of the *United States*, which provides, that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts, does not prevent a State from passing retrospective laws, or laws operating upon vested rights, although a contrary opinion has been at different times intimated by some of the Judges. *Satterlee* v. *Mathewson*, 1 *Peters*, 413.

Our constitution carefully guards the right of private property, and provides, that it shall not be taken from any one, unless the public exigencies require it. This does not, however, prohibit the legislature from passing such laws as act retrospectively, not on the right of property or obligation of the contract, but only upon the remedy which the laws afford to protect or enforce them. The legislature must necessarily possess the power to determine, by law, in what manner the person or property of a debtor shall be subjected to the demands of a creditor; and of making alterations in such laws, as a change of circumstances, or the public good, may require. And in doing this, one may be deprived of a right which he has by existing laws to arrest the body, or to attach, or seize a certain description of property, without infringing any constitutional provision. When a person, by the existing laws, becomes entitled to recover a judgment, or to have certain real or personal estate applied to pay his debt, he is apt to regard the privilege, which the law affords him, as a vested right, not considering that it has its foundation only in the remedy, which may be changed, and the privilege thereby destroyed. It was decided in *Potter* v. *Sturdivant*, 4 *Greenl.* 154, that the legislature might mitigate the severity of a penalty, and award to the party injured, as much as he deserved, in equity and good conscience, to receive. And in the *People* v. *Livingston*, 6 *Wend.* 526, that the legislature possessed the power to take away by statute, what was given by statute, except vested rights. And when a party, by the statute provisions, becomes entitled to recover a judgment in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount, which may be so recovered, does not become vested till after judgment.

In *Ogden* v. *Saunders*, 12 *Wheat.* 262, Mr. Justice *Washington* thus states the result of his examination. "It is thus most apparent, that whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts; or to the evidence or remedy to be employed in enforcing them, we are met by the overruling and admitted distinction between those which operate retrospectively and those which operate prospectively. In all of them, the law is pronounced to be void in the first class of cases, and not so in the second." And *Marshall C. J.*, in the

same case, 349, says, "in prescribing the evidence, which shall be received in its courts, and the effect of that evidence, the State exercises its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its courts."

The bond in suit was taken to secure to the plaintiffs, the benefit of that part of the remedy for the recovery of a debt, which the laws afforded them by an arrest of the body of their debtor. And it was competent for the legislature to refuse any such remedy, or to impart it under such restrictions and modifications as it thought proper, and to change them at pleasure. By the *act* of 1839, the legislature does not impair the obligation of the contract, or deprive the plaintiffs of any vested right. It in effect provides, that a different description of evidence shall be received, as proof that the obligors have fulfilled that part of the condition of their bond, which required them to give notice of an intention to take the oath, not making it effectual, however, to bar the obligees from the recovery of such damages as they had actually suffered. The facts agreed do not prove, that the plaintiffs have sustained any damages; and by the agreement, a nonsuit is to be entered.

Silvanus Blanchard *vs.* Inhabitants of Cumberland.

By the *8th sec.* of the *spec. act* of 1821, *c.* 78, dividing the town of *North Yarmouth* and creating the town of *Cumberland*, the right of election there given, to persons dwelling upon lands adjoining the division line, can operate only upon lands owned by such persons, at the time the act took effect.

Where one had erected a dwellinghouse on land, and lived thereon for a long time, although less than twenty years, claiming the same as his own, and of which he was the visible and apparent owner, this land adjoining land on the line of the towns, of which he was the undisputed owner; he is to be so far considered the owner, as to have the right to make the election to which of the towns the land should belong, and not the person who had the legal title thereto.

Exceptions from the District Court for the Western District, Whitman J. presiding.

The action was originally brought before a justice of the peace, to recover the sum of $7,62 and interest, the amount of a tax upon certain lands of the plaintiff, claimed by the defendants to be within their town. The objection to the legality of the tax, was founded upon the allegation, that the land taxed was not in *Cumberland*. The *spec. act* of 1821, *c.* 78, § 8, incorporating the town of *Cumberland* from a part of *North Yarmouth*, provided, "that all persons dwelling on lands adjoining the division line described in the first section of this act, shall have liberty to belong, with their lands adjoining said line, to which of said towns they may elect; provided they make their election in writing, describing such lands, and file the same in the office of the Secretary of State, within ninety days from the passing of this act." If no election was made in this case, the land was on the *Cumberland* side of the line.

The facts are sufficiently stated in the opinion of the Court.

The plaintiff contended, that the right of election was given by the statute to the person who was the real owner of the land; that the request made by *Joshua Blanchard* to *William*, in 1795, to purchase the land of *Waite* and others, and his agreement to exchange the ten acres for seven, was an admission of the title of *Waite* and others, and amounted to a consent on his part, to hold what he occupied on the gore as tenant to *William*, until the agreement to exchange should be carried into effect, and as there was no evidence that he afterwards pretended to hold adversely to *William*, till the year 1804, or that he ever denied *William's* title to the land, the right of election was in *William*, and that he, having rightfully made his election, the whole gore was a part of *North Yarmouth*.

The judge ruled, and instructed the jury, that in order to determine who had the right of election, they had only to inquire, who was the visible, open, and apparent owner, at the time of the passage of the act; that if *Joshua* was acknowledging *William* as his landlord, or paying him rent, so that *William* could have a constructive possession at the time, he would have the right to make the election; but if *Joshua* did not acknowledge *William* as his landlord, and was holding adversely to him, and would not suffer him to occupy, and had done so for any considerable time,

though for a less period than twenty years, so that *William* could not be considered as having actual or constructive possession of the premises at the time — in that case, *William* could not be considered as having the right to make the election, and it was therefore void. The verdict was for the defendants, and the plaintiff filed exceptions.

S. Fessenden and *Eastman*, argued for the plaintiff, and cited *Spec. st.* 1821, *c.* 78, § 8; *Richards* v. *Daggett*, 4 *Mass. R.* 534; *Cumberland* v. *Prince*, 6 *Greenl.* 408; *Ken. Pur.* v. *Springer*, 4 *Mass. R.* 416; *Norcross* v. *Widgery*, 2 *Mass. R.* 506; *Com.* v. *Dudley*, 10 *Mass. R.* 403; *Porter* v. *Hill*, 9 *Mass. R.* 34; *Little* v. *Libby*, 2 *Greenl.* 242; *Ken. Pur.* v. *Laboree*, *ib.* 275; *Porter* v. *Hammond*, 3 *Greenl.* 188.

Preble, argued for the defendants, but did not cite authorities.

The opinion of the Court was by

Weston C. J. — It appears to us, that upon a fair construction of the eighth section of the act, dividing the town of *North Yarmouth* and creating the town of *Cumberland*, the right of election there given to persons dwelling upon lands adjoining the division line, can operate only upon lands owned by such persons, at the time the act took effect. Thus limited, some judgment could be formed of the extent, to which it might be carried. But if the line might be subject to further fluctuation, by subsequent sales and transfers, a new element of vagueness and uncertainty is introduced, which, in our judgment, the language used does not require. The period of ninety days, within which the certificate of election was to be filed, in the office of the Secretary of State, was intended to afford to those, to whom the privilege was extended, a reasonable time to make up their judgment with due deliberation. It was not intended to afford opportunity to bring, by subsequent purchases, other lands within the influence of this principle; but it was a condition, upon which the right given was made to depend.

Notwithstanding the extraordinary manner, in which *Joshua* and *William Blanchard*, father and son, managed with regard to the part of the gore in dispute, in which legal rights appear to have been lost sight of, under the influence of parental authority on the

one hand, and filial acquiescence on the other, we are of opinion that the right of election was in the father, and not the son. The former certainly dwelt, at the time, on lands adjoining the division line. Prior to 1795, he had erected a house and other buildings on this land, which he continued to occupy, and which it does not appear that the son had ever claimed. The fee of the land the son had acquired, not with a view to disturb, but to quiet the father. He did not first enter under the son, nor had he ever recognized his right to dispossess him. In 1804, he resisted his claim, and persisted in the exclusive enjoyment of the land, in defiance of his son, who appears to have acquiesced in his pretensions. Under the peculiar circumstances of this case, we are of opinion, that the father, at the time when the town was divided, had an interest as owner in the buildings and improvements, which might have been sustained at law. The privilege of election, given to those who bordered upon the line, was yielded to their personal wishes and predilections. If conceded to the son for this property, he would have a right not only to elect for himself, but to transfer his father also to *North Yarmouth*, although he might be better satisfied to remain in *Cumberland*, which embraced lot number eighty-three, of which he was the undisputed owner, being the greater part of his land. If he made no election on his part, and it does not appear that he did, it is evidence that he acquiesced, as far as he was concerned, in the line established by the legislature. So the line must be regarded as remaining, unless it has been made to appear affirmatively, that it was changed, as it respects this part of the gore, by the election of *William Blanchard*. And this, we are of opinion, could not be exercised, to this extent, under the act, without violating or impairing the rights of *Joshua Blanchard*, the father.

Exceptions overruled.

PORTLAND MANUFACTURING COMPANY *vs.* DANIEL FOX *& al. Ex'rs.*

Where an action has been referred generally to referees, by rule of Court, it is no objection to their award, if they have decided contrary to law.

And if it appear, that the referees, in making their decision, disregarded the statute of limitation respecting suits against executors and administrators, the report will nevertheless be accepted, unless the question is submitted, by the referees, to the determination of the Court.

THE action was covenant broken, on a deed of the testator, *Archelaus Lewis*, conveying certain real estate. In the Supreme Judicial Court, the action was referred by rule of Court in common form. The referees awarded, "that the plaintiffs recover against the estate of the said testator, in the hands of the defendants the sum of fifteen hundred dollars, with costs of reference. This report is, however, subject to the decision of the Court upon the question of law raised by the defendants. It appeared, that they were appointed executors in *March*, 1834, and duly gave bond and notice of their appointment as by law provided, and that this action was not commenced till *October* 30, 1838. The defendants contended, that as at law they were not bound to answer to any suit commenced against them after the lapse of four years next after the time of their appointment, it was not competent for us, as referees in this case, to proceed further. But we ruled, that we were not, on this ground, precluded from hearing the plaintiffs on the merits of their claim; and determined, that if they should appear to be well grounded therein upon principles of equity, the award should be made in their favor. If in our decision in this particular we erred, we award that the defendants recover of the plaintiffs their costs of reference." The report was returned into Court when holden by SHEPLEY J., who ordered the report to be accepted, unless it should be the opinion of the full Court that the same ought not to be accepted because the referees have decided to allow the claim contrary to law. To this ruling of the Judge the defendants excepted.

Longfellow, Sen. and *Longfellow, Jr.*, for the defendants, contended, that the *st.* 1821, *c.* 52, § 26, was a complete bar to the

action; that it was the duty of an executor or administrator to oppose the statute against all claims barred by it; that the promise of the executor, to pay the debt, would not bind the estate, as the statute was made for the benefit of heirs, as well as executors and administrators; and that no license could be obtained to sell real estate for the payment of such claim. *Brown* v. *Anderson*, 13 *Mass. R.* 201; *Parsons* v. *Mills*, 1 *Mass. R.* 431; *Same parties*, 2 *Mass. R.* 80; *Ex parte Allen*, 15 *Mass. R.* 58; *Thompson* v. *Brown*, 16 *Mass. R.* 172; *Emerson* v. *Thompson*, *ib.* 429; *Scott* v. *Hancock*, 13 *Mass. R.* 162; *Dawes* v. *Shed*, 15 *Mass. R.* 6.

The whole law on the subject before the referees, was submitted for the revision of the Court. But if they did not so intend it, the referees exceeded their jurisdiction in doing away the provisions of the statute, and for that cause, the report should not be accepted.

W. P. Fessenden, for the plaintiffs, contended, that the only question, submitted by the referees to the opinion of the Court, was, whether they had power to decide in favor of the plaintiffs, if justice required it, and not whether they did right in so doing.

It is a general and unlimited rule, that executors and administrators have a right to enter into a rule of reference to bind the estate. *Coffin* v. *Cottle*, 4 *Pick.* 454. Referees have power to decide both law and fact, and their decision is final, unless they specially refer a question of law for the decision of the Court. *Coffin* v. *Cottle*, before cited; *Forseth* v. *Shaw*, 10 *Mass. R.* 253; *Bigelow* v. *Newell*, 10 *Pick.* 354; *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21; *Parsons* v. *Hall*, 3 *Greenl.* 60; *Bacon* v. *Crandon*, 15 *Pick.* 79.

When the administrators, or executors, have conducted themselves properly, the Court will grant license to sell real estate, if necessary. *Richmond, Pet'r*, 2 *Pick.* 567; *Nowell* v. *Bragdon*, 2 *Shepl.* 320.

The opinion of the Court was drawn up by

Shepley J. — The referees selected by the parties, have submitted, on their report, a question of law. It becomes necessary first to determine, what question they intended to submit. It is contended for the defendants, that they intended to submit, whether the statute, *c.* 52, § 26, was a legal bar to the action. Upon

examining the report, it will be perceived, that the referees do not question, that the provisions of the statute are a legal bar, but they determined, that they were not necessarily bound to decide upon the rights of the parties according to the statute provisions. And the question, whether they had the right and power to decide contrary to the statute provisions, is clearly the only one submitted by them to this Court. They allow the defendants to submit to this Court, the question, which they made before them, whether referees selected by the parties, and to whom the whole matter in contest, including fact and law, is submitted without limitation, are bound to decide upon the rights of the parties, according to law; or whether they may decide according to their own sense of what is equitable and just.

Although there may be found cases difficult to reconcile, it is believed, that most of the *English* cases proceed upon the principle, that the parties are supposed to intend, that referees should decide according to law, unless it appears, that the law was intended to be submitted. When therefore there is a general reference of the whole matter, including law and fact, the award will be set aside for an erroneous decision of the law, if such erroneous decision appear on the face of the award, but will not be set aside unless it does so appear. 9 *Moore*, 666. Whenever it does appear that the law was intended to be submitted, the parties are left to the decision of the judges of their own selection. *Chase* v. *Westmore*, 13 *East*, 357; *Ching* v. *Ching*, 6 *Ves.* 282.

As the law has been administered in *New York*, *Massachusetts*, *New Hampshire*, and *Maine*, when the whole matter, including law and fact, is referred without restriction, it is supposed to be the intention of the parties, that the referees should decide the law as well as the fact, it having been as fully submitted to them. And the Courts have permitted this intention and their decisions to prevail; and have held, that it is no objection to such an award, that the referees have decided contrary to law. *Jackson* v. *Ambler*, 14 *Johns. R.* 96; *Jones* v. *Boston Mill Corporation*, 6 *Pick.* 148; *Greenough* v. *Rolfe*, 4 *N. H. Rep.* 357; *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21.

It is said, that if a judgment be rendered against the executors in this case, that they will not be enabled to protect themselves,

by obtaining a license to sell real estate, in case of a deficiency in the personal estate to satisfy it.

The rules, which the Courts have prescribed to themselves in this matter, were examined in the case of *Nowell* v. *Bragdon*, 14 *Maine Rep.* 320, and according to the principles there stated, the executors may be protected.

Exceptions overruled and report accepted.

JOHN WILLIAMS *& al. v.* ELI MCDONALD *& al.*

If a debtor be arrested on an execution, and committed to prison, and while there, cites his creditor to attend to his disclosure at an appointed time and place, and attends at the time and place, and takes the debtor's oath, and after the citation, and before taking the oath, gives the debtor's bond to the creditor, having therein the condition that he will cite the creditor according to law, and submit himself to examination in manner prescribed in the poor debtor acts; the giving of the bond is a waiver of the notice, and the condition is not performed by the proceedings under the notice *given before the bond was made.*

McDonald, on *August* 21, 1838, was arrested on an execution in favor of the plaintiffs against him, and committed to jail, and there remained until the twenty-third of *August*, when he was released upon giving a bond with surety, in the common form of poor debtors' bonds, dated on that day. The present suit is on that bond. On the day of the commitment, and before giving the bond, the debtor applied to the jailer, and the jailer to a magistrate, who issued his notice to the creditors, which was duly served the same day, citing them to appear at the prison, on the fifth of *September*, then next, to attend to the disclosure of *McDonald.* On the fifth of *September*, at the time and place appointed in the notice, *McDonald* appeared before two justices of the peace and of the quorum, and was by them examined and discharged, on taking the poor debtor's oath, and a certificate of his discharge was left with the jailer. No notice was given to the creditors after the bond was signed. The condition of the bond is found in the opinion of the Court. If the plaintiffs were entitled to recover, the

defendants were to be defaulted; if otherwise, the plaintiffs were to become nonsuit.

The case was submitted on the briefs of the counsel.

Codman & Fox, for the plaintiffs, cited *Harrington* v. *Dennie*, 13 *Mass. R.* 93; *Knight* v. *Norton*, 3 *Shepl.* 337; *Slasson* v. *Brown*, 20 *Pick.* 436.

Fessenden & Deblois, for the defendants, cited *Black* v. *Ballard*, 1 *Shepl.* 239; *Cordis* v. *Sager*, 2 *Shepl.* 475; *Agry* v. *Betts*, 3 *Fairf.* 417; *Hayward, Pet.*, 10 *Pick.* 358; *Haskell* v. *Haven*, 3 *Pick.* 404; *Bond* v. *Cutler*, 10 *Mass. R.* 419; *Gage* v. *Gannett*, 11 *Mass. R.* 217; *Manly* v. *U. M. & F. Ins. Co.*, 9 *Mass. R.* 85; *White* v. *Crawford*, 10 *Mass. R.* 183.

The opinion of the Court was drawn up by

EMERY J. — The defendant, *McDonald*, was arrested and committed on execution in favor of the plaintiffs, on the twenty-first of *August*, 1838, notified the jailer of his poverty, and desired him to apply to some justice of the peace, to notify the creditor of his intention of taking the poor debtor's oath, and the jailer, on the same day, applied to a justice to cite the creditors to hear him take the benefit of an act for the relief of poor debtors. They were cited to appear on the fifth day of *September* following. The defendant continued in close jail till the twenty-third day of *August*, 1838, when he gave the bond now in suit, and on the fifth day of *September*, took the oath.

The condition of the bond, after reciting, that "whereas said *Eli McDonald* hath been, and now is, arrested by virtue of the plaintiff's execution," concludes in this way: "Now if the said *Eli McDonald* shall, in six months from the time of executing this bond, cite the said *John Williams & al.*, the creditors, before two justices of the peace and of the quorum, and submit himself to examination, as is prescribed in the tenth section of an act, entitled 'an act for the relief of poor debtors,' passed *March* 24th, A. D. 1835, and take the oath or affirmation, as provided in the seventh section of an act, entitled 'an act supplementary to an act for the relief of poor debtors,' passed *April* 2d, A. D. 1836, or pay the debt, interest, and costs, and fees arising in said execution,

or be delivered in custody of the jailer within said time, then the said obligation to be void, otherwise to remain in full force."

The facts admitted do not disclose a literal, nor indeed a substantial performance of the condition of the bond. If we were to consider the first notice, given before the execution of the bond, effectual after the execution of the bond, it would be going against the direct language of the condition. The giving of the bond assumes a new state of engagements which the debtor has the right to make. He might, notwithstanding the citation, omit to appear to take the oath at the expiration of the time first appointed, if he should elect so to do. And if, after the citation, he proffer to the creditor, before that period, his bond, conditioned that he shall, after its execution, cite the creditor, we know no reason why the creditor should not believe him. The creditors might well suppose that the debtor, for some good reason, intended to take further time, and we think, under the circumstances of this case, it must necessarily be a waiver of the first notice. They could not be bound to attend, and cannot be bound by the doings of the debtor.

According to the agreement of the parties, the defendant must be defaulted, and judgment be rendered in favor of the plaintiffs, for debt, interest, costs and fees.

This does not conflict, as we apprehend, with former decisions, on account of the dissimilarity of facts from any other case which comes to our recollection.

Francis O. J. Smith *vs.* Jeremiah Berry.

If the payee of a note for specific articles makes an express promise to pay to an assignee of the note the amount due thereon, the assignee may recover the same in an action in his own name.

The amount of damages to be recovered, is the value of the specific articles, at the time they should have been delivered.

Assumpsit on a promise of the defendant, to pay and deliver to the plaintiff, on demand, at *Portland*, 130 casks of lime. A demand for the lime was made *August* 10, 1839. The plaintiff offered in evidence a note, which had been assigned to him, of

which a copy follows: "For value received I promise to pay *T. W. Pettengill* or order, one hundred and thirty casks of *Thomaston* lime on or before the first of *July*. *Portland*, *May* 4, 1839. *Jer'h Berry*." The plaintiff also produced and read letters from the defendant to him, bearing date *July* 23d, and *August* 10th, 1839, the substance of which is found in the opinion of the Court. It was agreed, that on the first of *July*, 1839, lime was worth, at the wharves in *Portland*, ninety cents per cask, and that after *August* 10, 1839, it was worth one dollar and twenty-eight cents per cask, and that the plaintiff paid that sum therefor. A verdict was taken by consent for the plaintiff, for $167,66, being at the rate of $1,28 per cask, on which judgment was to be rendered, if the plaintiff was entitled to that sum; but if not, the verdict was to be set aside, and judgment entered for such sum as the Court should direct.

Smith argued *pro se*, and cited *Matthews* v. *Houghton*, 2 *Fairf.* 377; *Mowry* v. *Todd*, 12 *Mass. R.* 283; *Hatch* v. *Spearin*, 2 *Fairf.* 354; 7 *Har. & J.* 213; 3 *Har. & J.* 441; 4 *Har. & J.* 351; *Lang* v. *Fiske*, 2 *Fairf.* 385; *Crocker* v. *Whitney*, 10 *Mass. R.* 319; *Skinner* v. *Somes*, 14 *Mass. R.* 107; *Jones* v. *Witter*, 13 *Mass. R.* 304; *Jenkins* v. *Brewster*, 14 *Mass. R.* 291; 1 *Dane*, *c.* 1, *art.* 7, § 15; *Attwood* v. *Clark*, 2 *Greenl.* 253; 1 *Peters*, 455; 4 *Rand.* 346; *Greenwood* v. *Curtis*, 6 *Mass. R.* 358; 1 *Bay*, 423.

Fox argued for the defendant, and cited *Gainsford* v. *Carroll*, 2 *B. & Cr.* 624; *Gray* v. *Portland Bank*, 3 *Mass. R.* 364; 1 *Dane*, 544.

The opinion of the Court was from

WESTON C. J. — The note, given by the defendant to *Pettengill*, which forms the basis of this action, being for specific articles, and not for cash, was not a negotiable instrument. But being in fact assigned to the plaintiff, if the defendant had notice of the assignment, and expressly agreed to pay the plaintiff, the latter may maintain an action in his own name, and may recover the amount due thereon, to which the original payee would have been entitled. And the rights of the plaintiff as assignee, may constitute a safe and legal consideration for a new contract, on the part

of the defendant, with new terms and conditions. The plaintiff places his right to the amount he claims upon the assumption, that the defendant entered into a new contract directly to him, enlarging and extending the time of payment. This, it is insisted, is deducible from his letters of the 23d of *July* and of the 10th of *August*, 1839. He first attempts to excuse his non-performance, stating that if the lime is not forthwith furnished, he shall be compelled to raise the money, adding, that the plaintiff will hear something more definite from him in a few days. This admits notice of the assignment, and may fairly amount to an express promise to hold himself answerable to the plaintiff as assignee, but is not evidence of a new contract, expressly engaging to deliver lime at a future day. That of the 10th of *August*, which purports to be in answer to letter of the plaintiff of the 4th, advises, that the defendant had shipped the lime, which he supposed had been delivered, as by agreement, but that he had been apprised, that such had not been the fact. He adds, that it was then out of his power to get lime, but that he would take up the note in a short time, when he received his pay for a job he was doing for the government. Here was no new undertaking to deliver lime, but an intimation, that it was then out of his power. His promise to take up the note, as it was not to be done by the delivery of lime, must be understood to be by paying the money, which was not only the legal effect of the contract, if he failed to deliver the lime at the day, but such was the defendant's sense of the obligation, as expressed in his letter to the plaintiff on the 23d of *July*. The letters indicate, that the defendant had hoped or intended to furnish lime, to the acceptance of the plaintiff, after the maturity of the note, but they contain no express promise to do so, nor does it appear, from any evidence in the case, that the plaintiff had agreed to receive the lime, so that the defendant could have tendered it in discharge of the contract, after the time originally stipulated. There is reason to believe he would have accepted it, and that it would have been convenient and desirable to do so; but we find no contract to this effect, binding upon either party. The measure of damages, then, to which the defendant is liable, must depend upon the terms of the note. The promise was, to deliver one hundred and thirty casks of *Thomaston* lime, on or before the first of *July*.

If not delivered on that day, the contract was broken, and not before. The value of lime on that day, very clearly upon the authorities, constitutes the amount of damages, to which the plaintiff is legally entitled. According to the agreement of the parties, the verdict is to be set aside, and judgment rendered for the plaintiff, for the agreed value at that time, with interest thereon to the time of its rendition.

Richard Tukey & *al.* *vs.* Joseph Smith.

The removal of a sheriff from office after the attachment of personal property on a writ, does not destroy his right to keep it to await the judgment and execution, or excuse his neglect to deliver it, to be taken on execution, upon a demand made therefor within thirty days after final judgment.

Exceptions from the Western District Court, Whitman J. presiding.

The action was brought against the defendant, who had been sheriff of the county of *Cumberland*, for the default of *Sawyer*, one of his deputies, in not keeping and delivering a quantity of boards and board logs, attached by *Sawyer* on a writ in favor of the plaintiffs against *Seal* and *Bailey*.

The plaintiffs produced *Sawyer's* return on the writ of his attachment of the property, and proved a demand upon *Sawyer* for it, within thirty days after final judgment in the suit, and a neglect to deliver it to be taken on the execution.

The defendant offered to prove, that he was removed from the office of sheriff, previous to the recovery of judgment in the original suit, and contended, that he was not in law bound to keep the property attached, after his removal from office, and is not accountable for property, after his removal. He also contended, the exceptions state, that the property, and especially the logs in the river, was of such a nature, that it could not be kept to be delivered on the execution, and that the defendant is not therefore liable for the neglect to keep it.

The Judge rejected the testimony, and directed a verdict for the plaintiffs, to which the defendant excepted.

Rand, for the plaintiffs.

Willis and *Fessenden*, for the defendant.

The opinion of the Court was drawn up by

Emery J. — If the Judge in the District Court rejected testimony, which, if admitted, would have constituted a defence against the action, the exceptions must be sustained. It is probable the idea of taking the ground, on which the defendant relies, arose from some remarks of the Court in the case *Blake* v. *Shaw*, 7 *Mass. R.* 505. But in the present case, we must apprehend, that after the attachment was made, and while the defendant was in office, there was negligence, to the injury of the plaintiff.

The law invests the sheriff with power to attach, and imposes on him the duty to keep the property attached, to respond the judgment which may be obtained in the suit. His removal from office abates nothing of his power to retain the possession of the property, which he rightfully took upon the original writ, for thirty days after judgment, for the ultimate purpose, for which he began the service.

To be sure, he cannot, when removed, serve an execution issuing after his removal; but the special property remained in the deputy to secure the plaintiffs in the fruits of their judgment, if seasonably required. 13 *Mass. R.* 394.

The offer, by the defendant, to prove that he was removed from the office of sheriff previous to the recovery of judgment in the original suit, if permitted, we think would be altogether inadequate to exonerate the defendant from responsibility for the acts and omissions of his deputy.

The exceptions are therefore overruled.

LEVI CUTTER *vs.* THOMAS J. COPELAND.

Where the question is, whether the vendee of personal property shall hold it, or whether it shall be subject to the attachment or seizure of a creditor of the vendor, upon the ground that the sale was fraudulent, the interest of the debtor or vendor is balanced, and he is a competent witness for the vendee or his assignee.

And if the vendor be made the agent of the vendee in managing the property, still he is a competent witness.

There is no legal objection to the employment of the mortgagor as the agent of the mortgagee.

After the making of a mortgage of personal property, an arrangement, whereby the mortgagor is to continue in possession of the property as agent of the mortgagee, no visible alteration as to the property taking place, is not, in itself, *prima facie* evidence that the mortgage was fraudulent, but is only evidence to go to the jury in determining the question.

Possession of personal property by an agent is the possession of the principal.

The mortgagee of personal property may maintain trespass against an officer, seizing or attaching the same as the property of the mortgagor, without first giving notice of his claim to the officer, or stating his account of the amount due on the mortgage, and without any refusal or neglect of the officer to pay his demand and discharge his lien. Under the *st.* 1835, *c.* 188, it is the duty of the officer, first to make his demand in writing.

The law does not require, that when the vendor is made agent of the vendee, he should declare or make known his agency. His failing to do so, may be evidence before the jury to prove fraud, but from its omission, the Court are not bound to declare the sale to be fraudulent.

TRESPASS for a quantity of board logs of the plaintiff, alleged to have been taken in the *Kennebec* river, by a deputy of the defendant, then sheriff of the county of *Somerset.* The justification set up was, that the logs were the property of *John Bradley* and *Isaiah Warren*, and as such were taken on an execution against them in favor of *Stephen Chase.*

The plaintiff, to show property in the logs to be in himself, offered in evidence a mortgage bill of sale, dated *March* 16, 1837, from *Warren* to *Bradley;* an assignment of this bill of sale by *Bradley* to the plaintiff, dated *March* 18, 1837; and a mortgage bill of sale of the same logs from *Bradley* to *Cutter* of the same date. He also offered *Warren* as a witness, mutual releases having been given. The defendant still objected to his admission.

But EMERY J., presiding at the trial, overruled the objection. On *March* 21, 1837, *Cutter* gave *Warren* a written power of attorney to act for him in relation to these logs. Before the mortgage bills of sale were given, *Warren* had been in the possession and care of the logs, and continued his possession afterwards, without giving notice at that place of the bill of sale, or of his agency, and made no visible alteration with respect to the logs, and did not alter the marks upon them. There was much evidence spread upon the report of the case, tending to show, that the sale was or was not fraudulent, the character of which, pertinent to any questions of law in the case, sufficiently appears in the opinion of the Court.

The counsel for the defendant requested the Judge to instruct the jury, that a mortgagee of personal property cannot maintain trespass *de bonis asportatis* against an officer for taking the property on a debt of the mortgagor, such property being in the possession of the mortgagor, before such mortgagee has given notice of his mortgage, and stated his claim and account, and the attaching creditor or the officer has neglected or refused to pay his demand, and discharge his lien. And that such an arrangement as was entered into between *Bradley* and *Warren* and the plaintiff, furnished *prima facie* evidence of fraud, and was not consistent with public policy. The Judge declined to give these instructions. They also requested the Judge to instruct the jury, that the delivery of personal property, in case of a mortgage thereof, is requisite in order to enable the mortgagee to hold the same against a subsequent attaching creditor of the mortgagor; that the plaintiff had not proved such a delivery of the logs mortgaged to him by *Bradley* and *Warren*, as would enable him to hold them against an after attaching creditor; that the law requires such a change of possession as indicates to the world at large a change of ownership, and if such possession was not taken by the plaintiff in this case, it was no excuse that he entrusted it to a third person, to take possession for him, who was negligent, ignorant, or unfaithful. The Judge did not give such instructions, but did instruct the jury, that the execution and delivery of the mortgage bills of sale, or mortgage deeds, to the plaintiff, passed the property to the plaintiff, if the jury should find the transaction to be fair and honest, and not entered into with a fraudulent design or intention, and

they were satisfied that possession of the logs was taken by the agent under the power for the benefit of the plaintiff, according to the nature and situation of the property; that the power of attorney from the plaintiff to *Warren*, of itself furnished no evidence of fraud; that the plaintiff might lawfully constitute *Warren* his agent to take the care and possession of the logs; that the marks of *Bradley* and *Warren* remaining on the logs, and the logs remaining in their possession, were circumstances to be taken into consideration by the jury, to determine whether the transaction was fraudulent or not; that if *Warren* went on under the power of attorney, and acted as the agent of the plaintiff in the care and management of the mortgaged property, it was sufficient, without his declaring his agency, or doing any thing to indicate to the public any change in the ownership of the logs.

If the rulings and decisions of the Judge were erroneous, or if the evidence rejected ought to have been received, or if any was received after objection which should have been rejected, or if any instructions requested and withheld ought to have been given, or if the instructions given were incorrect, the verdict for the plaintiff was to be set aside; otherwise the verdict was to stand.

Howard & Osgood argued for the plaintiff, and cited *Case* v. *Reeve*, 14 *Johns. R.* 81; *Marquand* v. *Webb*, 16 *Johns. R.* 89; *Eldridge* v. *Wadleigh*, 3 *Fairf.* 371; 1 *Stark. Ev.* 91; *Woods* v. *Skinner*, 6 *Paige*, 76; 3 *Stark. Ev.* 48; *Abbott* v. *Hutchins*, 2 *Shepl.* 390; *Baring* v. *Calais*, 2 *Fairf.* 463; *Bridge* v. *Eggleston*, 14 *Mass. R.* 245; *Miller* v. *Baker*, 20 *Pick.* 285; *Cobb* v. *Haskell*, 2 *Shepl.* 303; 2 *Kent*, 516, 524, 530; *Bullock* v. *Williams*, 16 *Pick.* 33; *Forbes* v. *Parker*, *ib.* 462; *Barrett* v. *Goddard*, 3 *Mason*, 112; *Lunt* v. *Whitaker*, 1 *Fairf.* 310; *Houdlette* v. *Tallman*, 2 *Shepl.* 400.

Fessenden & Deblois, argued for the defendant, and cited *Cushman* v. *Loker*, 2 *Mass. R.* 106; *Emerson* v. *Prov. Hat. Man'g Co.* 12 *Mass. R.* 241; *Eldridge* v. *Wadleigh*, 3 *Fairf.* 371; *Rice* v. *Austin*, 17 *Mass. R.* 197; *Rice* v. *Bancroft*, 11 *Pick.* 469; *Prince v. Shepard*, 9 *Pick.* 176; *Corinna* v. *Exeter*, 1 *Shepl.* 321; *Bridge* v. *Eggleston*, 12 *Mass. R.* 245; *Clark* v. *Waite*, 12 *Mass. R.* 439; *Matthews* v. *Houghton*, 1 *Fairf.* 420;

Hackett v. *Martin*, 8 *Greenl.* 77; *Pickard* v. *Low*, 3 *Shepl.* 48; *Lunt* v. *Whitaker*, 1 *Fairf.* 310; *Tibbetts* v. *Towle*, 3 *Fairf.* 341; *Sargent* v. *Carr*, *ib.* 396; *Badlam* v. *Tucker*, 1 *Pick.* 389; *Holbrook* v. *Baker*, 5 *Greenl.* 309; *St.* 1835, *c.* 188; *Rev. St. of Mass. p.* 556, § 78, 79; *Gleason* v. *Drew*, 9 *Greenl.* 79; *Haskell* v. *Greely*, 3 *Greenl.* 425; *Brinley* v. *Spring*, 7 *Greenl.* 241; *Johns* v. *Church*, 12 *Pick.* 557; *Melody* v. *Chandler*, 3 *Fairf.* 282; *Shumway* v. *Rutter*, 8 *Pick.* 443; *Chapman* v. *Searle*, 3 *Pick.* 38; *Davis* v. *Moore*, 1 *Shepl.* 427; *Vincent* v. *Germond*, 11 *Johns. R.* 283.

The opinion of the Court was drawn up by

Weston C. J. — Where the question is, whether the vendee of personal property shall hold it, or whether it shall be subject to the attachment or seizure of the creditor of the vendor, upon the ground that the sale was fraudulent, the debtor or vendor is a competent witness for the vendee or his assignee. His interest is balanced. If the creditor prevails, his debt is discharged to the value of the property, and he is answerable for the value to his vendee. If the vendee prevails, he is no longer liable to him, but his debt, which might have been extinguished to the value of the property, remains unpaid. The contingency of different estimates of value, the law does not regard as sufficient to disturb this equipoise of interest. *Eldridge* v. *Wadleigh*, 3 *Fairf.* 371. *Warren*, the witness received, stood in this predicament. On the one side, was the lien of the plaintiff and the reversionary interest of the witness, which made up the value of the property; on the other was the same value, made available to the witness, by the extinguishment of his debt to an equal amount.

It is urged, that in addition to the liability of *Warren*, arising from his covenant to *Bradley*, which was assigned to the plaintiff, he is further liable for the faithful performance of his duty to him, as his agent. To this it may be answered, first, that his liability upon both grounds would not exceed the value of the property which would be balanced by the payment of the debt of the witness, to an equal amount. Secondly, the fidelity or unfaithfulness of the witness is not an issue between these parties; nor is that point determined by this verdict.

It is further insisted, that the witness should not have been permitted to testify, that it was his intention to act as the plaintiff's agent. If he did not so act, and had failed to do what he intended, his secret intentions were not admissible to affect the case. But he expressly and affirmatively testifies, that he did act as agent. This, of itself implies an intention to do so. A direct statement of such intention, was another form of expressing the same thing, not adding to its strength, or giving it a different character. We perceive no legal objection to the employment of *Warren* as an agent.

The arrangement entered into between *Bradley*, *Warren*, and the plaintiff, was not, in itself, *prima facie* evidence of fraud, as the Judge was requested to instruct the jury. All the circumstances indicative of fraud, whether in the employment of *Warren* as agent, or otherwise, were left to them, with proper legal instructions. The jury have found the transaction fair, and that the agent, in behalf of the plaintiff, took all the possession of the property, of which, from its nature and situation, it was susceptible. This was a question of fact, which it did not belong to the Court to decide; but one properly appertaining to the province of the jury. Possession by his agent was equivalent to possession by the plaintiff.

The letter from *Bradley* to *Chase*, was written after the title of the plaintiff had accrued; and was not admissible to affect it. *Bradley* might have been called as a witness by either party, his interest, like *Warren's*, being balanced.

The counsel for the defendant requested the presiding Judge to instruct the jury, that the mortgagee of personal property cannot maintain trespass against an officer, seizing or attaching the same, as the property of the mortgagor, until he has given notice of his claim to the officer, and stated its amount, or the officer has neglected or refused to pay his demand and discharge his lien. To sustain this request, the defendant has cited *Miller* v. *Baker*, 20 *Pick.*, 285. The Court do not decide this point, but if they had, it depends upon a provision in the statute of *Massachusetts*, which is not to be found in our statute. *Mass. revised laws, c.* 90, § 79. It is there provided, that the mortgagee shall furnish to the officer, in writing, a true and just account of the amount, for

which the property is mortgaged. By our statute of 1835, *c.* 188, § 3, the mortgagee is bound to do this, upon a demand in writing being first made upon him; and by the second section, the extinguishment of the lien, is made a condition precedent to the attachment of the property, for the benefit of the creditor. By the same section, without such previous payment, the officer might sell the debtor's right to redeem; but here he sold and delivered the property itself, without any saving of the rights of the mortgagee. In our judgment, the first requested instruction was properly withheld.

We are not aware that the law requires, that the agent should declare or make known his agency to others, to make his acts effectual in behalf of his principal. His failing to do so, might be evidence of fraud, upon which the jury have passed; but it is not an omission, which of itself the Court is bound to declare fraudulent. The finding of the jury is not submitted to our revision. There is no motion to set aside the verdict as against evidence. In our opinion, the rulings and instructions of the presiding Judge were in conformity with the law applicable to the case.

Judgment on the verdict.

Daniel Winslow *vs.* Samuel Tarbox.

The mortgagee of a vessel, who had never taken possession, or received a delivery thereof, is not liable for repairs or supplies furnished the vessel without his knowledge.

An absolute bill of sale of a vessel, with a bond given back at the same time to reconvey the same on the payment of a certain sum and all expenses arising in consequence of having received the bill of sale, by a stipulated time, is but a mortgage.

Daniel D. Smith, of *Boston*, on the 22d of *April*, 1836, being sole owner of brig *Mary Hart*, conveyed, by absolute bill of sale, one half the brig to *Samuel Tarbox*, of *Westport*, in *Massachusetts*, for the alleged consideration of $1,100, to secure a note from *Smith* to him, of $701,40; and *Tarbox*, at the same time, and as a part of the same transaction, gave back to *Smith* a bond,

conditioned, that as the bill of sale was made as collateral security for the payment of the note, that if the note was paid at maturity, and he was indemnified for any charges and expenses he might be at on account of the brig, he would reconvey the half to *Smith*. On *May* 24, 1836, *Smith* conveyed to the plaintiff, who resided in *Portland*, half of the same brig. In the winter of 1837, the brig was repaired and supplies furnished by order of *Smith*, by one *Tupper*, in *Charleston*, *South Carolina*, and sailed from thence on her return home, and was lost on her passage. *Tupper* drew on the plaintiff for the amount of repairs, and was paid. This suit is brought to recover one half of the sum. The other facts in the agreed statement of the parties, appear sufficiently in the opinion of the Court.

In the written arguments of the counsel,

Neal, for the plaintiff, contended: —

1. That to render *Tarbox* liable as part owner for repairs and supplies furnished in good faith, under the circumstances of this case, it was not necessary that he should have taken possession under the bill of sale; that he should have received the earnings of the vessel; that he should have had any care or management of her; nor to have had his name inserted in the enrolment; but that having always manifested his determination to assume the ownership from the moment she was repaired and fitted for sea, at *Portland*, to the time of her loss; having ordered possession to be taken of her, three several times; having twice ordered the enrolment to be changed; having ordered her to be sold, or taken and repaired, by *Tupper*, as his agent — *Tarbox* did all in his power to manifest his ownership, and was therefore liable to those who might be deceived by such appearances of ownership.

2. That these repairs and supplies were furnished in good faith, since there is no intimation to the contrary; and that *Winslow*, who paid the whole amount for these repairs and supplies; and *Tupper*, who furnished both, were deceived by these appearances of ownership; and that, if *Winslow* is not entitled to recover, the absolute bill of sale from *Smith* to *Tarbox*, the false consideration therein alleged, and the secret understanding between *Smith* and *Tarbox*, that *Smith* should continue to hold the brig on his own

account as before, notwithstanding the sale — an agreement of which it is admitted *Winslow* knew nothing — was a fraud upon the public in general, and upon *Winslow* in particular.

3. That the sale to *Tarbox*, being but of one half the vessel, the sale being made at *Westport*, while the vessel was at *Portland* undergoing repairs and fitting for sea, and *Smith* not in the actual possession thereof, actual delivery of the part sold was impossible, and the possession of *Smith* and *Winslow* was the possession of *Tarbox*.

4. That if a formal taking possession was possible and necessary, the possession of *Smith* and *Winslow* not being the possession of *Tarbox*, we contend that *Tarbox* was not obliged to follow her from port to port; that he might wait until she returned to *Portland*, or to *Westport*, where the conveyance was executed; and that the whole of the facts, taken together, are at least equivalent to the taking possession and change of enrolment, and therefore amount to an acknowledgment of ownership by *Tarbox* for all the purposes of this action.

5. That inasmuch as the draft by *Tupper* on *Winslow*, was for the whole amount of the supplies and repairs while *Tarbox* was believed by both to be half owner; as the said supplies and repairs were charged by *Tupper* to the brig herself, and not to *Smith*; and as *Winslow* wholly paid the draft so drawn by *Tupper*, he was entitled to recover of *Tarbox* one half of the amount of said draft.

He cited the following authorities, and commented upon them: *Tucker* v. *Buffington*, 15 *Mass. R.* 477; *Story's Abbott on Shipping*, 11, 12, and *note*; *Badlam* v. *Tucker*, 1 *Pick.* 397; *Hussey* v. *Allen*, 6 *Mass. R.* 163; *Brinley* v. *Spring*, 7 *Greenl.* 254; *Pearce* v. *Norton*, 1 *Fairf.* 252; *Dame v. Hadlock*, 4 *Pick.* 458; *Colson* v. *Bonzey*, 6 *Greenl.* 475; *Hatch* v. *Smith*, 6 *Mass. R.* 53; *Chapman* v. *Durant*, 10 *Mass. R.* 51; *James v. Bixby*, 11 *Mass. R.* 34.

Randall, for the defendant, contended, that *Tarbox* was not liable in this case: —

1. Because *Tupper*, who made the repairs at the request of *Winslow* and *Smith*, gave no credit to *Tarbox* as owner, and

made no charge against him. *Tucker* v. *Buffington*, 15 *Mass. R.* 477.

2. Because *Tarbox* was, at most, only mortgagee, and as such not liable, having never taken possession, nor caused the papers to be made out in his name. *Chinnery* v. *Blackburne*, 1 *H. Black.* 117; *Story's Abbott*, 19, *note*; *Colson* v. *Bonzey*, 6 *Greenl.* 474.

3. Because *Tarbox*, by neglecting to take possession of the brig, which was in port when conveyed, and for near a month afterward, had lost all claim to her, as to all the world except *Smith*. *Portland Bank* v. *Stubbs*, 6 *Mass. R.* 422; *Tucker* v. *Buffington*, before cited; *McIntyre* v. *Scott*, 8 *Johns. R.* 159; *Colson* v. *Bonzey*, 6 *Greenl.* 474.

4. Because *Tarbox* had he been actual part owner, would not be liable to the other part owner for repairs which he never consented to make. *Abbott*, 68; *Collyer on Part.* 681.

5. Because *Tarbox*, had he been actual owner, was not owner for the voyage, *Smith* having employed the vessel on his own account, from the time of giving the bill of sale to the time of the loss. *Abbott*, 22, 100.

The opinion of the Court was drawn up by

WESTON C. J. — In the *Portland Bank* v. *Stubbs*, 6 *Mass. R.* 425, it was laid down, that a mortgage of a chattel is not valid, without possession by the mortgagee. And in *Tucker* v. *Buffington et al.*, 15 *Mass. R.* 477, the Court say, "it may well be doubted, whether a mortgagee, who might have taken possession, but never has, can be considered as owner to any purpose whatever." *Smith* being, at the time when he made his bill of sale to *Tarbox*, sole owner of the brig, might have given him possession of the part secured to him. She remained at *Portland*, at no great distance from the residence of the defendant, for twenty-one days, before *Smith* conveyed the other half to *Winslow*. For any thing which appears, while she was plying from port to port, in coasting trips that season, the defendant might readily have obtained information of her position, and might thereupon have taken possession, but no movement to this effect was taken by him, until *October* or *November*, when the attempt failed. This was not ex-

cused by his ineffectual order on *Winslow*, to have his name, instead of *Smith's*, inserted in the enrolment. If actual delivery or possession is essential to give effect to such a mortgage, it does appear to have been wanting in this case; and the omission is not excused by the facts agreed. But we do not place the decision of the cause upon this point, being of opinion, that the defendant is entitled to judgment upon other grounds.

If the lien, intended to be created, by the bill of sale to the defendant and the bond to *Smith*, took effect, the position of the defendant was that of a mortgagee, who had not taken possession. In *Chinnery* v. *Blackburne*, 1 *Hen. Bl.* 117, *note*, it was said by *Lord Mansfield*, that "till the mortgagee takes possession, the mortgagor is owner to all the world, and he is to reap the profits." And it was accordingly held, that such mortgagee was not liable for repairs in *Jackson* v. *Vernon*, 1 *Hen. Bl.* 114. Opposed to this opinion, is the *dictum* of *Lord Kenyon*, in *Westerdell* v. *Dale*, 7 *T. R.* 306.

In *Philips* v. *Ledley*, 1 *Washington's C. C. Reports*, 226, *Washington J.* fully sustains the cases, cited from *Henry Blackstone*, with which he insists, that of *Westerdell* v. *Dale* is not necessarily at variance. And although he admits, that the mortgagee of a vessel, before possession delivered, has the legal title, yet he decides, that he is not responsible for repairs, or entitled to her earnings. In *McIntyre* v. *Scott*, 8 *Johns. R.* 159, the Court approve the decision in *Jackson* v. *Vernon*, and held, that a mortgagee out of possession, was not liable for supplies furnished to the ship. This last case, as well as the two cited from *Blackstone*, is distinctly recognized and approved in *Thorn* v. *Hicks*, 7 *Cowen*, 697. The weight of *American* authority then, is manifestly against the liability for repairs, of a mortgagee, out of possession.

But in this case, the mortgagor, *Smith*, was not only in possession, employing the vessel for his own purposes, and on his own account, but the repairs, for the payment of which the plaintiff claims contribution of the defendant, were made by *Tupper*, the consignee of *Smith*, at the request of *Smith*. It does not appear, that at the time they were made, he was advised, that the defendant had any interest whatever. *Tupper's* contract was therefore with *Smith*, the mortgagor in possession. In the original text of

Abbott, as cited by *Story*, *Story's Abbott*, 19, *note*, *Abbott* states, that where repairs are ordered by the mortgagor, they may be reasonably deemed in law, to have been furnished on his credit.

It is insisted, however, that the defendant rendered himself liable by his letter to *Tupper*, dated *February* seventh, and received on the eighteenth of that month. The repairs had then been made by *Tupper*, as the consignee of *Smith*, and by his order. The defendant directed *Tupper*, first, to take possession for him; secondly, to cause the vessel to be enrolled in his name; thirdly, to sell her if he could; and lastly, if that could not be done, he authorized him to repair her; but specially directed him, in no event, to suffer the vessel to leave the port of *Charleston* without taking possession, and causing her to be enrolled in the defendant's name. *Tupper* failed to comply with these requisitions, taking no measures for the benefit of the defendant, after the receipt of his letter. If the defendant was not liable before, he cannot be made so by that letter, upon the facts agreed.

Upon the whole, the opinion of the Court is, that the action is not sustained.

Plaintiff nonsuit.

Albus Rea *vs.* Oliver B. Dorrance.

The *st.* 1824, *c.* 272, allowing three days grace on promissory notes, inland bills of exchange, drafts or orders for the payment of money only, when the same shall be discounted by any bank, or left therein for collection, does not apply to such paper, unless the same shall have been so discounted or left for collection, *before it arrives at maturity by its terms.*

The indorser is always entitled to a notice, whether he becomes such for value, or lends his name for the accommodation of another party.

From the statement of facts agreed by the parties, it appeared, that the suit was against the defendant, as indorser of a paper, of which a copy follows. "*Portland, March* 27, 1837. For $1500. On the first day of *May* next, for value received, pay to the order of *O. B. Dorrance*, fifteen hundred dollars. *William W. Woodbury.*" This was addressed to the cashier of the *City*

Bank, *Portland*, and indorsed in blank by *Dorrance*. The draft on *May* 2, 1837, was duly presented to the cashier of the *City Bank* for payment, which was refused because *Woodbury* had no funds there, and on the same day notice thereof was given to the defendant. On the second or third day of *May*, 1837, the draft was left in the *Canal Bank* for collection, and on the fourth day of *May*, was, by order of the cashier of that bank, duly presented at the *City Bank* for payment, which was refused for want of funds of the drawer, and notice thereof given to the defendant. The suit was afterwards, on the same day, commenced. *Woodbury* had no funds in the *City Bank*, on the fourth of *May*, or during a week preceding. It was agreed, that the Court should order judgment to be entered for the plaintiff, if he was entitled to maintain his action, and if not, that a nonsuit should be ordered.

Fessenden & Deblois, for the plaintiff, contended: —

1. That demand on the drawer, or notice to the defendant, was not necessary, as they said it appeared from the facts, that the defendant was not an indorser in the common course of business, and the drawer had no funds in the bank. *De Bert* v. *Atkinson*, 2 *H. Black.* 336; *Terry* v. *Parker*, 6 *Ad. & El.* 502.

2. The note was left in a bank for collection, and comes within the provisions of the *st.* 1824, *c.* 272, and was entitled to three days grace.

Kinsman, for the defendant, contended, that the case *De Bert* v. *Atkinson* was distinguishable from the present. And that the case had been overruled, and was not now the law. *Brown* v. *Maffey*, 15 *East*, 216; 6 *Bing.* 523; *Groton* v. *Dallheim*, 6 *Greenl.* 476; *Campbell* v. *Pettengill*, 7 *Greenl.* 126; *Mohawk Bank* v. *Broderick*, 10 *Wend.* 304.

As no demand was made or notice given on the day the note fell due, and the draft was not on that day left in any bank, the defendant was discharged. Besides, the paper is not one of the description entitled to grace by the statute, if it had been seasonably left in a bank.

The opinion of the Court was prepared by

Weston C. J. — The *statute* of 1824, *c.* 272, allowing three days grace on promissory notes, inland bills of exchange, drafts or

orders for the payment of money only, when the same shall be discounted at any bank, or left therein for collection, does not, in our judgment, apply to such paper, unless the same shall have been so discounted or left for collection, before it arrives at maturity by its terms. If it were otherwise, the effect of laches, for three days, on the part of the holder of negotiable paper, might always be obviated, by leaving it in a bank for collection, on the last day of grace; thus producing vagueness and uncertainty, as to the limits of conditional liabilities, where the rules of law require precision and certainty. The time of payment on paper, which has once arrived at maturity, cannot be extended by this expedient.

This order or draft, being due on the first day of *May*, should have been presented for payment on that day. This not having been done, the general rule of law is, that the indorser is discharged. *Groton* v. *Dallheim*, 6 *Greenl.* 476.

It is, however, insisted, that in this case, such demand and presentment are excused. And it is assumed in argument for the plaintiff, that the indorsement made by the defendant, was not in the ordinary course of business, but that he lent his name merely to give credit to the paper. It is thence deduced, that demand and notice are excused, upon the authority of the case of *De Bert* v. *Atkinson*, 1 *H. Black.* 336. In the first place, the case does not find, that the defendant was an indorser, for the accommodation of the drawer, or that he did not receive and pass the paper, in the ordinary course of business. Secondly, the case of *De Bert* v. *Atkinson* would not be held to be law at the present day. The indorser is always entitled to notice, whether he becomes such for value, or lends his name for the accommodation of another party. *Bayley on Bills*, 5 *Ed.* 307, *note* 160; *Smith* v. *Becket*, 13 *East*, 187; *Brown* v. *Maffey*, 15 *East*, 216; *Leach* v. *Hewitt*, 4 *Taunton*, 731; *Groton* v. *Dallheim*, before cited; *Holland* v. *Turner*, 10 *Conn. R.* 308. In that case, the Court say, that *De Bert* v. *Atkinson* has been questioned and repeatedly overruled, both in *Great Britain* and in this country.

In the opinion of the Court, the plaintiff is not entitled to judgment, upon the facts agreed.

Plaintiff nonsuit.

JOHN MCKEEN, *Ex'r*, *vs.* SAMUEL PAGE.

Where the defendant gave the plaintiff's testator a note payable in two years, with interest annually, and the testator, at the same time, gave to the defendant a bond, therein agreeing to convey to him certain real estate on the payment of the note at its maturity, and all taxes on the real estate during the time, and further agreeing, that the defendant should occupy the premises during the two years, "free from rent excepting the payment of interest on his note, and if, after the expiration of said term, the" testator "shall make his election to enter upon the" defendant "and eject him from the premises," the defendant "shall be entitled to have his note given up, and this bond is to be given up, said note and bond being both void from the taking of such possession;" and where the defendant entered and occupied for three years, paying no rent nor any part of the note, when the testator entered and ejected the defendant, and afterwards this suit was brought upon the note; *it was held*, that the action could not be maintained.

THE action was on a note, dated *September* 28, 1835, for $600, given by *Page* to *Amos Lunt*, of whose estate *McKeen* is executor, payable in two years, with interest annually.

The facts appear in the opinion of the Court, and in the foregoing abstract of the case.

Everett argued for the plaintiff, citing *Tucker* v. *Randall*, 2 *Mass. R.* 283; *Estabrook* v. *Moulton*, 9 *Mass. R.* 258; *Greenleaf* v. *Kellogg*, 2 *Mass. R.* 568; *Hastings* v. *Wiswall*, 8 *Mass. R.* 455; *Cooley* v. *Rose*, 3 *Mass. R.* 221.

Morgan argued for the defendant.

The opinion of the Court was by

SHEPLEY J. — The testator obliged himself to convey certain estate to the defendant, upon payment of the promissory note now in suit according to its terms. The defendant entered into possession, and was to occupy it until the note was payable "free from rent excepting the payment of the interest due on his note, and the taxes." The interest was payable annually, and the testator might have collected it as it became due. And he might probably, at an earlier time, and in a proper suit, even after the defendant was ejected, have collected the rent. This suit is upon the note, and the question now submitted, is, whether it can be maintained. It was a part of the written contract, that "if, after the expiration of the said term of two years, the said *Lunt* shall

make his election to enter upon the said *Page* and eject him from the premises, the said *Page* shall be entitled to have his note given up, and this bond is to be surrendered, said note and bond being both void from the taking of such possession." The case finds, that the testator, after the lapse of three years, entered upon the premises and ejected the defendant; and according to the terms of their agreement, both note and bond were from that time void.

The argument for the plaintiff is, that the intention of the parties being clearly apparent, that the defendant should pay the rent or interest; although he failed to complete the purchase, the note should not be regarded as wholly void, but as an existing contract for the interest or rent. A construction so much at variance with the language used by the parties, is not authorized, when it is considered, that without it, the testator might have secured all his rights, by a seasonable attention to them. He omitted to collect the interest or rent while the remedy was perfect; and elected in accordance with his own agreement to destroy that remedy, so far as it depended upon the note. Any loss, which he may have suffered, must be regarded as occasioned by his own voluntary acts, or by his neglect to enforce his rights in season.

Plaintiff nonsuit.

Henry Moore *vs.* Leonard Bond *& al.*

If the notice to the creditor states that the debtor intends to take the oath provided by the poor debtor act of 1835, instead of that of 1836, and the creditor appears without objection, and examines the debtor, the justices have jurisdiction, and are entitled to proceed.

Under those acts, in determining when the six months expire, the day of the date of the bond should be excluded.

The act of 1835 does not take away the power given to the justices by previous acts on the same subject, to adjourn the examination to the next day.

If the justices, *at the request of the creditor*, adjourn the examination to the next day, being the day after the expiration of the six months, and then administer the oath and discharge the debtor, the law excuses strict performance, and will not suffer the creditor to take advantage from an act procured to be done by himself.

If the magistrates, in their certificate, refer to the act of 1835, instead of the act of 1836, as containing the oath administered, and annex a copy thereof, which shows that the proper oath was in fact administered, it is sufficient.

When a paper offered in evidence is referred to in a bill of exceptions, by a particular name or description, the legal presumption is, that the whole paper is intended to be presented to the court of law, and not so much of it only as may best comport with the description of it.

Exceptions from the Western District Court, Whitman J. presiding.

Debt on a bond, dated *October* 2, 1838, given by *Bond*, as principal, and the other defendant, as surety, to the plaintiff, to procure the release of *Bond* from imprisonment, on being arrested on an execution against him in favor of the plaintiff. On *March* 18, 1839, the keeper of the prison at the request of *Bond*, who was not then in confinement within the prison, applied to a justice of the peace who issued a notice to the plaintiff, which was served the same day, notifying him of the intention of *Bond* to take the benefit of the act entitled "An act for the relief of poor debtors," at the prison in *Portland*, on the 2d day of *April*, 1839. This was the title of the poor debtor acts of 1822 and of 1835, but not of that of 1836. *Bond* appeared at the prison, before two justices, on the second of *April*, and the plaintiff also attended and put interrogatories to the debtor. The justices "adjourned from *April* 2d, 1839, to the next day, *April* 3d, 1839, at the request of the

plaintiff, the debtor not objecting," and on that day "*Bond* was admitted to take the poor debtors' oath and was discharged." The other facts sufficiently appear in the opinion of the Court. The Judge ruled, that the plaintiff had failed to make out his case, and the plaintiff filed exceptions.

Howard & Osgood, for the plaintiff, argued in support of the five objections to the validity of the proceedings noticed in the opinion of the Court. In support of the first, they cited *st.* 1835, *c.* 195, § 10; *st.* 1836, *c.* 245, § 7; *Slasson* v. *Brown*, 20 *Pick.* 436; *Knight* v. *Norton*, 3 *Shepl.* 337. In support of the second, *Wheeler* v. *Bent*, 4 *Pick.* 167; *Presbrey* v. *Williams*, 15 *Mass. R.* 193; *Pease* v. *Norton*, 6 *Greenl.* 230; *Windsor* v. *China*, 4 *Greenl.* 298. In support of the third, *Ellis* v. *Paige*, 1 *Pick.* 45. In support of the fourth, *Prescott* v. *Wright*, 6 *Mass. R.* 20; *Heywood* v. *Hildreth*, 9 *Mass. R.* 393; *Waterhouse* v. *Waite*, 11 *Mass. R.* 207.

Fessenden & Deblois, argued for the defendants.

That under the *st.* 1835, *c.* 195, the justices who administered the oath might lawfully adjourn the examination of the debtor from day to day. This authority is a fair inference from the act itself. Again, the justices are in this regard constituted a court, and clothed with judicial power as to the subject matter of the statute. As a court, therefore, they have the power to adjourn, as incidental. *Cordis* v. *Sager*, 2 *Shepl.* 475; *Black* v. *Ballard*, 1 *Shepl.* 239; *Agry* v. *Betts*, 3 *Fairf.* 417; *Hayward, Pet'r*, 10 *Pick.* 358; *Haskell* v. *Haven*, 3 *Pick.* 404.

The objection, that the day on which the oath was administered was after the expiration of six months from the date of the bond, is fully answered by the case *Murray* v. *Neally*, 2 *Fairf.* 238.

The continuance having been granted on the motion of the creditor, he cannot now take advantage of his own motion, to render this act a breach of the bond. This would be taking advantage of his own wrong. *Haskell* v. *Haven*, 3 *Pick.* 404.

But as the debtor did all in his power to keep the bond and its condition, the creditor cannot avail himself of the breach. 10 *East*, 100; *Pease* v. *Norton*, 6 *Greenl.* 229; *Lewis* v. *Staples*, 8 *Greenl.* 173.

The opinion of the Court was drawn up by

SHEPLEY J. — The proceedings offered in evidence by the defendants, to prove a performance of the condition of the bond, are alleged to be insufficient for that purpose.

1. Because the notice to the creditor stated, that the debtor proposed to take the oath provided by the act of 1835, instead of that provided by the act of 1836. The object of the notice is to afford him an opportunity to appear and examine the debtor; and he did appear without objection and examine, and when both parties were present before the magistrates, and entered upon the examination at the time and place appointed, there can be no doubt, that they had jurisdiction and were entitled to proceed. It is analagous to a defective service, which becomes immaterial, when the party has appeared without objection. And so it was considered, in *Haskell* v. *Haven*, 3 *Pick.* 408.

2. It is said, that the day of the date of the bond, should be included in the computation of the six months. It was the intention of the legislature to allow the debtor six months to fulfill the conditions of the bond; and if there were any doubt respecting the construction, the principle established in *Windsor* v. *China*, 4 *Greenl.* 298, that, to save a forfeiture, the court should adopt a liberal one, requires, that the day should be excluded.

3. It is alleged, that the magistrates adjourned without any legal authority for it. By the prior acts they were authorized to adjourn, and the act of 1835 repeals only so much of them, as are inconsistent with its provisions, and as relate to jail yards and limits. If all the provisions in former acts, relating to the same subject, were to be regarded as repealed, there would be no longer any law requiring the justices to keep a record of their proceedings, or authorizing an adjournment, or the creditor to receive the answers, which the debtor had made and signed; and that part of the fourth section of the act of 1835, relating to the disclosure, would be obscure and defective; for while it provides, that the debtor shall sign and make oath to the same, it makes no provision, that the interrogatories shall be put and answered in writing. There is no express repeal of the former provisions on any of these subjects; nor can any inference be drawn from any

thing in the act of 1835, that such was the intention, while there is much to authorize a different conclusion.

4. It is said, that the defendants did not actually perform the condition, by taking the oath within the six months. The argument assumes, that, as a necessary consequence, the plaintiff is entitled to recover. Such, however, is not the conclusion of the law, for a strict performance is, in certain cases, excused. It is so, where the law interposes and prevents it, or the obligee, by his own act, occasions it. *Com. Dig. Cond. L.* 6 and 13. The plaintiff, in this case, procured the adjournment, and thereby occasioned the delay of which he now seeks to take advantage; but the law, by excusing performance under such circumstances, does not permit him to do it.

5. Because the proper oath was not administered. Although the certificate of the magistrates refers, by the title, to the act of 1835, instead of the act of 1836, as containing the oath administered, yet the copy of the oath, annexed to the certificate, and signed by the debtor, shows that the proper oath was administered. This, it is said, forms no part of the case, because, in the bill of exceptions, it is only stated, "said certificate is to form a part of this case." When a paper, offered in evidence, is referred to in a bill of exceptions, by a particular name or description, the legal presumption is, that the whole paper is intended to be presented to the court of law, and not so much of it only as may best comport with the description of it.

Exceptions overruled.

Enoch Osgood *vs.* Richard Davis.

Parol evidence is inadmissible to prove the intention of the parties to have been different from that expressed in writing, and thereby to alter the legal operation of a written instrument.

Thus, *in an action of assumpsit*, where it was shown, that one had made a written assignment "of all his right, title and interest in" a certain share in an incorporated stage company, without any covenants therein, parol evidence is inadmissible to prove, that he at the same time promised to make to the assignee, a good and effectual title to the share.

And if there be a special count on the warranty, and also the money counts, the cause of action being the same, there would exist the same objection to the reception of parol evidence under either count.

Exceptions from the Western District Court, Whitman J. presiding.

The declaration alleged, that in consideration of the exchange of certain land therefor, "the said *Davis* did then and there pretend and affirm to the plaintiff, that he was owner of five shares in the capital stock of the *Portland and White Mountain Stage Company*, and did then and there, in consideration that the plaintiff, at the special instance and request of the said *Davis*, would convey to him said real estate, affirm and assure the plaintiff, that his title to said shares was good; and did then and there undertake and promise that he would convey and assign to the plaintiff, one share and twenty fifty-fifths of another share of said capital stock, and make to the plaintiff a good and effectual title thereto, in exchange for the plaintiff's land," and that the plaintiff conveyed the land to the defendant, "giving full credit to the said affirmation and warranty of said *Davis*," "and the said *Davis* did then and there make and execute to the plaintiff a pretended conveyance and assignment of share numbered seventy, and twenty fifty-fifths of share numbered eighty." "Now the plaintiff, in fact, saith, that at the time of the pretended assignment and conveyance and of said affirmation and promise, said *Davis* was not proprietor of said shares, and had no right or title thereto, but said shares had long before been sold to another person to pay an assessment thereon, and this the defendant well knew, and so the defendant's pretended assignment and conveyance was wholly ineffectual to

make any good and valid title to the plaintiff, and so the defendant has not kept and fulfilled his said promise and undertaking." There was another similar count, excepting averring the consideration to have been $75 in money, with the money counts.

The plaintiff read in evidence a certificate, that *O. B. Dorrance* was proprietor of share number seventy in the company, "which share can only be transferred by making an assignment on the back of this certificate." On the back of the certificate was an assignment by *Dorrance* to *Clapp*, and by *Clapp* to *Davis*, of all his right, title and interest to the within share, and an assignment by *Davis*, as follows: "*Bridgton, Dec.* 15, 1838. For a valuable consideration, I hereby assign all my right, title and interest to the within share, to *Enoch Osgood*, of *Bridgton. Richard Davis.*" He also read in evidence a paper, of which the following is a copy. "*Bridgton, Dec.* 15, 1838. This may certify that I have this day sold to *Enoch Osgood*, twenty fifty-fifth parts of share numbered eighty, of the *Portland and White Mountain Stage* capital stock, the certificate of ownership being in my possession; and for a good and valuable consideration, I hereby agree to pay said *Osgood* in proportion of twenty to fifty-five of all the proceeds which may come into my hands on account of said share, on demand, after said funds or proceeds are received by me — said *Osgood* to pay in the same proportion of all assessments upon said share. *Richard Davis.*"

The plaintiff also offered to prove, by parol testimony, all the facts and allegations set forth in his writ. The Judge ruled, that it was not competent to prove the same by parol testimony, and directed a nonsuit, to which the plaintiff excepted.

Eastman & Howard, for the plaintiff.

Every vendor of personal property, is considered as warranting the title of the thing sold, though there be no express warranty. *Comyn on Con.* 263; *Heermance* v. *Verney*, 6 *Johns. R.* 5; *Doug.* 18; 1 *Ld. Raym.* 593; 5 *T. R.* 57; *Emerson* v. *Brigham*, 10 *Mass. R.* 202; 2 *Bl. Com.* 451; *Cro. Jac.* 474; 1 *Roll. Abr.* 90. The principle which excludes parol testimony, to explain or vary a written contract, has never been extended so far as to exclude it, when offered to prove an independent collateral fact. In many instances, the terms reduced to writing may con-

stitute but a small part of the real contract. 3 *Stark. Ev.* 1049, and *note ; Storer* v. *Logan*, 9 *Mass. R.* 55 ; *Barker* v. *Prentiss*, 6 *Mass. R.* 434 ; *Wallace* v. *Rogers*, 2 *N. H. Rep.* 506 ; *Schuyler* v. *Russ*, 2 *Caines*, 202 ; 1 *Stark. Cas.* 267 ; *Bradford* v. *Manley*, 13 *Mass. R.* 142. The parol evidence was admissible to show the part of the contract not reduced to writing. The assignment or transfer in this instance is no higher evidence, and purports to be nothing more, than is intended in a common bill of parcels.

Assumpsit, for money had and received, may be maintained. *Miller* v. *Miller*, 7 *Pick.* 133 ; *Dana* v. *Kemble*, 17 *Pick.* 549 ; *Woodward* v. *Cowing*, 13 *Mass. R.* 216 ; *Spring* v. *Coffin*, 10 *Mass. R.* 34.

H. Carter, for the defendant, argued : —

1. The writings not only contain no express warranty, but negative any implied warranty.

2. There can be no implied warranty. First, because the writings negative any. Second, because the principle of implied warranty of title, cannot be applied to the transfer of stock in corporations. Even in the sale of chattels out of the possession of the vendor, there must be an express warranty in order to support an action. 2 *Stark. Ev.* 902 ; *Com. on Con.* 117 ; 1 *Salk.* 210.

3. Parol testimony to prove a verbal affirmation amounting to a warranty, was inadmissible. The principle laid down in the books is — " No oral representation previously to a sale by written contract, will operate as a warranty ; for the writing is the only legitimate evidence to prove the terms of the contract." 2 *Stark. Ev.* 902 ; 4 *Taunt.* 779 ; *Mumford* v. *M'Pherson*, 1 *Johns. R.* 414 ; *Wilson* v. *March*, *ib.* 503 ; *Dean* v. *Mason*, 4 *Conn. R.* 428.

4. The plaintiff, if entitled to recover at all, cannot recover as for money had and received. To recover on such count, *money* must have been received, or property received as money.

The opinion of the Court was drawn up by

Shepley J. — The rule of law which excludes parol evidence, tending to contradict or vary a written contract, may sometimes permit the crafty to take advantage of the ignorant and negligent ;

but the propriety of adhering to one of so much importance and usefulness, is but little lessened by such a consideration.

The writing on the back of the certificate of share numbered seventy, signed by the defendant, does not purport to sell or assign the share itself, but only the right, title and interest which the defendant had to the share. It is such a writing as one, who had held the share only for a special purpose, and who, after that purpose had been accomplished, intended to part with whatever of title he received, might properly sign. It would seem to have been drawn with the design to exclude any inference, that he warranted the title to the share, for it is language become familiar by being frequently used in conveyances, where there is no intention to warrant the title. Parol evidence is inadmissible to prove the intention of the parties to have been different from that expressed in writing, and thereby to alter the legal operation of a written instrument.

In *Powell* v. *Edmunds*, 12 *East*, 6, such evidence, tending to prove, that an auctioneer warranted, that a lot of timber, described in the written conditions of sale, would amount to eighty tons, was excluded. And in *O'Harra* v. *Hall*, 4 *Dallas*, 340, where a bond was assigned in general terms, it was decided, that parol evidence could not be received to prove, that the assignor agreed to guarantee the payment of it.

To admit parol evidence in this case to prove, that the bargain was for a good title, would be, to change the apparent intention of the parties, as disclosed in their written contract, as well as to vary and alter the legal construction of it. This case is not like that of a sale by a bill of parcels. Such a writing was considered, in *Bradford* v. *Manley*, 13 *Mass. R.* 142, as designed to state the fact simply, that a sale had been completed, without intending to state the terms of the contract, and the parol evidence was not regarded as contradicting or varying the act of the parties existing in writing. To permit the parol evidence offered in this case, would be like permitting it to vary the quantity or description of goods contained in a bill of parcels.

The contract relating to share numbered eighty, states, that a part of it had been sold; and it then proceeds to state, specifically, the obligations, which the defendant assumed in relation to it. A

sale, in the proper sense, could not have been intended for no actual transfer of a part could take place. The share could not be divided, nor could the plaintiff control or sell the portion. The design must have been, to give the plaintiff the beneficial interest in a part, and the terms upon which the defendant became liable to account for that beneficial interest, are stated in the contract. In attempting to make the defendant account to him for that interest upon different terms, the plaintiff must meet difficulties similar to those, which have been stated, respecting the sale of the other share.

In stating the offer to prove, by parol evidence, all the allegations set forth in the writ and declaration, it must have been understood, that the money count was for the same cause of action as the other counts, and there would exist the same objections to a reception of the testimony under that, as under the other counts.

The testimony was not offered to prove, that the defendant knowingly made false and fraudulent representations in relation to the title, to induce the plaintiff to enter into these contracts.

Exceptions overruled.

Daniel Harmon *vs.* Henry Merrill *& al.*

Neither the town where her settlement is, nor the mother of a bastard child, has power to settle a prosecution under the bastardy act, against the alleged father of the child, without the consent of the other, and a settlement with either one is no discharge; and therefore a note, given to the treasurer of the town, by the alleged father, on a settlement with the overseers, without the assent, approval, or ratification of the mother of the child, is without consideration, and no suit can be supported upon it.

Exceptions from the Western District Court, Whitman J. presiding.

Assumpsit on a note by the defendants to the plaintiff, as treasurer of the town of *Durham*, promising to pay him $125,00 in eight months, with interest. The whole evidence appears in the exceptions, but enough is found in the opinion of the Court here, to understand the principle of law decided. On the evidence, the

District Judge instructed the jury, that if it was believed, the plaintiff could not maintain the suit. The plaintiff filed exceptions on the return of the verdict against him.

Fessenden & Deblois argued for the plaintiff, and cited *st.* 1821, *c.* 72; *Dennett* v. *Nevers*, 7 *Greenl.* 403; *Com. on Con.* 13; 8 *Mass. R.* 200; 10 *Mass. R.* 230; 15 *Mass. R.* 35.

Codman & Fox argued for the defendants, and cited 13 *Pick.* 285; *Dennett* v. *Nevers*, 7 *Greenl.* 403; 6 *Pick.* 104; 3 *Bingh.* 424; 17 *Pick.* 252; 5 *Mass. R.* 541.

The opinion of the Court was by

SHEPLEY J. — It appears from the testimony in the case, that one *Maria Cooper*, a pauper of the town of *Durham*, had made a complaint against *Merrill*, as the putative father of her child, upon which a warrant had issued; and *James Strout*, one of the overseers and special agent of the town, to adjust the business with *Merrill*, received the warrant and proceeded to the town of *Jackson*, where they agreed upon a conditional settlement. The promissory note now in suit, was received on such adjustment, and was to be delivered back, and the parties were to be again restored to their legal rights, if *Merrill* should appear at *Durham* before the next court, and submit to an arrest and examination there upon the warrant. If he did not so appear, the design seems to have been, that he should pay the note, and that the prosecution should be considered as settled. He did not appear according to the agreement.

It was decided, in the case of *Furbish* v. *Hall*, 8 *Greenl.* 315, that the property of a pauper does not rest in the town or overseers of the poor upon receiving supplies; and that the overseers could not submit a claim of the pauper to arbitration.

In the case of *Dennett* v. *Nevers*, 7 *Greenl.* 399, it was decided, that the statute, which prohibits the settlement of such a prosecution without the consent of the overseers, authorized the town having an interest in it, to advance its funds and aid in the prosecution. But it did not decide, that the town or its overseers thereby acquired the power of settling the prosecution, without her consent. While she cannot do it without theirs, they cannot do it

without hers. There must be a mutual consent to discharge the accused party.

There is no evidence of her consent, or of any authority from her to make the conditional settlement, which was the consideration of the note. Nor does it appear, that she had approved or ratified these proceedings. *Merrill* was therefore still liable to be dealt with in the same manner as before the note was given.

The adjustment being ineffectual to afford him any protection, if he were required to pay the note, he must do it without having received any consideration for it, and without depriving the town or the pauper of any of their legal rights.

Exceptions overruled.

Ezra Carey *vs.* James Osgood *& al.*

Under the poor debtor acts of 1835 and 1836, the certificate of two justices of the peace and of the quorum, that the debtor had notified the creditor according to law of the time and place of examination and administering of the oath to the debtor, is conclusive evidence of that fact, in a suit upon the bond.

Parol evidence, therefore, that a notice of but *fourteen days* was in fact given, when the law requires fifteen at least, is inadmissible.

Debt on a bond given by *Osgood*, as principal, and the other defendants as sureties, dated *June* 6, 1839, to procure the liberation of *Osgood* from arrest on an execution against him in favor of the plaintiff, under the poor debtor acts of 1835 and 1836. On *December* 6, 1839, *Osgood* submitted himself to examination before two justices of the peace and of the quorum, and was admitted to take the poor debtor's oath and discharged. The justices certified, that *Osgood* had caused "*Ezra Carey*, of, &c., the creditor at whose suit he was so arrested, to be notified according to law, of his, the said *Osgood's*, desire of taking the benefit of the acts for the relief of poor debtors." The plaintiff offers to prove, by parol, if the same be legally admissible on objection being made thereto, that the notice was given but fourteen days before the said sixth day of *December*, 1839, when the statute requires at

least fifteen. The plaintiff did not attend on the sixth of *December*, and an appraisement was made of certain property to satisfy the execution.

In their statement of facts, the parties agreed, that if the plaintiff was entitled to recover, judgment was to be entered for him; and if not, he was to become nonsuit.

C. Washburn, for the plaintiff, contended: —

That the acts of the justices, where they have no jurisdiction, may be avoided by plea or evidence. *Haskell* v. *Haven*, 3 *Pick.* 401. The certificate of the justices, that legal notice had been given, is not conclusive. The failure to notify the creditor is a fatal defect, and renders the subsequent acts of the magistrates wholly ineffectual. *Slasson* v. *Brown*, 20 *Pick.* 436.

The preliminary proceedings must be in conformity to the provisions of the statute, to give the justices jurisdiction. *Putnam* v. *Longley*, 11 *Pick.* 481.

No legal service of the notice having been made upon the plaintiff, the justices had no power to act, and it comes within the principle of the case *Knight* v. *Norton*, 3 *Shepl.* 337.

Howard & Osgood, for the defendants, contended: —

That the certificate of the justices, that the execution creditor was notified according to law, is to be received as conclusive evidence of that fact. *Black* v. *Ballard*, 1 *Shepl.* 239; *Agry* v. *Betts*, 3 *Fairf.* 415. The *st.* 1835, *c.* 195, § 10, makes it the duty of the justices to examine the notification and return, and if regular and in due form, to proceed. The objection to the notice should have been made before the justices. By the statute, they are made the tribunal to settle the question. Whether the papers were in proper form or not, was expressly submitted to the decision of the Court, by the parties, in their statement of facts in *Knight* v. *Norton*, and this question was not before the Court. The statute of *Massachusetts* is wholly different from ours, and their decisions on this subject have no application.

The opinion of the Court was drawn up by

Weston C. J. — It appears to us, that the opinion of this Court, in *Agry* v. *Betts et al.* 3 *Fairf.* 415, is well sustained, upon legal principles, and that it is decisive in this case. The

language of the statute of 1822, *c.* 209, § 13, there commented upon, authorizes the justices to examine the return of the notification; and if it shall appear to be duly made, to administer the oath. The statute of 1835, *c.* 195, § 10, provides, that the justices may examine the notification and return, and if regular and in due form, are to proceed; and if they administer the oath, they are required to certify, that the debtor had caused the creditor to be notified according to law. Upon this point, we perceive no substantial difference between the statute of 1822 and of 1835. The latter gives to the justices jurisdiction and power to examine the notification and the return. This necessarily confers the power to decide upon their correctness. They examine with a view to decide. The examination could have no other object; and their decision upon this point, is to be made a part of their certificate.

Slasson v. *Brown et al.* 20 *Pick.* 437, has been cited as an opposing authority. That depended upon the revised law of *Massachusetts*, *c.* 98, for the relief of poor prisoners. That statute confers no power upon the justices, to examine the notification and return. It does not therefore conflict with *Agry* v. *Betts*, the statute of *Massachusetts* not containing the provision, which was the ground of that decision.

Regarding the certificate of the justices as conclusive, the evidence proposed, with a view to control it, is not legally admissible. The appraisal of the notes has had no influence upon the conclusion, to which we have arrived.

Judgment for the defendants.

JOHN B. JONES *vs.* MAINE MUTUAL FIRE INSURANCE COMPANY.

Where a person has his store insured by a company, one of the rules in the policy being, "That no person whose property is insured in the company, shall be allowed to insure the same, or any other property connected with it, in any other company, or at any other office; and in case of any such insurance, his policy obtained from this company shall be void and of no effect;" and where he afterwards insures the goods in the store at another office; the policy on the store is not made void by obtaining the policy on the goods.

THE parties agreed to submit to the opinion of the Court, upon a statement of facts, the question, "whether the insurance obtained on the 27th day of *March*, on the goods then in said store destroyed the policy effected by the defendants? If it did, the plaintiff is to be nonsuit, otherwise the defendants are to be defaulted."

From the facts agreed, it appears, that on *February* 9, 1839, the defendants insured, against perils by fire, the sum of two hundred dollars on the store of the plaintiff in *Lewiston;* and that on *March* 27, 1839, the plaintiff obtained insurance at an office in *Boston* on his stock in trade in the same store, against perils by fire to the amount of $1200. Afterwards, during the year 1839, the store was wholly consumed by fire. In the second article of the by-laws of the company, § 2, when speaking of the rates of premium on different classes of risks, are found the following words. "First class. Houses unconnected with and standing at least four rods from any other building." "Second class. Like buildings, when connected with or standing within four rods of any other building." The eighth section is: — "That no person whose property is insured in the company, shall be allowed to insure the same, or any other property connected with it, in any other company, or at any other office; and in case of any such insurance, his policy obtained from this company shall be void and of no effect."

The case was submitted on the briefs of the counsel.

Codman & Fox, for the plaintiff, cited *Cornell* v. *Le Roy*, 9 *Wend.* 163; *Tyler* v. *Ætna Ins. Co.* 12 *Wend.* 507; 1 *Moody & M.* 90.

Fessenden & Deblois, for the defendants.

The opinion of the Court was by

SHEPLEY J. — To connect, is to join one thing to, or unite it with another. And a literal exposition of the language of the eighth section of the by-laws, would not prohibit the plaintiff from insuring his stock in trade at another office. That would be a very forced construction, which should regard goods deposited in a warehouse for a few days, to be again removed, as connected with it. And goods in a shop for sale, are placed there for safe keeping and exhibition, until sold; and they have no necessary union with that, more than with any other shop. And they cannot, by any proper use of the word, be considered as connected with it. There is nothing in this case indicating, that the parties used the word in any unusual sense. On the contrary, it appears to have been used in the second section of the by-laws, in its ordinary acceptation. In the first class of risks by houses unconnected with other buildings, are intended, those not united with or joined to them. And in the second class, by buildings connected with others, are designated those so joined or united. A just exposition of the language, and the apparent intention of the parties in the use of it, authorize the conclusion, that the plaintiff has not incurred any forfeiture by obtaining insurance upon his goods elsewhere.

Defendants defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK, APRIL TERM, 1841.

PETER SMITH *vs.* EDMUND COFFIN.

The *st.* 1833, *c.* 58, contemplates, that a belief in a Supreme Being is a prerequisite to the admission of a witness to testify. But after he has been admitted, no inquiry should be allowed as to his religious opinions.

The declarations of a witness are competent evidence of his disbelief of the existence of a Supreme Being.

When such declarations are proved, the person offered as a witness cannot be permitted to testify to his belief in a Supreme Being, in order to qualify himself for admission.

Although, after the proof of such declarations, an honest change of opinion may be shown, and the proposed witness thereby rendered competent, yet the testimony of another person, that the witness offered was then, and for many years next preceding, had been, a *Universalist*, and was an active member of a *Universalist* society, and has ever been, and then was, a firm believer in the *Christian* religion, was held to be inadmissible.

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

Replevin, for articles attached as the property of *Richard Bettes*, by the defendant, a deputy sheriff. To prove property in himself, the plaintiff offered *Bettes* as a witness. The counsel for the defendant objected to his being sworn, because *Bettes* was an atheist and a disbeliever in the existence of a Supreme Being; and offered *B. Gordon*, as a witness to prove the same. The plaintiff's counsel objected to the introduction of this testimony, requesting the Judge to admit *Bettes* to testify himself as to his

religious belief, and protesting against the testimony to prove the declarations of *Bettes*, unless he was first admitted to testify to his belief in the existence of a Supreme Being. The Judge overruled the objection, and permitted *Gordon* to testify. His testimony is stated in the opinion of the Court. The exceptions then state, that "the plaintiff's counsel offered to prove by said *Richard Bettes*, and by one *Azubah Bettes*, that the said *Richard Bettes* was now, and for many years last past had been, a *Universalist*, and was an active member of a *Universalist* society in *Biddeford*, and had ever been a firm believer in the *Christian* religion, and was now. The Judge ruled that this testimony was inadmissible, and nonsuited the plaintiff." The plaintiff filed exceptions.

The case was argued at the *April* term, 1839.

Leland, for the plaintiff, contended, that *Bettes* ought to have been permitted to testify, on the *voire dire*, and explain his religious belief. The public interest requires, that the testimony of witnesses should not be excluded. No one should be allowed to deprive a party of his testimony, by declaring to some one his disbelief in a Supreme Being. The reason of the rule is the same both in criminal and civil proceedings. *Bettes* should have been suffered to show, that he had renounced all atheistical opinions, if he ever entertained such. But certainly, the other witness, offered to prove that *Bettes* was an active member of a religious society, and ever had been, and then was, a firm believer in the *Christian* religion, was admissible. Such testimony was admissible to contradict the testimony of *Gordon*, and to show that he had mistaken or misrepresented the religious opinions of *Bettes*. If such testimony is to be excluded, then if one is to be found who will say that a man offered as a witness is an atheist, his testimony is lost to the party, although all the rest of his neighbors should say that the charge was groundless. 3 *Stark. Ev.* 92; *Paley's Ev. of the Christian Religion*, 61; *Com.* v. *Waite*, 5 *Mass. R.* 261; 7 *Com. Dig.* 461; *Rex* v. *Gilham*, 1 *Esp. R.* 285; *St.* 1833, *c.* 58; *Swift's Ev.* 50; 1 *Wright*, 126.

A. G. Goodwin, for the defendant, said, that the *st.* 1833, *c.* 58, left the common law as it found it; that to be a competent witness, a man must believe in the existence of a Supreme Being.

The very definition of an oath implies such belief. Incompetency from this cause, as well as from others, may be proved by others, and the party is not obliged to rely on any statement of such person, on the *voire dire.* When excluded by other evidence, he cannot be admitted to purge himself by his own testimony. When a confession of the belief of a proposed witness has been proved, it is not competent to disprove it by evidence, that he has made different statements on the subject to others. *Norton* v. *Ladd,* 4 *N. H. Rep.* 444; *Butts* v. *Swartwood,* 2 *Cowen,* 431; *Wakefield* v. *Ross,* 5 *Mason,* 16; 1 *Phil. Ev. c.* 3, § 19, 20; 7 *Conn. R.* 66; *Jackson* v. *Gridley,* 18 *Johns. R.* 98; *Willes' Rep.* 538; *Swift's Ev.* 48; *Peake's Ev.* 267; *Stark. Ev. (Ed. in* 2 *vol.)* 22, 123; *Curtis* v. *Strong,* 4 *Day,* 51; 1 *Root,* 480; 2 *Root,* 399; 2 *Overton,* 80; 4 *Serg't & R.* 298.

The opinion of the Court was drawn up, and delivered at the *September Term,* 1841, by

EMERY J. — Our statute passed the 21st *February,* 1833, *c.* 58, enacts, "that no person, who believes in the existence of a Supreme Being, shall be adjudged an incompetent or incredible witness, in the judicial courts or in the course of judicial proceedings in this State, on account of his opinions in matters of religion, nor shall such opinions be made the subject of investigation or inquiry."

Here a witness was rejected, because, when he was offered, the defendant's attorney objected to him, because the proposed witness was an atheist, or disbeliever in the existence of a Supreme Being. And one *Benjamin Gordon* was called, who testified, that in a conversation which he recently had with *Richard Bettes,* the offered witness, he repeatedly said, "he did believe that any thing and every thing was God, that that stick, that pair of wheels, *Jordan* mountains, was God, and that every thing like that was God, and that every thing about them was God, and that there was no other God in heaven or earth, but what was in that or them." He, *Gordon,* further stated, in reply to a question put by plaintiff's attorney, that said *Bettes* had, before the time of the conversation above referred to, said that he was an *Universalist,* and that he, the said *Bettes,* was friendly to that class of *Christians,* and also that

he had expressed himself friendly to the religion of the *Unitarian* denomination. This testimony of *Gordon* was not introduced before the plaintiff objected to its introduction; for the objection against its introduction was interposed before said *Gordon* was sworn. We apprehend that the permission to let in the testimony of *Gordon* was right. "For the opinion and belief of men can be known only by what they have said or written. Their declarations, therefore, either verbal or written, are the proper evidence of their opinions, and are not to be considered in the light of hearsay evidence, but as facts." *Swift's Law of Evidence*, 48.

In the *English* treatises on the law of evidence, it is a general rule, that those infidels, who believe in a God, and that he will punish them in this world, or, as it seems the next, if they swear falsely, may be admitted as witnesses.

Roscoe's Criminal Evidence, 96, citing *Omichund* v. *Barker*, *Willes' R.* 549, and the opinion of *Willes J.* was, that those infidels, who either do not believe in a God, or if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances; for this plain reason, because an oath cannot possibly be any tie or obligation upon them.

It is not yet settled by the *Scotch* law, whether a witness, professing his disbelief in a God, and a future state of reward and punishment, is admissible. "When the point shall arrive," says *Mr. Alison*, "it is well worthy of consideration, whether there is any rational ground for such an exception" — "whether the risk of allowing unwilling witnesses to disqualify themselves, by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession." *Roscoe's Crim. Ev.* 96, 97, citing *Alison Prac. Cr. L. Scotl.* 438.

In *New Hampshire*, in the year 1828, in the case *Norton* v. *Ladd*, 4 *N. H. Rep.* 444, one *John Hunter* was offered as a witness. It was proved, that he had, several times, within a short time before the trial, stated, that he had no belief in the existence of a God. "By the Court. *He who openly and deliberately avows* that he has no belief in the existence of a God, furnishes clear and satisfactory evidence against himself, that he is incapable

of being bound, by any religious tie, to speak the truth, and is unworthy of any credit in a Court of Justice. This witness is proved to have repeatedly avowed such a sentiment. And we have no hesitation *in rejecting him as a person worthy of no credit.*" Citing *Butts* v. *Swartwood*, 2 *Cowen*, 431; *Jackson* v. *Gridley*, 18 *Johns. R.* 98; *Omichund* v. *Barker*, *Willes' Rep.* 538. The objection was taken to *Hunter's competency.*

In *Jackson, ex dem. Tuttle* v. *Gridley*, 18 *Johns. Rep.* 98, it was held, that one who does not believe in the existence of a God, nor in a future state of rewards and punishments, cannot be a witness in a court of justice, under any circumstances; and that when it was proved, that a person, offered as a witness, had, within three months before the trial, often, deliberately and publicly, declared his disbelief in the existence of a God, and a future state of rewards and punishments, *he cannot*, on being called to be sworn and objected to, *be admitted to deny those declarations, or to state his recantation of them, and his present belief in a God, &c.*

The like decision was made in *Connecticut*, in 1809, in the case of *Curtis* v. *Strong*, 4 *Day's Cases in Error*, 51.

In *Wakefield* v. *Ross*, 5 *Mason's R.* 16, the counsel for the defendant objected to the admission of two witnesses, father and son, offered, upon the ground of their want of any religious belief; and to establish the fact, a witness was called, who swore that he knew the persons well; that he had often heard the son say, that he did not believe in the existence of a God, or of a future state. As to the belief of the father, he said that he had heard him declare, that he did not believe in a future state; that he had read *Tom Paine's* works, and did not know, whether he, the father, believed anything. In answer to a question from the Court, whether the father believed in a state of rewards and punishments, the witness answered only as before, adding, that from the statements of the father he did not seem to believe any thing. It was then suggested, on the part of the plaintiff's counsel, that the father and son might be examined personally as to their belief, for the father might be a *Universalist.* To this suggestion, the Court answered, that the defendant's counsel, who took the objection, were not bound to rely on the testimony of these persons for proof of incompetency. The Court said, "We think these persons are not competent witnesses. Per-

sons, who do not believe in the existence of a God, *or of a future state, or who have no religious belief*, are not entitled to be sworn as witnesses. The administration of an oath supposes, that a moral and religious accountability is felt to a Supreme Being, and is the sanction, which the law requires, upon the conscience of a person, before it admits him to testify." This was in *Rhode Island*.

In *New York*, in the case cited from 18 *Johns. R.* 98, it was considered, that a *witness may be restored to his competency*, on giving satisfactory evidence *of a change of mind*, some time before the trial, so as to repel the presumption, arising from his former declarations of his infidelity, *existing at the time he is called to be sworn.* And it was further held, that, though infants may be examined as to their religious knowledge and belief, it is merely to test their capacity to give evidence, or their understanding of the nature and obligation of an oath. But an adult of sound mind, when called as a witness, and objected to as an infidel, is not to be questioned as to his religious creed.

In *Hunscom* v. *Hunscom*, 15 *Mass. R.* 184, the objection to the competency of the witness offered, was founded upon his professed *disbelief of a future state of existence*, and evidence was offered to prove his repeated declarations of such disbelief. But the Court, *Parker*, Chief Justice, *Thatcher* and *Wilde*, Justices, admitted him to be sworn, and said the objection *went only to his credibility.*

When we consider what changes have been made as to the admissibility of witnesses, we may well deliberate, before we hastily adopt rules, which may lead to consequences of a most disappointing and distressing character. At one time, persons not believing in the *Christian* religion, could not be admitted as witnesses, nor *Quakers*, who would not take an oath.

In the celebrated opinion, delivered by Chief Justice *Willes*, in *Omichund* v. *Barker*, which was not published from his own manuscript till 1799, about fifty years after it was delivered, he says, "Supposing an infidel who believes a God, and that he will reward and punish him in this world, but does not believe a future state, be examined on his oath, as I think he may, and on the other side, to contradict him, a *Christian* is examined, who be-

lieves a future state, and that he shall be punished in the next world as well as this, if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a *Christian*, because he is plainly not under so strong an obligation." And he quotes *Lord Stairs*, in his *Institutes of the Laws of Scotland*, page 692. "It is the duty of Judges, in taking the oaths of witnesses, to do it in those forms that will most touch the conscience of the swearers, according to their persuasion and custom; and the *Quakers* and fanatics, deviating from the common sentiments of mankind, refuse to give a formal oath, yet if they do that which is materially the same, it is materially an oath."

Swift, in his *Law of Evidence*, page 50, says, it may still be a question, whether it would *not originally have* been better, to consider questions of this kind, as going to the credit rather than the competency. *In the conflict of parties, both religious and political, misrepresentations will often take place*, and it will commonly *be safer to rely on the general character for truth, which a man has acquired, by his conduct in society, than on his mere opinions.* The application of the rule, in *Connecticut*, defeated a devise, the party rejected being one of the subscribing witnesses.

In *Walker's Introduction to American Law*, 544, he remarks, that the oath of an atheist, though it wants the religious obligation which belongs to the oath of the believer, has yet the same temporal obligation resulting from the pains and penalties of perjury. For these reasons, he says, it would seem that the want of religious belief ought not to render a witness incompetent, though the jury may properly take it into consideration in weighing his credibility.

It was doubted, in *Ohio*, whether a defect in religious belief should go to the competency or merely to the credibility of the witness. The objection was raised, and it was shewn by third persons, that the witness' creed, so far as collectable from his conversations, was as follows: he said, he did not believe in the existence of a God; but added, that he saw God in trees, bushes, herbage, and every thing he saw; that a man would be punished for falsehood by his conscience, and in this life only; that a man is bound to speak true at all times, and an oath imposes no additional obligation. The Court held, that it was unnecessary to

inquire, whether in *Ohio*, the same rule should prevail as in *England*, for if it should, the witness was competent. *Wright J.* said, "The Court thought his declarations equivalent to an avowal of belief in the existence of a God. He sees him in all created nature." *Easterday* v. *Kilborn*, 1 *Wright*, 345 – 6.

And in *South Carolina*, a person who does not believe in future rewards and punishments, but that our evil deeds will all be punished in this world, and that we shall exist immortal in a future state, exempted from punishment for deeds done in the body, is a competent witness. *Farnandis* v. *Henderson*, in chancery before *Ch. Desaussure*, *August*, 1827, *South Car. Law Journal*, 202, cited in *Cowen & Hills'* notes to *Phillips' Treatise on the Law of Evidence*, *part* 2*d* in the *Supplement*, *page* 1503.

In this case, we think that our statute contemplates, that the belief in a Supreme Being is a pre-requisite for the admission of a witness; but after he is admitted, no inquiry is to be tolerated as to his religious opinions. Yet as it is calculated to impose, as it were, a penalty of degradation and disgrace upon a citizen, to object to his being admitted as a witness for such disbelief, according to the decisions in *New York* and *Connecticut*; and is against the spirit of our institutions in other respects, inasmuch as it, as it were, condemns without a hearing; (for, according to decided cases, the person excepted against is not permitted to explain;) therefore, as the law seems to stand thus, courts ought to require proof of clear, open, deliberate, avowals of the disbelief on the part of the proposed witness in the existence of a Supreme Being. It is communicated, that the witness asserted that he was a *Universalist*, who may believe in punishment in this world. And our statute is entitled "An act to secure to witnesses freedom of opinion in matters of religion."

Besides, agreeably to our statute, one conscientiously scrupulous of taking an oath, may be admitted to affirm, which will be under the pains and penalties of perjury. In this there is no appeal to God. It rests on temporal penalties.

In this case, there was no assertion made by the witness that he was conscientiously scrupulous of taking an oath. So that the question came nakedly, whether a person, who was before the Court, and proffered as a witness to take an oath, did believe in

the existence of a Supreme Being. Grateful as we feel to that source of excellence for our own creation; soothed, consoled, and sustained by our deep conviction of our dependence upon him alone; we can scarcely imagine, that *any mortal*, can *seriously avow his disbelief in the existence of a Supreme Being;* yet the Judge was necessarily *to decide upon the competency of the proposed witness, on the evidence offered against him.* Had there been distinct and satisfactory evidence given *of the honest change of* opinion, on the part of the proposed witness, after the proof made by the testimony of *Gordon* of the recent avowal by *Bettes* of his belief, the rejection of the witness could not have been supported. The proposal to prove, by *Azubah Bettes*, that the said *Richard Bettes* was, and for many years last past had been, a *Universalist* and was an active member of a *Universalist* society in *Biddeford*, and had ever been a firm believer in the *Christian* religion, and was, at the time of the examination, the Court think *was not calculated to prove a change of opinion which had been avowed by said Richard in the recent conversation with Gordon;* and therefore, the Judge might direct the nonsuit without hearing the testimony of said *Azubah Bettes.* Whether this person was man or woman, is not stated. If the wife of said *Richard*, we think she could no more be admitted than *Richard* himself.

Exceptions overruled.

After reading the foregoing opinion, Judge EMERY remarked, for himself alone, that the *st.* 1833, *c.* 58, entitled "An act to secure to witnesses freedom of opinion in matters of religion," had been passed over eight years. He did not recollect that it had before come in question for decision. Upon the necessarily strong judicial construction which has been made upon the terms of the statute, and the acts of the Judge in deciding, as he must, on the evidence, he said: I can frankly declare, that a much more appropriate title to the act would be, "An act to *deprive* witnesses of freedom of opinion in matters of religion, and to jeopardize the rights of innocent people, who may have a deep interest in the knowledge and testimony of an unwilling witness, perhaps hairbrained and reckless enough *to avow his atheism*, so that the requisite proofs can be had, and so escape examination, when he ought to

be holden to disclose the truth, under such temporal penalties as can be brought to bear upon him." The revised statutes, without retaining the delusive title of the former act, yet continues the objectionable matter, and brings no relief.

The revised statutes, *c.* 115, § 72, runs thus: "No person, who believes in the existence of a Supreme Being, shall be adjudged an incompetent or incredible witness in any judicial Court, or in the course of judicial proceedings, on account of his opinion in matters of religion, nor shall such opinions be made a subject of investigation or inquiry."

Barnabas Palmer *vs.* The President, &c. York Bank.

Mem. Shepley J., having an interest in the bank, took no part in the hearing or decision of this case.

A statute giving four times as much damage, as is allowed by law for the detention of other debts, is penal in its character; but as it is given to the party injured, who seeks the recovery of a just debt, to which the increased damages are made an incident, a suit therefor it is not properly to be regarded as a penal action.

Wherever penal damages are given by statute to the party injured, where he had a remedy at common law, if he would claim the statute damages, he should do so by a reference to the statute.

If the owner of bills would hold a bank to the payment of the penal damages given by statute, on neglect to make payment in gold or silver on demand, or within the time limited, he must distinctly claim such damages in his declaration, or he will be restricted to the measure of damages which the law accords to other creditors.

In an action against a bank, on its bills, where the declaration has no reference whatever to the statute, and makes no claim to the twenty-four *per cent.* damages; and where the defendants have been defaulted, and the plaintiff has received the amount of his bills and six *per cent.* interest; and the question, whether he is entitled to an additional eighteen *per cent.* has been argued; if a motion to amend the declaration be then made, it will not be granted.

The declaration in this action contained one count for money had and received; also a set of many counts, similar to that which

is to follow, numbered one; also a set of counts similar to that herein numbered two; also a set of counts similar to that numbered three. The second and third sets of counts, were on the same bills, the one alleging a presentment thereof by *Perkins*, and the other by the plaintiff. The counts allege presentments at the bank at different times during the suspension of specie payments by the *New England* banks, the first on *July* 22, 1837, and the last on *January* 23, 1838. A few days prior to the resumption of specie payments by those banks, *July* 13, 1838, the bank tendered to the plaintiff the amount of the bills presented, with six *per cent.* interest, and a sum in addition thereto to cover any expenses. The plaintiff refused to receive the money tendered, and on *October* 13, 1838, brought his action, the writ being made returnable to the *April Term* of the Supreme Judicial Court, 1839. The money tendered was brought into Court on the first day of the term at which the action was entered. The defendants were defaulted on the second day, and entered a prayer to be heard in damages. The plaintiff took the money out of court, claiming a further sum to the extent of twenty-four *per cent. per annum.*

Copies of one of each set of counts:

No. 1. "Also, for that the said *President, Directors, and Company of the York Bank*, being a banking corporation within this State, by law duly incorporated and established at *Saco* in the county of *York*, on the fourth day of *October*, in the year of our Lord one thousand eight hundred and thirty-one, made their other certain note and bill in writing, of that date, signed by the president and cashier of said bank, wherein and whereby the said *President, Directors and Company* promised to pay *William Lord* or bearer, at their banking house, five dollars, on demand — which said note and bill, so made and signed as aforesaid, was thereafterwards, on the same day, by said *President, Directors and Company*, duly issued from said bank, and thereafterwards on the same day, for a valuable consideration, the said note and bill was duly assigned and delivered over to the plaintiff, who thereby became the bearer thereof: Of all which the said *President, Directors and Company* thereafterwards on the same day had notice, and in consideration thereof, then and there promised the plaintiff to pay him the contents of said bill and note, accord-

ing to the tenor thereof: — And the plaintiff thereafterwards, at said *Saco*, on the twenty-second day of *July*, in the year of our Lord one thousand eight hundred and thirty-seven, in the usual banking hours of said day, presented the said bill and note of said corporation to the cashier of said bank, at their banking house for payment; and then and there at said bank, in the usual banking hours of said bank, demanded payment of said bill and note of said cashier; and the said cashier and the officers of said bank then and there refused to pay the same, and afterwards so continued to delay and refuse to pay the same for the term of more than fifteen days thereafter, and still delay and refuse to pay the same."

No. 2. "Also, for that the said *President, Directors and Company of the York Bank*, being a banking corporation within this State, by law duly incorporated and established at *Saco*, in said county of *York*, on the first day of *May*, in the year of our Lord one thousand eight hundred and thirty-two, made their other certain note and bill in writing, of that date, signed by the president and cashier of said bank, wherein and whereby the said *President, Directors and Company* promised to pay *J. Chadwick*, or bearer, at their banking house, five dollars on demand: — which said note and bill so made and signed as aforesaid, was thereafterwards on the same day, by said *President, Directors and Company* duly issued from said bank, and thereafterwards on the same day, for a valuable consideration, the said note and bill was duly assigned and delivered over to one *John G. Perkins*, who thereby became the bearer thereof: Of all which the said *President, Directors and Company* thereafterwards on the same day had notice, and in consideration thereof then and there promised said *Perkins* to pay him the contents of said note and bill, according to the tenor thereof. And the said *Perkins* thereafterwards, at said *Saco*, on the first day of *August*, in the year of our Lord one thousand eight hundred and thirty-seven, in the usual banking hours of said day, presented said bill and note of said corporation to the cashier of said bank, at their banking house, for payment, and then and there at said bank, in the usual banking hours of said bank, demanded payment of said bill and note of said cashier; and the said cashier and the officers of said bank then and there refused to pay the same to said *Perkins*, and afterwards so contin-

ued to delay and refuse to pay the same to him for more than fifteen days thereafter. — And thereafterwards on the twenty-third day of *January*, in the year of our Lord one thousand eight hundred and thirty-eight, the said *Perkins* for a valuable consideration, assigned, transferred and delivered the same bill and note, then due and unpaid, to the plaintiff, who thereby became the bearer thereof. Of all which the said *President, Directors and Company* afterwards, to wit, on the twenty-third day of *January* in the year of our Lord one thousand eight hundred and thirty-eight, at *Saco* aforesaid, had notice, and in consideration thereof then and there promised the plaintiff to pay him the contents of said bill and note according to the tenor thereof. Yet the said *President, Directors and Company* have never paid said bill and note to the plaintiff, but still delay and refuse to do it."

No. 3. "Also for that the said *President, Directors and Company of the York Bank*, being a banking corporation within this State, by law duly incorporated and established at *Saco* in the county of *York*, on the fourth day of *February*, in the year of our Lord one thousand eight hundred and thirty-five, made their other certain note and bill in writing, of that date, signed by the president and cashier of said bank, wherein and whereby the said *President, Directors and Company* promised to pay *Joshua Maxwell* or bearer, at their banking house, five dollars on demand — which said note and bill, so made and signed as aforesaid, was thereafterwards on the same day, by said *President, Directors and Company*, duly issued from said bank, and thereafterwards, on the same day, for a valuable consideration, the said note and bill was duly assigned and delivered over to the plaintiff, who thereby became the bearer thereof: Of all which the said *President, Directors and Company* thereafterwards, on the same day had notice, and in consideration thereof, then and there promised the plaintiff to pay him the contents of said bill and note, according to the tenor thereof: — And the plaintiff thereafterwards, at said *Saco*, on the twenty-third day of *January*, in the year of our Lord one thousand eight hundred and thirty-eight, in the usual banking hours of said day, presented the said bill and note of said corporation to the cashier of said bank, at their banking house for payment; and then and there at said bank, in the usual banking

hours of said bank, demanded payment of said bill and note of said cashier; and the said cashier and the officers of said bank then and there refused to pay the same, and afterwards so continued to delay and refuse to pay the same for the term of more than fifteen days thereafter, and still delay and refuse to pay the same."

At the close of the argument, the counsel for the plaintiff remarked, that if the Court should be of opinion, that the plaintiff could not recover twenty-four *per cent.* interest, as the declaration then stood, he wished for leave to amend.

Preble, for the plaintiff, in the course of his argument, cited *st.* 1831, respecting banks, *c.* 519, § 11, 20; *st.* 1821, regulating inland bills of exchange, *c.* 88; *Field* v. *Nickerson*, 13 *Mass. R.* 137; *Carley* v. *Vance*, 17 *Mass. R.* 389; *McMillan* v. *Eastman*, 4 *Mass. R.* 378; 1 *Saund.* 250; 1 *Burr*, 402.

The late Judge *Mellen* and *J. Shepley*, for the defendants, under the expectation that the case would be argued in writing, immediately after the term at which the action was entered, made their written arguments, but they were not handed to the Court, as the counsel for the plaintiff declined to adopt that course. *Mellen* was expected to take the principal part, and prepared his argument, and sent it to *Shepley*, with the request that he would also furnish remarks and additional authorities, which was done. At the argument in 1840, each used, as his brief, his written argument, adding a few more authorities. Expecting to receive the very learned argument of his senior, the Reporter did not take minutes of it; and as he is not possessed of this brief, much to his regret, he cannot give the views or authorities there taken.

Shepley said, that the plaintiff, under any declaration which could be framed on the facts, could not recover the two *per cent.* per month; that the acts of 1836, *c.* 233, and 1838, *c.* 326, were to govern; and that by those acts, before the holder of the bills can recover a penalty, he must make a second presentment at the expiration of the thirty or fifteen days given.

But if the *st.* of 1838 is not applicable, and we are to look only at the *st.* of 1831, still but six *per cent.* interest can be recovered. The special counts, after setting forth the bill, and that it came

into the hands of the plaintiff for value, alleges that the defendants "then and there promised the plaintiff to pay him the contents of said bill or note according to the tenor thereof." This is the only promise or allegation of liability to be found in the special counts. The plaintiff then states a demand at the bank, and that "the cashier and the officers of said bank then and there refused to pay the same, and afterwards so continued to delay and refuse to pay the same, for the term of more than fifteen days thereafter, and still delay and refuse to pay the same." There is not the slightest reference to the statute, nor to the two *per cent.* per month in the declaration. The statement of the delay of fifteen days is mere surplusage, as the general allegation of delay and refusal covers that time and much more. If the plaintiff intended to claim but six *per cent.* interest, could he omit any material allegation in his count, and have a good writ?

"If a statute give a remedy for a matter which was actionable at common law, without expressly or by necessary implication, taking away the common law remedy, the action may be brought either at common law or upon the statute." "And if the plaintiff intends to rely upon the statute, if it is a public one, he must refer to it, otherwise it will be a waiver of his remedy upon the statute, and he will be obliged to rely on his remedy at the common law, or fail in his action. 2 *Inst.* 200; *Oliver's Prec. of Decl.* 450, referring to *Coke*; 1 *Com. Dig.* 446, 447, *(Day's Ed.) Action upon statute, A* 3, *C.* "If a man bring his action at common law, he waives his remedy by the statute." *Com. Dig. Action upon stat. C. citing* 2 *Rol.* 49. "If a statute give a remedy in the affirmative, without a negative express or implied, for a matter actionable at common law, the party may pursue either remedy." 1 *Day's Com. Dig.* 448.

It is believed, that there is no one position better established in law, than that if a party seeks to recover damages given by a statute for a violation of any of its provisions, he must not only state in his declaration all the facts necessary to bring his case within its provisions, but must refer to the statute giving the penalty or damage, either expressly, or generally, "according to the form of the statute in such case made and provided." *Heald* v. *Weston*, 2 *Greenl.* 348; *Barter* v. *Martin*, 5 *Greenl.* 78; *Ba-*

yard v. *Smith*, 17 *Wend.* 88. And it is wholly immaterial, whether it be what is technically called a penal action, or one given by statute to an aggrieved party to recover his damages, with an additional sum. 17 *Wendell*, 88, and many authorities cited by Judge *Mellen* are of the latter class. The statute, however, calls the two *per cent.* per month a penalty, and it is so called in the case *Worcester Bank* v. *Suffolk Bank*, 5 *Pick.* 106. The proviso in the statute should have been negatived, if it is intended as a declaration on the statute. *Smith* v. *Moore*, 6 *Greenl.* 274.

Should there be a motion to amend, it cannot be permitted, as it would introduce a new cause of action. *Mason* v. *Waite*, 1 *Pick.* 452.

The opinion of the Court was drawn up and delivered at the *April Term*, 1841, by

Weston C. J. — In none of the counts in the plaintiff's declaration, is there any reference to the statute, upon which he claims to be allowed four fold interest by way of damages. If this falls within the class of penal actions, the current of authorities require, that the facts charged should be averred to be against the form of the statute, upon which it is based. The statute, upon which the plaintiff relies, calls the twenty-four *per cent.* damages, it imposes, a penalty. A similar statute in *Massachusetts* is called by the court highly penal, in the case of the *Suffolk Bank* v. *the Worcester Bank*, 5 *Pick.* 106. As it gives four times as much damage, as is allowed by law for the detention of the other debts, it is certainly penal in its character. But as it is given to the party injured, who seeks the recovery of a just debt, to which these increased damages are made an incident, we are not satisfied that it is to be regarded properly as a penal action.

In *Reed* v. *Northfield*, 13 *Pick.* 96, a similar point was raised, and the authorities bearing upon the question were examined, to which we refer, without deeming it necessary to cite them in detail. *Shaw C. J.*, who delivered the opinion of the Court, takes a distinction between an action brought for damages given by statute to the party injured, and an action for a statute penalty, *eo nomine*. The action then under consideration, was for double

damages, sustained by a defect in the highway. The Chief Justice says: "In the present case, we think the action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty, operate to a certain extent as punishment; but the distinction is, that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner." And it was held by the Court, that the averment that upon the facts charged and by "force of the statute in that case made and provided," the town became liable, was sufficient.

In *Bayard* v. *Smith*, 17 *Wendell*, 88, which was an action for damages by the party injured by false weights, given by statute, the Court held a general reference to the statute sufficient. And in a note by the reporter, he states that a general reference is all, which can be required in such cases. If this is necessary, where the action is founded altogether on a public statute, of which the Court take judicial notice, it would seem to be still more necessary, where there is also a concurrent remedy at common law. In trespass by one tenant in common against another for treble damages, a reference to the statute, which imposes them, has always been deemed indispensable. So in actions against the sheriff for five fold interest, for not paying over money collected on demand, averments of his liability to this extent under the statute, are inserted in the declaration. And wherever penal damages are given by statute to the party injured, where he had before a remedy at common law, we are of opinion, that if he would claim the statute damages, the weight of authority requires, that he should do so by a reference to the statute.

If the plaintiff had averred the liability of the defendants to pay the fourfold interest, we should have been more strongly inclined to have got over this technical objection. But he sets up no such liability. The legal assumpsit, upon which he declares is, that in consideration of the previous averments, the defendants promised to pay each bill, according to its tenor. Facts are set forth, upon which a liability to increased damages under the statute might arise, but such liability is not charged, nor any such claim made by the plaintiff.

With every disposition to sustain a law, which has been deemed wise and salutary, and has repeatedly received the sanction of the

legislature, both in *Massachusetts* and in this State, we feel constrained to decide, that if a plaintiff would avail himself of its provisions, he should set forth distinctly and affirmatively the extent of his claim. How much forbearance, the holders of bills might reasonably be expected to practice, under peculiar circumstances, each must decide for himself; but if he would hold a bank to the payment of the penal damages, given by statute, it cannot be regarded too much to require, that he should distinctly claim them in his declaration. If he does not, it is not unreasonable, that he should be restricted to the measure of damages, which the law accords to other creditors.

In the *Suffolk Bank* v. *The Worcester Bank*, a question was presented about the penal damages. The declaration contained only a count for money had and received; but it was submitted to the court upon a case stated. Their attention was not called to the form of declaring.

The plaintiff has moved for leave to amend, if necessary. We do not deem it reasonable to grant it in this stage of the proceedings. The defendants have been defaulted upon the declaration, as it stood. The plaintiff has been paid principal and legal interest. The case has been argued upon the existing counts. And we do not feel justified in allowing them to be amended.

JOTHAM STORER *vs.* MOSES GOWEN.

It is a principle well settled, that the admissions of a party, when given in evidence, must be taken together, as well what makes in his favor as against him. Both are equally evidence to the jury, who will give to every part of the testimony such credence as it may appear to deserve.

A bailee of goods without reward, to be carried from place to place, is responsible only for gross negligence; that is, a want of that care which men of common sense however inattentive, usually take, or ought to be presumed to take of their property.

Whether there has or has not been gross negligence, is a question of fact for the decision of the jury.

EXCEPTIONS from the Western District Court, WHITMAN J. presiding.

Assumpsit for money had and received. The plaintiff claimed to recover the sum of $70, alleged to have been enclosed in a letter, *June* 25, 1837, and delivered by him to the defendant, to be carried to *Somersworth*, and there to be left with a *Capt. Varney*, or his wife, for *Kelsey & Rundlet*, of *Portsmouth*, but by the defendant converted to his own use.

Varney, it was proved, was master of a packet plying between *South Berwick* and *Portsmouth*, and in the habit of carrying packages and letters. *Varney* and his wife, and the only girl belonging to the family, testified that they had never received any letter or package of the kind, and had never seen one of that description. The plaintiff offered evidence of the admissions of the defendant, tending to show that he received of the plaintiff a letter enclosing $70, and well understood that it contained that sum, to be carried by him to *Somersworth*, in which admissions he also stated that he delivered the letter and its contents to a young woman or girl, and pointed out as the girl the same who was afterwards the witness; that she came to the door on his knocking at the house of *Varney;* that he delivered the letter to her, at the same time seeing *Mrs. Varney* sitting in the kitchen. It was in evidence, that at that time a child of *Varney's* was quite sick, and that the neighbors were in and out in the course of the day. The defendant also introduced evidence tending to prove the admissions of the plaintiff, that he directed the defendants to leave the letter with *Varney* or at his house. There was no evidence that *Gowen* did receive or was to receive compensation for carrying the letter, or the contrary. The money was not delivered to *Kelsey & Rundlet.*

The counsel for the defendant requested the Judge to instruct the jury, that the admissions of *Gowen*, made at one and the same time, must be taken together, and were evidence for as well as against him, when offered in evidence by the plaintiff. The Judge "declined so to instruct them, and did instruct them upon this point, that the admissions of the defendant were good against him, but that such parts as he at the same time stated in favor of himself, were not evidence in his favor, unless supported by other proof." The same counsel also contended, that a bailee without recompense was responsible only for gross negligence, and request-

ed the Judge to instruct the jury, that if they believed that *Storer* directed *Gowen* to deliver the letter to *Capt. Varney*, or to leave it at his house, the defendant would be justified in delivering it to a young woman or girl like the one described by him in his admissions, if he saw *Mrs. Varney* in the house at the same time. The Judge declined to give the requested instruction, and did instruct them, that if the defendant delivered the letter to a girl under such circumstances without being sure she was one of the family, it was at his own peril; and that the delivery of a letter to a girl of ten or eleven years of age, if not one of the family, though he saw *Mrs. Varney* in the house, was gross negligence, for which he was responsible, as it would have given him but very little additional trouble to have delivered the letter to *Mrs. Varney* herself. The verdict was for the plaintiff, and the defendant filed exceptions.

Appleton, for the defendant, contended, that the instructions requested should have been given, and that those actually given were clearly wrong; and cited 1 *Phil. Ev.* 84; 2 *Stark. Ev.* 48; *Carver* v. *Tracy*, 3 *Johns. R.* 427; *Fenner* v. *Lewis*, 10 *Johns. R.* 38; *Credit* v. *Brown*, *ib.* 365; *Hopkins* v. *Smith*, 11 *Johns. R.* 161; *Wailing* v. *Toll*, 9 *Johns. R.* 141; *Story on Bailments*, 3, 11, 125; *Tracy* v. *Wood*, 3 *Mason*, 132; *Beardslee* v. *Richardson*, 11 *Wend.* 25; *Coggs* v. *Barnard*, 2 *Ld. Raym.* 909. He also contended, that assumpsit will not lie for a misfeasance of this kind. 11 *Wend.* 25. To support such action, there should have been a special count.

D. Goodenow, for the plaintiff, contended, that the District Judge committed no error, in refusing to give the instructions requested, or in giving such as he did. 5 *Mass. R.* 10, 104; 1 *Greenl.* 17; 15 *Mass. R.* 225.

But if there was any error in the instructions given, or if the Judge decided a question properly for the jury, the Court will not set aside the verdict, if it was right upon the facts. *McDonald* v. *Trafton*, 15 *Maine Rep.* 225.

The opinion of the Court was drawn up by

Weston C. J. — It is a principle well settled, that the admissions of a party, when given in evidence, must be taken together, as well what makes in his favor as against him. Both are equally

evidence to the jury, who will give to every part of the testimony such credence, as it may appear to deserve. The presiding Judge erred in instructing the jury, that the admissions of the defendant were good evidence against him, but that what he said at the same time in his favor, was not evidence, unless supported by other proof.

It is not alleged, nor did it appear in proof, that the defendant was to have any compensation. As services of this kind are generally gratuitous, it may admit of great doubt, whether a promise, on the part of the plaintiff to make compensation, can be implied.

Assuming that the defendant was to have no reward, it presents a case of what the law calls a mandate, which is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them. In such case the bailee, or mandatary, is responsible only for gross negligence. *Story on Bailments*, § 174, 175. The care required in a bailment of this kind, will depend much upon the nature of the goods delivered. If money is delivered, it is to receive more care than common property. *Tracy* v. *Wood*, 3 *Mason*, 132. *Story J.* there says, "that where there is a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, that is gross negligence." How much care will, in a given case, relieve a party from the imputation of gross neglect, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances, which the law cannot exactly define. *Story on Bailments*, § 11. It was the province of the jury, and not of the court to decide the question whether gross negligence was, or was not, proved in this case. The presiding Judge erred, in taking this upon himself.

No question is presented, in these exceptions, as to the form of the action.

Exceptions sustained.

Almon Lord *vs.* Caleb Burbank.

However common it may be for persons in receiving payments to waive their strict rights, and make use of a paper currency, the law does not recognize such usage as binding upon any person; and when any one insists upon his legal right to receive gold and silver only in payment, the law will uphold him in the exercise of that right, although it may appear to be an unexpected exercise of it, and not in conformity to the accustomed course of transacting business between parties in such circumstances.

Where money is received by an attorney at law on a demand, left with him for collection without any special directions, he is bound by law to pay the amount to the creditor in the legal currency.

A demand of money thus collected *to be paid in specie*, is sufficient.

Exceptions from the Western District Court, Whitman J. presiding.

Assumpsit for money collected by the defendant as an attorney at law. The defence set up was, that the money had been received in bank bills, and he would pay in bills, but not in gold or silver.

The only evidence of a demand of the money was contained in a deposition, from which it appeared, that the deponent at the request of the plaintiff presented the receipt given for the demand by the defendant to him, and requested the defendant to pay over the money collected for the plaintiff "in specie." This the defendant refused to do, but expressed a willingness to pay in bills.

The defendant objected to the sufficiency of this evidence, but the Court overruled the objection, and to this ruling the defendant filed exceptions.

Howard & Caverly, for the plaintiff.

D. Goodenow, for the defendant.

The opinion of the Court was by

Shepley J. — The defendant insists, that he must be regarded from the well known course of business as authorized to receive the common paper currency in payment of the promissory note intrusted to him for collection; and that having received it, his duties were fully performed by holding and paying it over upon demand.

However common it may be for persons in receiving payments to waive their strict rights, and to make use of a paper currency; our laws can recognize no such usage as binding upon any person; and when any one insists upon his legal right to receive gold or silver only in payment; the law will uphold him in the exercise of that right, although it may appear to be an unexpected exercise of it and not in conformity to the accustomed course of transacting business between parties in such relations. The defendant may have had a well grounded expectation, that the common paper currency only would be required of him, but if he would have protected himself against the claim for specie he should have secured in the receipt which he gave for the demand a right to receive and pay it, in the usual paper currency.

If a demand should be regarded as necessary to enable the plaintiff to maintain the action, a demand for the legal currency was sufficient.

Exceptions overruled.

DANIEL BURNHAM *vs.* JONATHAN TUCKER.

The indorsee can secure to himself by the indorsement of a note, when over due, only such rights as the payee himself could have then enforced.

The set-off of judgments is not restricted to cases where the parties to the record are the same.

Under our statutes, where a promissory note has been indorsed when over due, and judgment has been obtained thereon against the maker in the name of the indorsee, and a judgment in favor of the maker of that note has been rendered on a note given to him before the indorsement by the payee of the other; the latter judgment may be set-off against the former.

THE suit was on a note given by *Tucker* to *David Webster*, dated *June* 22, 1835, payable on demand, and indorsed to the plaintiff after *June* 1, 1837. The note was afterwards assigned by *Burnham* to *James Rangely*. *Tucker* claimed the benefit of a set-off to the amount of certain notes given by *David Webster* to him long before the note in suit was made, but *Tucker* had not filed any account in set-off, and moved for a continuance until judgment might be obtained against *Webster*, that there might be

a set-off made. The parties agreed upon an auditor to report the facts, and that on the return of the report the "court should consider and determine whether it is competent for the defendant to have the legal benefit of set-off, by way of defence, to this action, or of judgment in an action against said *Webster* by said *Tucker;* and if such should be the opinion of the court, the said matter of set-off shall be applied by the court, so far as they shall find the same to be legally due from said *Webster* to said *Tucker*, to reduce the amount for which judgment shall be rendered for the plaintiff."

The auditor reported, that there was due from *David Webster* to *Tucker* on three notes, given before the note in suit, the sum of $843,12.

Daveis and *Leland*, for the plaintiff, contended, that as here was no account filed in set-off, that none could be allowed, unless it were proved, that the notes were agreed to be taken in part payment. There was no such agreement. They also argued that the indorsement to *Burnham* defeated any set-off in favor of *Tucker*. *Clark* v. *Leach*, 10 *Mass. R.* 51; *Holland* v. *Makepeace*, 8 *Mass. R.* 418; *Peabody* v. *Peters*, 5 *Pick.* 1; *Sargent* v. *Southgate*, *ib.* 312; *Braynard* v. *Fisher*, 6 *Pick.* 355; *Adams* v. *Butts*, 16 *Pick.* 343; *Barney* v. *Norton*, 2 *Fairf.* 350; 2 *Story's Eq.* 556; *Green* v. *Darling*, 5 *Mason*, 208; *Howe* v. *Sheppard*, 2 *Sumner*, 409; *Gordon* v. *Lewis*, *ib.* 143 *and* 628; *Weston* v. *Barker*, 12 *Johns. R.* 276; *Banks* v. *Pike*, 3 *Shepl.* 268.

W. P. Haines, for the defendant, contended, that as this note was not indorsed until after it was over due, it was subject to all the objections, and to every defence, which could have been made, had it remained in the hands of *Webster*. *Bayley on Bills*, 82, and note; *Burgess* v. *Tucker*, 5 *Johns. R.* 105.

By the *st.* 1823, *c.* 228, the defendant might have filed and been allowed in set-off *any notes* of the plaintiff to him. As the right to the set-off in this mode is limited to notes given by the plaintiff to the defendant, filing a set-off would have been useless. The defendant lost no right by this omission. Where a dishonored note is indorsed, so much only of the note is assigned to the indorsee as may be due to the payee on an adjustment of all de-

mands between the original parties. *Shirley* v. *Todd*, 9 *Greenl.* 84; *Calder* v. *Billington*, 3 *Shepl.* 400; *Sargent* v. *Southgate*, 5 *Pick.* 312; *Fowler* v. *Bush*, 21 *Pick.* 231. We are entitled under the agreement to have the same set-off made, as if both demands had come to a judgment, and in such case our right to have it made exists. *Gould* v. *Parlin*, 7 *Greenl.* 82; *Goodenow* v. *Buttrick*, 7 *Mass. R.* 140.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an action on a promissory note, made by the defendant, and payable to *David Webster*, or order, and by him indorsed to the plaintiff after it was over due. The defendant held a note payable to himself, and signed by *Webster*, and also one signed by *Webster* and another, both bearing date before the note in suit. These notes were not filed in set-off, but by an agreement between the parties the set-off is to be allowed if a judgment upon them obtained by the defendant against *Webster* could be set off against the judgment in this suit.

According to the rules by which courts of equity are governed, these demands being distinct and independent could not be set off. *Greene* v. *Darling*, 5 *Mason*, 201.

Our statutes provide, that distinct and independent claims may be set off whether existing by note or in account.

In the case of *Sargent* v. *Southgate*, 5 *Pick.* 312, it was decided upon a statute similar to ours, that a demand might be filed and a set-off take place, when the suit was not between the same parties as those to the claim filed, it having been brought in the name of an indorsee of a note over due. A different opinion had been before intimated in the cases of *Holland* v. *Makepeace*, 8 *Mass. R.* 418, and *Peabody* v. *Peters*, 5 *Pick.* 1. In *Shirley* v. *Todd*, 9 *Greenl.* 83, this Court did not decide whether it would adopt the doctrines of *Sargent* v. *Southgate*.

If the assignee of a note over due, takes it subject to the same infirmities, equities and defences, as if it remained in the hands of the original owner, there does not appear to be any other mode of accomplishing the object of making the defence effectual, but by carrying out the intention of the legislature, and allowing demands to be filed or judgments obtained upon them to be set off, although

the parties to the record are not the same. That the assignee does take, in such cases, subject to a notice implied by law, and to the same infirmities, equities and defences as might be made against the payee, has been decided in many cases. 4 *Burr.* 2214; 10 *Mass. R.* 51; 5 *Pick.* 1, and 312; 5 *Johns. R.* 118; 18 *Johns. R.* 493; 9 *Greenl.* 83.

Nor are the books without precedents for setting off judgments recovered in different names when the beneficial interest in them is mutual.

In the case of *Ford* v. *Stuart*, 19 *Johns. R.* 342, one will be found. That was an action upon a promissory note, payable to *Obadiah Ford*, or bearer, and transferred after it was over due to one *Vanderbilt*, and by him to the plaintiff. The defendant under a notice for a set-off, offered a judgment in favor of *Adrian Post*, against *Obadiah Ford*, and an assignment of it to himself, after his note to *Ford* had become due, and before it was transferred, and the set-off was allowed. The court refused in the case of *Holland* v. *Makepeace*, to permit a purchased demand to be made use of as a set-off, and our statutes do not contemplate the filing or setting off of purchased claims. While no such set-off as that made in *Ford* v. *Stuart* could take place under our statute, that case affords a strong illustration of the application of the principle, that the indorsee of a promissory note over due at the time of indorsement can secure to himself no other or greater rights than the payee had in it at the time of indorsement.

In the case of *Moody* v. *Towle*, 5 *Greenl.* 415, this Court ordered a judgment recovered by the maker of the note against the payee to be set off against so much of a judgment recovered on the note by an indorsee as exceeded all the just claims of the indorsee against the indorser, the note having been transferred as collateral security for such claims.

The plaintiff in this case under our statute provisions and the mercantile law, could secure to himself by an indorsement of the note when over due only such rights as the payee himself could have enforced, and the set-off must be allowed.

THE INHABITANTS OF LIMERICK, *Petitioners for a certiorari.*

The *st.* 1821, *c.* 118, does not require that the doings of the selectmen in laying out a town or private way should be recorded previous to being offered to the town for acceptance, and therefore they cannot properly become a matter of record until they are approved by the town or, on an appeal, by the county commissioners.

A statement in the record of the proceedings, that notice was given by the selectmen before they proceeded to act, is *prima facie* evidence of the fact.

All which the statute requires, as evidence that a road laid out by the selectmen is for the benefit of the town or of an individual, is, that it be approved and allowed by the town in a legal meeting called for the purpose of acting upon it, or by the county commissioners on appeal.

The selectmen, therefore, are not required to state in their report to the town, that the way will be beneficial to the town or to some one or more of its inhabitants.

A road laid out by the selectmen is still a town or private way, when brought before the commissioners by an appeal from the action of the town; and they are required to pass such judgment only as the town should have done.

When a defect in a record is occasioned by an omission of the court to render the proper judgment, or to come to a conclusion upon the whole matter embraced in the cause, such defect, arising out of an incorrect, or a want of judicial action, cannot be amended after the session has closed, and the cause is no longer *sub judice.*

But if the court have performed its whole duty correctly, and the recording officer has erred in making up a proper or full record, the court may in its discretion cause the record at any time to be amended or corrected, so as to have it declare the whole truth.

Each court must necessarily be the judge of what it has decided and adjudged; and when it orders an amendment of the record, the presumption of other courts must necessarily be, that it does not undertake to order its clerk to record what it never had decided.

But usually a court cannot order its clerk, after the close of a session, to enlarge the record so as to embrace any matter, which did not appear from the documents, or minutes of the Court or clerk, to have been decided.

THE causes of error set forth in the petition for a certiorari to quash the proceedings of the county commissioners, and the facts in the case pertinent to the legal questions arising at the hearing, are found in the opinion of this Court.

Howard and *M. McDonald* argued for the petitioners, and in support of the first cause of error assigned; that the records of the

county commissioners do not show any location of the supposed town or private way by the selectmen of the town of *Limerick*, or any record of any such supposed way; cited *st.* 1821, *c.* 118, § 9, 10, 11; *State* v. *Inhabitants of Pownal*, 1 *Fairf.* 24; *Howard* v. *Hutchinson*, *ib.* 335; *Lisbon* v. *Merrill*, 3 *Fairf.* 210; *Goodwin* v. *Hallowell*, *ib.* 271.

In support of the second, that the record of the county commissioners do not show that there was any evidence before said town of *Limerick*, or before said commissioners, that notice was given to all persons interested by said selectmen, preceding or at the time of the location of the supposed way, they cited 1 *Co. Litt.* 260, *a*; 3 *Black. Com.* 24; 5 *Bac. Ab. Trial, B*; 1 *Bac. Ab. Amendment, B* 90; *Com. Dig. Amendment, D* 1; *Atkins* v. *Sawyer*, 1 *Pick.* 353; *Hall* v. *Williams*, 1 *Fairf.* 278; *Clark* v. *Lamb*, 8 *Pick.* 415; *Varnum* v. *Bissell*, 14 *Pick.* 191; *Jackson* v. *Ashton*, 10 *Peters*, 480.

The error pointed out was a judicial one, and was not subject to be amended. The right to amend a record did not exist at common law. *Jac. Law Dic. Amendment.* It results only from ancient statutes, and can extend no further than those statutes give it. The cases in which they are permitted by those statutes are, misprisions of clerks, want of form, clerical errors. They are not allowed unless there is something on the record by which to amend. *Hall* v. *Williams*, 1 *Fairf.* 278. Here was nothing by which to amend the record. Whether notice was, or was not given, could not be within the knowledge of the clerk, but of the court only, and therefore was a judicial error. *Gouldsb.* 104. Without such notice, there was no jurisdiction or power to act.

Appleton & Caverly, for the original petitioners for the road, contended, that the record of the county commissioners, as originally made up by the clerk, was sufficient.

That if the record was originally erroneous, the court had the right to amend it. *Hall* v. *Williams*, 1 *Fairf.* 290; *Howe's Pr.* 382; 3 *Dane, c.* 95, *art.* 3, § 4; 2 *Johns. R.* 184; 5 *ib.* 89; 14 *ib.* 219; 17 *ib.* 86; 1 *Ld. Raym.* 116; 1 *Pick.* 351; 4 *Mod.* 371; 2 *Ld. Raym.* 895; 17 *Mass. R.* 351; 3 *Greenl.* 29; 6 *Greenl.* 415.

There was sufficient on the files of the court and on record by which to amend it.

The records as amended, together with the papers on the files of the court, afford conclusive evidence of the correctness of the whole proceedings in the case.

The record shows, that the town had notice, and acted upon it, and that is sufficient. It is not necessary that any previous notice should have been given to any one. *Harlow* v. *Pike*, 3 *Fairf.* 438; *Cool* v. *Crommett*, 1 *Shepl.* 250.

The opinion of the Court was drawn up by

SHEPLEY J. — The first, second, and fourth errors assigned in this petition state in substance, that there is no record of a way laid out by the selectmen of the town; that notice was not given to persons interested; and that it does not appear, that the town unreasonably delayed or refused to approve and allow of a way laid out.

The petitioners in their application to the county commissioners allege, that a petition was presented to the selectmen in writing, requesting them to lay out the way, that they did proceed as requested, after giving due notice to all persons interested therein, and that to a legal meeting of the inhabitants, called for that purpose, they reported their proceedings in laying out said way, in writing under their hands; and that the town unreasonably neglected and refused to approve and allow the same. The record shows, that the commissioners caused the town to be notified, and that it appeared and was heard thereon, and that "the allegations in said petition being fully proved" they proceeded to decide upon the merits. It has been decided, that the statute does not require, that the doings of the selectmen should be recorded previous to being offered to the town for acceptance, and that a statement in the proceedings, that notice was given by the selectmen is *prima facie* evidence of the fact. *Cool* v. *Crommett*, 13 *Maine R.* 250. The proceedings could not therefore properly become a matter of record until after they were approved by the town or, on appeal by the commissioners. And their record states, that the allegations in the petition were not only fully proved, but that the town unreasonably delayed and refused to approve and allow the way as

laid out. These facts must be regarded as established to the satisfaction of the commissioners, who were authorized to decide upon them.

The third error assigned is, that the commissioners did not adjudge the way to be "of common convenience or necessity, or of general or individual benefit." A public highway from town to town, or place to place, is to be laid out by the commissioners, when they judge, that the common convenience or necessity requires it. "Town or private ways for the use of such town only, or for one or more individuals thereof, or proprietors therein," are to be laid out by the selectmen of the town, who are not constituted the judges of the convenience or necessities of the public. It should not be expected, that the selectmen or the town, or the commissioners, when acting in their place on appeal, would adjudge such a way to be of common convenience or necessity for the public, when the statute only authorizes it to be laid out for the use of the town only, or for one or more individuals thereof. The statute does not require the selectmen to state in their report to the town, that the way will be beneficial to the town or to some one or more of its inhabitants. It does not become established by their proceedings, which are only preparatory, but by vote of the town approving and allowing it. When the statute in the tenth section declares, that the damages are to be paid by the town "if it be of general benefit," reference is had to the general benefit of the town not to that of the public. All, which the statute seems to require as evidence of its being for the benefit of the town or of an individual, is, that it be approved and allowed in a legal meeting called for the purpose of acting upon it. It is still a town or private way, when brought before the commissioners by an appeal from the action of the town, and they are required to pass such a judgment only as the town should have done. Their record, after reciting the facts, states, "that said town or private way would be of general benefit" and that they "accordingly accept and approve the same."

When a defect in a record is occasioned by an omission of the Court to render the proper judgment, or to come to a conclusion upon the whole matter embraced in the cause, such defect arising out of an incorrect or a want of judicial action cannot be amended after the session has closed, and the cause is no longer *sub ju-*

dice. But if the Court have performed its whole duty correctly, and the recording officer has erred in making up a proper or full record, the Court may in its discretion cause the record at any time to be amended or corrected so as to have it declare the whole truth. The Courts in this State are by statute *c.* 108, § 3, required to inspect the conduct of their clerks, and to cause deficient records to be made up under their direction. Each Court must necessarily be the judge of what it has decided and adjudged; and when it orders an amendment of the record, the presumption of other Courts must necessarily be, that it does not undertake to order its clerk to record what it never had decided.

Usually a Court could not order its clerk after the close of a session to enlarge the record so as to embrace any matter, which did not appear from the documents or minutes of the Court or clerk to have been decided. It could not be expected to rely upon the memory in a matter of such importance.

Writ denied.

EDWARD LAMB *& al. vs.* FRANKLIN MANUFACTURING COMPANY, *and Trustees.*

The answers of a trustee are to be regarded as true and conclusive upon all matters of fact in them; but when the trustee sets up rights or draws conclusions, arising out of or resulting from the facts stated, such rights or conclusions are subject to the revision of the court.

When the trustee admits that he holds the property of the principal to a certain amount subject to this process, it must clearly appear from his answers, that he has just claims to an equal amount, before he can be discharged. Every doubtful statement is to be received as indicative that he could not truly make one, which would relieve the case from doubt.

THE questions in this case arose upon the answers of *A. F. Howard* and *W. A. Burnham*, who were summoned as trustees. The company was in debt, and suits were brought and personal property of the company attached, for which *Howard* and *Burnham* became receipters. The company had also made contracts partly performed at the time of the attachment, which the company could not complete. An arrangement was made by which with the as-

sent of the creditors *Howard* and *Burnham* were to complete the contracts, and obtain payment, making use of the property attached. The description of services performed by them sufficiently appears in the opinion of the Court. The trustees in their answers say : — " Our whole expenditures in finishing the contracts before named, amount to the sum $12,735,33. Our receipts to $15,023,52. And we have charged $1200 each as commissions and compensation for our services in performing said contracts, leaving a balance due us of $111,81."

Bradley, for the plaintiffs, cited 4 *Mason*, 460 ; 5 *Mason*, 281 ; 5 *N. H. Rep.* 178.

Appleton, for the trustees.

The opinion of the Court was by

SHEPLEY J. — The answers of a trustee are to be regarded as true and conclusive upon all matters of fact stated in them. When the trustee sets up rights or draws conclusions arising out of or resulting from the facts stated, such rights or conclusions are necessarily subject to revision. And when he admits, that he holds the property of the principal to a certain amount subject to this process, it must clearly appear from his answers that he has just claims to an equal amount before he can be discharged. Every doubtful statement is to be received as indicative that he could not truly make one, which would relieve the case from doubt.

The trustees in this case do not state that they were entitled to any agreed compensation. Their claims are in the nature of a *quantum meruit* for services, commissions and risks. It appears that the contract was completed in little more than three months, and the whole business settled at the factory in little more than two months more. One of the trustees left that place in a couple of weeks afterward and shortly after the country. The other does not appear to have been further employed upon the business of the contract except so far as his personal attention might be required about the suit, occasioned by an attachment of a part of the property.

Under all the circumstances exhibited in the answers the Court cannot decide, that it clearly appears, that the trustees were entitled to retain the full amount charged, and they must be adjudged trustees.

THOMAS FROST *vs.* VALENTINE HILL, JR.

Prior to the operation of the additional militia act of 1839, *c.* 399, in an action to recover a fine for the neglect of a private to attend a company training, he may give in evidence as a sufficient defence, that he was laboring under a bodily infirmity and permanent disability at the time of the supposed neglect, although he had not procured a certificate of the surgeon, nor offered an excuse to the commanding officer of the company.

If it be competent for a State legislature to require of one, who is not by the laws of the *United States* subject to enrolment, to obtain a surgeon's certificate as the only proof of that fact, it was not required by any act applicable to cases prior to *Sept.* 20, 1839.

WRIT of Error. The original suit was brought to recover a fine incurred by *Frost*, the plaintiff in error, by unnecessarily neglecting to appear at a meeting of the company of militia within the bounds of which he resided, and of which *Hill* was clerk. The meeting was on *Sept.* 19, 1839, and the suit was brought *Oct.* 29, 1839. *Frost* proved at the trial by a physician, who had frequently prescribed for him, that he was laboring under bodily infirmity and permanent disability at the time of the alleged neglect, and had been for some years immediately preceding. No excuse had been offered by *Frost*. *Frost* objected that the action could not be maintained, 1. Because it was proved that *Frost* labored under a permanent bodily disability to do military duty. 2. That the action was not brought within the time prescribed by law.

The Justice decided that such disability was no defence to the action, and that the suit was brought within the time prescribed by law; and adjudged that *Frost* should pay a fine.

M. Emery, for the plaintiff in error, made the same objections taken before the Justice. Under the first he cited *Carter* v. *Carter*, 3 *Fairf.* 291; *Pitts* v. *Weston*, 2 *Greenl.* 349; *st.* 1834, *c.* 121; *st.* 1837, *c.* 276; *st.* 1839, *c.* 399.

Leland, for the defendant in error, contended, that by the last statute where no certificate from the surgeon of the regiment was produced, no disability could be given in evidence as a defence, unless an excuse had been made to the commanding officer of the company within the time limited. The commanding officer is bound to enrol every one within the bounds of his company, and

the legislature intended that if a person enroled and notified would not make his excuse, so as to prevent the bringing of a suit, that he should pay a fine.

The opinion of the court was by

SHEPLEY J. — It appears from the record that the plaintiff in error proved before the magistrate "that he was laboring under a bodily infirmity and permanent disability at the time of the supposed neglect and for some years before."

It has been decided, that those "who are permanently disabled either by natural defects or by casualty are excluded from the militia. *Hume* v. *Vance*, 7 *Greenl.* 158. It is said that the act of the 20th of *March*, 1839, *c.* 399, deprived him of the right to make such proof.

It is not now necessary to decide whether it be competent for a State legislature to require one, who is not by the laws of the *United States* liable to enrolment, to obtain a surgeon's certificate as the only proof of that fact, for the act of 1839 did not take effect in season to affect this suit.

Judgment reversed.

DOMINICUS CUTTS *vs.* THE YORK MANUFACTURING COMPANY.

Mem. SHEPLEY J. having formerly been consulted as counsel, did not sit in this case.

If an entry to foreclose a mortgage be made by one acting as attorney of a bank to which the mortgage had been assigned, without legal authority, and the fact that the entry had been made, is afterwards recited in an agreement executed between the bank and the assignees of the mortgagor, this is a sufficient ratification and adoption of the act of the attorney to make it the act of the bank.

If the stockholders of the bank, by their vote, authorize one of their directors to execute an instrument under seal, waiving and relinquishing the entry made by order of the bank to foreclose the mortgage, and the instrument be executed in pursuance of such vote, it is no waiver of the entry, unless the instrument is delivered over to the holder of the equity.

Although the production of a deed by the party in whose favor it is made, is evidence of a delivery, which is to be referred to the day of its date; yet it is competent for the other party to show the true time of the delivery, or that it was obtained improperly, or against the will of the party whose signature and seal are affixed.

Where land is mortgaged to secure the payment of a sum of money according to the terms of a bond, and the mortgagee assigns the mortgage and bond to secure a sum of money due from him, it is by no means certain that it is not to be treated as real estate and thus the assignor of the mortgage entitled to the statute period of three years, after breach of condition, before his interest can be foreclosed. But if it is to be treated as a mortgage of personal property, if the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption which may be asserted by the mortgagor, if he brings his bill to redeem within a reasonable time.

The institution and prosecution of a suit by the assignee of the mortgage against the assignor on the debt secured by the assignment, is evidence that the right to redeem is still open.

Although long before the expiration of the three years, the assignees of the mortgagor had paid to the assignees of the mortgagee the amount of their debt, and entered into the actual possession of the mortgaged premises, and had taken a written agreement to assign or convey to them on request, and to pay over the money, if the property should be redeemed; yet as the agreement provided, that the assignees of the mortgagee should proceed to consummate the entry to a foreclosure, if the assignees of the mortgagor requested it, *it was held*, that the entry to foreclose the mortgage was not waived as against them.

The release by the assignees of the mortgage to the assignor of "all the estate, right, title and interest in and to the said mortgaged premises by force of the conveyance made thereof by him to us, to hold in like manner as if he had never conveyed the same to us," does not preclude him from availing himself of the entry to foreclose the mortgage made by the assignees, but imparts to him all the power to pursue the entry to a foreclosure, which they would have had, if the mortgage had remained in their hands.

Where the question at issue was, whether an entry made by the assignees of the mortgagee against the owners of the equity of redemption, of which the tenants afterwards became the assignees, was waived and relinquished, it was held, that the declarations of the agent of the defendants, an incorporated manufacturing company, made to the assessors of a town, that the fee of the premises was in the assignees of the mortgagee, were either properly admitted in evidence, or had too slight a bearing on the issue to be a sufficient cause for granting a new trial.

THIS is the same action, wherein a case was reported in the fourteenth volume of the Reports of this State, 326. The same facts appeared, and some additional ones at the new trial, also before EMERY J. The demandant produced a re-assignment of the

mortgage from *R. Cutts* to *D. Cutts* from the *Atlantic Bank* to him, in the handwriting of the counsel of *Cutts*, in which the bank "do hereby in consideration of said payment, remise, release and forever quitclaim to the said *Dominicus Cutts*, all the estate, right, title and interest in and to the said mortgaged premises, by force of the conveyance made thereof by said *Dominicus Cutts* to us; to have and to hold the same to him and to his heirs and assigns in like manner as if he had never conveyed the same to us." The demandant offered one of the assessors of *Saco* to prove that the demanded premises were taxed to the defendants in the year 1832, and that the agent of the company in the spring of the ensuing year requested that the property might be taxed to the bank, and stated, that it belonged to the bank, or that the fee was in the bank. This testimony was objected to by the tenants, but was admitted. The demandant offered a power of attorney purporting to be from the *Atlantic Bank* by *P. Cutler*, the president thereof, to *G. Thacher*, authorizing him to make an entry to foreclose the mortgage. This was objected to without first showing authority for that purpose. The fifth article of the by-laws of the bank was read, giving to the president "the general superintendence of the concerns of the bank, to make loans, discounts and purchases of drafts," "provided that if the director of the week be present, or any other director, his approbation shall be first obtained." And also the seventh article, authorizing the president and cashier to execute deeds and other papers in pursuance of any vote of the directors. The Judge ruled, that this was sufficient, and the paper was admitted. The demandant also offered in evidence, an agreement under seal between the bank and the company in the handwriting of a counsellor at law of *Boston*, duly executed by *H. F. Baker*, for the bank, dated *July* 1, 1832, and proved, that the tenants admitted that the paper was actually executed and delivered, *Dec.* 14, 1833. This recited the payment by the company to the bank of the amount due on the mortgage, and the bank engaged to assign the mortgage to the company at any time on request, and if it should be foreclosed, to convey the land, or if redeemed, to pay over the money, "together with all the benefit and advantage of the entry upon the land and property made by said bank for the purpose of creating a forfeiture of the mortgaged pre-

mises;" "meaning to release and quitclaim to said company, all the right, title, property, claim and advantage of the bank in and to the premises, and to constitute, authorize and empower the company to do all things necessary to consummate the possession and use thereof, and to have and to hold the same forever." The company therein agreed to cause the entry to be enforced for the use of the company, and to "execute any other and further conveyances, that might be tendered by the company," "to transfer their rights, powers and property in the premises to the company." The tenants proved, that they paid to the bank the amount due from *Cutts* to the bank, and for which they held the mortgage as security, on *July* 3, 1832. The demandant also proved, that *Pliny Cutler*, the president of the bank, was also the treasurer of the company. The tenants proved, that the right of *Richard Cutts* to redeem the premises had been sold by his creditors, and had been afterwards purchased by the company for the sum of $4500. They also offered in evidence a paper, purporting to be signed and sealed by the *Atlantic Bank* to the company, stating, that the entry to foreclose was never intended to be enforced against the company, and waiving all claim under it, dated *Dec.* 14, 1833, in the handwriting of a counsellor at law in *Saco*, at the request of the agent of the company, excepting the date and the name of the person who was to execute it for the bank, which were in the handwriting of one of the directors of the bank, who executed the paper by authority of a vote of the stockholders of that date, proved to have been passed and recorded on that day. The demandant objected to the admission of this paper, and the tenants offered the depositions of the subscribing witnesses, and of the director of the bank who filled up the date, and other testimony, to prove the execution and delivery of the paper. The demandant proved by his counsel, that the same paper was shown to him in *Boston* by *Pliny Cutler*, in the director's room of the *Atlantic Bank* on *Dec.* 20, 1833.

Whether the paper dated *Dec.* 14, 1833 was executed, and was delivered, prior to *December* 17, 1833, when *Cutts* redeemed of the bank, was submitted for the determination of the jury. On this point in the case, the counsel for the tenants requested the Judge to instruct the jury, that as the instrument of *Dec.* 14, 1833, was

drawn up by the attorney of the company at their request, and by them presented to the bank for execution, that if it was actually executed on that day by the bank, that no delivery over by the bank to the company was necessary to give the instrument its legal effect as a waiver or relinquishment of any act or acts of the bank, at or before that time, to foreclose the mortgage against the company, as owners of the equity. The Judge declined to give this instruction. The papers in the case, with the report, extend to 116 folio pages, but it is believed, that the *questions of law* will be sufficiently understood from what already appears in this and in the former case.

The jury returned a verdict for the demandant, and on inquiry by the Court at the request of the counsel for the tenants, the jury answered, that they were not satisfied, that the said paper, dated *Dec.* 14, 1833, "*was executed and delivered,*" on said fourteenth day of *December*, or before the seventeenth of that month; and on further inquiry, they answered, "that they were not fully satisfied, that the said instrument was *executed* on said fourteenth day of *December*, or before said seventeenth day before the tender." If the rulings and decisions of the Judge were correct, the verdict was to stand, unless it should be set aside on the motion for a new trial.

The tenants on the next day filed a motion for a new trial.

1. Because the verdict is not only without evidence, but against all the evidence in the case, and opposed to the uncontradicted testimony of several unimpeached witnesses.

2. That the jury have answered inquiries, whereby it appears, that they were not fully satisfied, that an instrument dated *Dec.* 14, 1833, was executed on that day, or before the 17th of the same month, when the execution of that instrument was distinctly proved by several credible witnesses, corroborated by strong circumstantial evidence, and not opposed by any testimony whatever; and when the fact, that said instrument was executed at the time aforesaid, was very material to the determination of the issue on trial, and having a strong, if not a conclusive, tendency to determine the issue in favor of the tenants.

3. That the verdict was against law and evidence.

J. Shepley, for the tenants, contended: —

1. No authority was given by the *Atlantic Bank* to take possession to foreclose. The fifth article of the by-laws, giving the president the general superintendance, gives no power to sign a power of attorney, because the mode in which papers are to be signed for the bank is specially provided in the seventh section. That mode is by the signatures of the president and cashier with the approbation of the directors by vote, or by some person authorized by a vote of the stockholders. Neither course was adopted. The question, whether this was ratified or not, was not made, and was not submitted to the jury. But were it open, there was no ratification in any manner unless by the paper which releases and waives the entry.

2. The declarations of the factory agent were improperly admitted. The only question submitted to the jury was, whether the instrument dated *December* 14, 1833, was executed and delivered before the seventeenth of that month. A conversation in 1832, or in the spring of 1833, respecting taxing the property, in which the agent took a part, could have no relevancy to that issue. The declarations of an agent are inadmissible, unless made when in the performance of the act. *Polleys* v. *Ocean Ins. Co.* 14 *Maine R.* 153; *Gooch* v. *Bryant*, 13 *Maine R.* 386. Here the agent took no part in the execution or delivery of the paper.

3. The instruction requested ought to have been given.

Nothing more was necessary to constitute a waiver of an entry to foreclose a mortgage, than the assent of the parties to the waiver. The proof of the entry was by parol in this case, and if the tenants had been living persons, the waiver might have been also by parol. A vote on the records of the bank, that they would waive the entry is sufficient. Any vote, or act, of the bank, which shows such intention, is sufficient. Had they ordered a second entry to have been made, that would have been a waiver of the first. The vote of the stockholders on this subject on the 14th of *December* is in itself a waiver, if the paper had never been executed. The waiver of an entry has no resemblance to a conveyance of land, where the execution and delivery of a deed are necessary to pass the title. In *Quint* v. *Little*, 4 *Greenl.* 495, this Court held, that the extension of the time of payment, proved

by a letter not under seal, was a waiver. In *Fay* v. *Valentine*, 5 *Pick.* 418, a second entry to foreclose was held to be a relinquishment of a former one, and when the second entry was made without the knowledge of the mortgagor. The positions we take, are understood to have had the assent of this Court in the former trial of this case. 14 *Maine R.* 333. And the same are found in *Dexter* v. *Arnold*, 1 *Sumner*, 117.

4. The verdict should be set aside, because the demandant, by evidence introduced by himself, and appearing in the case, has shown, that the mortgage had not been foreclosed. The paper of *July* 1, 1832, was introduced by him, acknowledging the receipt by the bank from the company of the full amount of the sum due the bank. The fact of payment in *July*, 1832, is also proved by other evidence. The company became beneficially interested, and could enforce their rights by law. The mortgage is but a mere chattel, and not real estate, and but an incident to the debt, and will pass by the assignment of the debt, at least in equity. *Crane* v. *Marsh*, 4 *Pick.* 131; *Wilson* v. *Troup*, 2 *Cowen*, 195; *Jackson* v. *Blodgett*, 5 *Cowen*, 202; *Coles* v. *Coles*, 15 *Johns. R.* 319; *Crosby* v. *Brownson*, 2 *Day*, 425; *Vose* v. *Handy*, 2 *Greenl.* 322. It would be as absurd to suppose that the bank, after this, could go on and foreclose against the company, as that they could proceed and foreclose against *Cutts* after he had paid the debt.

5. The reassignment of the mortgage by the bank to *Cutts*, limits him to the mortgage, as it was when assigned, and restricts him, as was intended, from setting up any claims under *Thacher's* entry.

A word only on the motion for a new trial. The only reliance for evidence contradictory to the testimony on the part of the tenants, to prove the execution and delivery of the instrument of *Dec.* 14, 1833, was the statement by the counsel of *Cutts*, that he saw the paper in the hands of *Mr. Cutler* at the bank after *Dec.* 17. *Cutts* proved that *Mr. Cutler* was not only president of the bank, but treasurer of the company, whose duty it was to keep the papers. The cashier is the proper keeper of the papers of the bank. It does not therefore contradict, but confirms the testimony of the other witnesses.

Daveis, who argued the motion for a new trial, and replied for the tenants, added to the points made by the opening counsel: —

The paper of *Dec.* 14, being found in the hands of the tenants, is presumptive evidence of its having been duly delivered at the time of its date.

The mortgage and bond were mere chattel interests, and therefore when *Cutts* had neglected to make payment when his debt became due, he lost all right to redeem.

A. G. Goodwin argued for the demandant, and cited authorities to the following points.

The declarations of the agent of the company were rightly admitted; but if they were not, the facts stated are wholly immaterial, and ought not to occasion a new trial. 14 *Maine R.* 116, 141, 201, 228; 13 *Maine R.* 439; 6 *N. H. Rep.* 80.

The attorney of the bank had sufficient authority to take possession. And his proceedings were afterwards ratified by the bank, and that is sufficient. 8 *Mass. R.* 113; 12 *Mass. R.* 185; 17 *Mass. R.* 103; 6 *Mass. R.* 193; 1 *Pick.* 372; 3 *Pick.* 232; 3 *Greenl.* 429; 5 *Greenl.* 38; 7 *Wend.* 377; 2 *Wend.* 561.

The instructions requested were rightfully withheld.

The release or assignment of all such interests must be by deed or note in writing. *Stat.* 1821, *c.* 53, § 2; 11 *Mass. R.* 533; 6 *Pick.* 489. A delivery of a deed is necessary. 3 *Greenl.* 141; 7 *Greenl.* 184; 12 *Mass. R.* 403; 13 *Pick.* 69; 2 *Stark. on Ev.* 271, *note* 1; *Cruise Dig. Deed, c.* 2, § 74, 80; 12 *Wend.* 105; 13 *Johns. R.* 235; 5 *Mason,* 161; 15 *Wend.* 656. In law any writing under seal, being a specialty, is a deed. 2 *Pick.* 345; 2 *Bl. Com.* 306. A bond takes effect from its delivery. 12 *Mass. R.* 403. A delivery of articles of agreement under seal is necessary. 5 *Greenl.* 336. A delivery from a corporation is necessary. 1 *Co. Lit.* 36, *(a);* 9 *East,* 360.

The signing for a coporation must be by authority, and the common seal must be affixed by the officer in whose custody it is, or by some person specially authorized. *Angel & A. on Corp.* 113, 168; 5 *Wheat.* 326; 16 *Mass. R.* 42; 1 *Greenl.* 339; 2 *Pick.* 353. A common seal does not authenticate itself, but must be proved by testimony to be genuine. 8 *T. R.* 303; 10 *Johns. R.* 381; 7 *Serg. & R.* 156; 1 *Stark. Ev.* 261, *note* 1; *Angel & A. on Corp.* 115; 3 *East,* 221; 15 *Wend.* 256. It is of the essence of a contract, that it be accepted by both parties. *Rob. on Fr.*

108; *Angel & A. on Corp.* 138; 13 *Pick.* 75. The act from which the assent of a corporation may be inferred, must be a corporate act. 1 *Pick.* 297; 7 *Pick.* 344; *Angel & A.* 137. All that can be inferred from the fact that one is an agent of a corporation, is the power to do the ordinary business of the company. 7 *Conn. R.* 219; *Angel & A.* 171. The deed or instrument must come to the possession of the grantee with the consent of the grantor. 7 *Greenl.* 184. "To show what acts are necessary, in the case of an individual, from which the acceptance may be inferred." 9 *Mass. R.* 307; 10 *Mass. R.* 456; 12 *Mass. R.* 456; 17 *Mass. R.* 213; 7 *Pick.* 29, 91; 12 *Pick.* 141; 13 *Pick.* 69; 3 *Greenl.* 141; 7 *Greenl.* 181. "What acts necessary, in case of a corporation, from which to infer assent or acceptance." 1 *Mass. R.* 159; 8 *Mass. R.* 292; 10 *Mass. R.* 397; 14 *Mass. R.* 58, 167; 17 *Mass. R.* 1; 3 *Pick.* 335; 7 *Pick.* 344; 12 *Wheat.* 64; 5 *Mason*, 60; 13 *Pick.* 69. Any person affected by a deed may at any time question its validity, and show that in fact it was not duly executed and delivered. 2 *Wend.* 308. Whether a deed was executed and delivered is a question for the jury. 10 *Wend.* 310.

Goodwin also argued against the motion for a new trial.

The opinion of the Court was drawn up by

WESTON C. J.—The counsel for the tenants objected to the legal admissibility of a certain declaration of *Samuel Bachelder*, testified to by *Cotton Bradbury*. *Bachelder* was the general agent of the tenants, and in 1833, appeared before the board of assessors in *Saco*, for the purpose of inducing them not to set the premises in question, in their assessment, to the company, against whom they had previously been taxed, stating as a reason, that they belonged to the *Atlantic Bank*, or that the fee was in them. And thereupon the change proposed, was made by the assessors. This declaration must be regarded as a part of the *res gesta*, and as such admissible. It was directly connected with the business he was transacting, and must necessarily have had an influence upon it. But if the law were otherwise, its bearing upon the question of title, which must depend upon other evidence, is so slight, that it would deserve

serious consideration, whether the verdict ought to be disturbed upon this objection.

It is contended, that the power of attorney to *George Thacher, Esq.* to take possession of the demanded premises, for the purpose of foreclosure was not made by competent authority. It is a document full and formal in its terms, executed by the President of the Bank, claiming to act in their behalf. By the seventh article of the by-laws of the stockholders, it is provided that the president and cashier, being authorized by a vote of the directors, may execute any of the powers given to the directors by attorney. And by the fifth article of the directors' by-laws a general superintendence of the concerns of the bank is confided to the president.

The necessity of resorting to the aid of an attorney, is of ordinary occurrence, and the president and cashier are the usual and accredited organs of a bank in much of its business. The prosecution of legal remedies on bonds, drafts, notes or other securities over due, must often become necessary in a bank having a large capital and discounting extensively. There might be a convenience in clothing the president or cashier with the power of resorting to these remedies, with such incidental authority, as their effectual prosecution might require. Taking possession of estates mortgaged, for the purpose of foreclosure as the law then stood, is one of these remedies.

It is not unlikely, that by a practical construction of their by-laws, it was understood, that the president had power, in virtue of the right given him of general superintendence to appoint an attorney to enter and take possession of an estate to foreclose a mortgage. Whether such a deduction of authority can be legally sustained or not, we deem it unnecessary to decide, as by the agreement, under the seal of the parties, bearing date, *July* 1, 1832, and which is admitted by the tenants to have been duly executed on behalf of the bank, as well as of the company, the entry made upon the premises, for the purpose of foreclosure, is expressly recited and the president, directors and company of the bank covenant to cause that entry to be made effectual. By the same instrument, the company were to lend their aid to that measure; and upon the contemplated consummation of the foreclosure, the bank

covenanted to convey the premises to the tenants. If there was before any want of authority, the entry, and the power under which it was made, was by that agreement adopted and confirmed. And this was done with the privity, consent and cooperation of the tenants.

With regard to the instructions requested they appear to us to have been properly withheld. Delivery is essential to a deed. The party executing it is not bound, so long as he keeps it under his own control and possession. *Chadwick* v. *Webber*, 3 *Greenl.* 141. The fact that the deed was prepared by the counsel for the tenants, does not dispense with delivery. It may be evidence, that they would have accepted it, and that they desired its execution, but delivery is the act of the party who executes, and it must be done with a view to give the deed effect.

A motion is made to set aside the verdict as against evidence or the weight of evidence. The jury responded, that they were not satisfied that the instrument dated *December* 14th, 1833, was executed and delivered prior to the tender on the 17th; and further, that they were not satisfied, that it was executed, that is, as we understand their answer, signed and sealed, on that day. Of this latter fact, the direct evidence is strong. But upon this part of the case the question is, whether it was an operative and effectual instrument, prior to the seventeenth of *December*, when the money secured to the *Atlantic Bank* was paid by the demandant, and a reassignment of the mortgage executed.

It is insisted, that the production of the instrument by the tenants is evidence of a delivery, which is to be referred to the day of its date. Such might be the effect of this evidence, if there were no opposing proof. But it is competent to show, that possession of the deed was obtained improperly, and against the will of the party, whose signature and seal are affixed. The true time of delivery is also open to inquiry, notwithstanding its date. *Benj. Dodd* deposes, that he saw this paper which he witnessed, signed, sealed and delivered, but he does not say to whom delivered, or whether to any one in behalf of the tenants. *Mr. Goodwin* positively testifies, that the instrument was in the hands of the president of the bank in *Boston*, on the 20th of *December*, with some writing on the blank leaf, which he was not permitted to see, and which has been

since torn off. This testimony justified the answer of the jury, that they were not satisfied, that it was executed and delivered prior to the seventeenth, when the money was tendered by the demandant.

But it is urged, that the interest of the demandant had vested absolutely in the bank, in trust for the tenants, long prior to the payment or tender by him. And this assumption is upon the ground, that the demandant's interest in the mortgage was personal property, and that upon his assignment to the bank by way of mortgage, they became the absolute owners, upon his failing to pay within the time, limited in the condition of that assignment.

Many of the authorities, cited for the tenants, treat a mortgage as a mere incident to the debt it is intended to secure, and as standing in the relation of an accessary to its principal. We are not however prepared to say, that he who mortgages an interest in real estate, which he holds himself in mortgage, is not entitled to the statute period of three years, after breach of condition, before his interest can be foreclosed. *Stat.* 1821, *c.* 39. The statute is broad enough in its terms to embrace such a case, and an equity of redemption is a favored claim. But from the view we have taken of the case, we do not deem it necessary to decide this point.

The doctrine in relation to a mortgage of personal property, is very clearly laid down by *Mr. Justice Story* in his commentaries, to which we refer, without adverting to the authorities, by which he is sustained. He says, a mortgage of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. 2 *Story on Eq.* 296, § 1030. He adds, that in mortgages of personal property, although the prescribed condition has not been fulfilled, there exists as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his bill to redeem, within a reasonable time. *Ib.* 297, § 1031. That the right to redeem was open to the demandant, when he paid the money, is deducible from the fact, that the bank, and in concert with them the tenants, treated the assignment of the mortgage as security only, by prosecuting a suit against the demandant, for the principal debt thus secured which was not discontinued until after they had received their money.

If they had a right to hold, and did hold, the collateral security as absolutely their own, it being of sufficient value their debt was paid. Their suit for the debt is, by fair implication, an admission that the equity of the demandant was still open, and his right to redeem not foreclosed. Whether therefore the mortgage assigned to the bank is to be regarded as personal property, or an interest in real estate, we are of opinion, that the demandant had a right to redeem, when he paid the money for that purpose to the bank.

It has been argued, that the agreement, under the date of *July* first, 1832, although executed in fact on the fourteenth of *December*, 1833, vested the beneficial interest in the debt, due from the demandant to the bank as well as the collateral security, in the tenants, by relation from the time of its date; and that it operated as a waiver of the entry to foreclose against the assignees of *Richard Cutts*, thirteen fifteenths of whose interest had been purchased by the tenants. But it is very manifest, from the terms of that agreement, that the tenants at that time deemed it for their interest to keep up and consummate the entry, which had been made for foreclosure. Although antedated, four days only were in fact wanted to complete that consummation. Perhaps nothing was then less expected, than the actual payment of the money, which was not a small sum, within that short period by the demandant. But to be prepared at all events, a formal waiver of the entry was executed, as the evidence shows at the same time, not very consistent with some of the avowed objects of the other instrument. As they had different dates, this discrepancy would not be apparent, and both together afforded the means of proving or disproving a foreclosure, as might be most for the interest of the tenants.

We do not mean to be understood, that any thing morally wrong was designed. The demandant would still be secure in all, to which he was equitably entitled. If the foreclosure took effect, his debt was paid; if it did not, it would remain a lien upon the estate. The appreciation in value, the tenants were doubtless anxious to secure to themselves, it having been created, as they allege, by their operations. It turns out, that they were not able to prove affirmatively, which they were bound to do, the seasonable delivery of the instrument of waiver. It does not appear that

counsel was consulted subsequently to the time, when the paper was drafted in *Saco*, two days prior to its date, and it may have been thought, that it might safely be retained by the bank, as a paper not likely to be wanted.

It is said, that it could not be the intention of the contracting parties to the agreement, dated *July*, 1832, to keep up the entry made by *Mr. Thacher*, against the tenants, for whose benefit that agreement was made. That entry was to foreclose the mortgage, executed by *Richard Cutts*. It must have been understood also to have the effect of foreclosing the demandant. This is to be inferred from the terms of the paper, dated *December* fourteenth, 1833. But as a waiver of the entry against the assignees of *Richard* might defeat a foreclosure of the demandant, which if effectual became such as an incident to that entry, the instrument of *July*, which is elaborately drawn, provided for a consummation of that entry generally. If the tenants have been disappointed in the results, they cannot, in our opinion, escape from the difficulties, in which they have become involved, by deducing a waiver of the entry from the agreement of *July*, without doing violence to the obvious meaning of its terms.

We cannot understand, that the reassignment, the day before the three years expired, interrupted or arrested the foreclosure. The entry having been made by the assignees of the demandant, between whom and himself there was a direct privity, continued to be available for his benefit. It would be unreasonable to hold, that he must begin *de novo*.

The motion for a new trial is overruled.

York Manufacturing Company *vs.* Dominicus Cutts.

Mem. Shepley J. having been consulted in relation to the controversy between these parties, before his appointment, took no part in the decision of this case.

The mortgagee brought his writ of entry against the assignees of the mortgagor, without declaring as upon a mortgage; the assignees by brief statement pleaded, that they were the owners of the equity and entitled to redeem, and that if any judgment should be rendered, it should be as upon a mortgage; to this the mortgagee replied, that the right to redeem had been foreclosed, and that an unconditional judgment should be rendered; the action was tried, and the jury found, that the assignees were not entitled to redeem in manner and form as they in their brief statement had alleged; questions of law were reserved in the case, and a motion for a new trial filed, and the action was continued. During the pendency of the suit on these questions, and before any decision or judgment of the Court thereon, the assignees tendered the amount secured by the mortgage, and brought their bill in equity to redeem, wherein it was, among other things, alleged, that the suit at law was pending, and that the mortgagee was thereby contriving unjustly to injure the assignees; the mortgagee demurred to so much of the bill as *sought relief*, and pleaded the proceedings on the writ of entry in bar of so much of the bill as *prayed for a discovery.*

It was held: —

That where the cause is argued upon a demurrer and plea in bar, that for the purpose of considering their legal effect, the averments in the plea are to be taken as true.

That if the mortgagee bring his writ of entry, without declaring as upon a mortgage, the assignees of the mortgagor, have their election to suffer a default, or to plead that they have a subsisting right of redemption, and that a conditional judgment only should be rendered. If the latter course be adopted, it opens the whole field of inquiry as to the facts and principles, legal and equitable, upon which the alleged right to redeem is based.

That where a controversy has been submitted to the decision of a court of law, a court of equity cannot proceed upon the same subject matter.

That the plea in bar, if the averments therein are not controverted, is sufficient to preclude the maintenance of the bill for the discovery of facts, based on the assumption, that the right to redeem remained.

That if the plea be allowed by the Court, still the complainants may reply to the plea, and deny the truth of the facts contained in it, and put the defendant to establish them by proof.

And that the complainants have a plain, adequate and certain remedy at law, adapted to the relief prayed for; that the whole matter had been submitted to a court of law, and was in a train for final adjudication; and that the matter set forth in the bill to which the demurrer extends, does not entitle them to relief in this Court, sitting as a court of chancery.

York Manufacturing Company *v.* Cutts.

THIS was a bill in equity arising out of the same transactions related in the cases between the same parties reported in 14 *Maine Rep.* 326, and *ante, p.* 190. Additional facts were stated in the bill, and among them, that the value of the property, since the mortgage was assigned by *Cutts* to the *Atlantic Bank*, has greatly increased, from the improvements and expenditures of the company in the immediate vicinity; that *Cutts* did not deny the right to redeem, or caution the company against purchasing, until after they had expended large sums of money in the purchase of the equity of his relatives; that the company could not ascertain the amount justly due from *Richard Cutts* to *Dominicus Cutts* on the mortgage, and that *Dominicus Cutts* refused to render any account thereof, or of any income, and therefore they could not safely make a tender to him; that after the company had paid to the *Atlantic Bank* the amount due from *D. Cutts* to them, in *July*, 1832, they immediately went into the actual possession and occupation of the premises, by consent of the bank, as the legal representatives of *Richard Cutts*, the mortgagor, and as assignees of the equity of redemption; that the *Atlantic Bank*, before the redemption by *Richard Cutts*, waived, surrendered and abandoned forever the entry made by their attorney to foreclose the mortgage; that the paper dated *Dec.* 14, 1833, was executed by the bank and delivered to the company on said fourteenth day of *December*, 1833; that *Cutts* well knew that the mortgage had not been foreclosed, but finding the mortgaged property had much increased in value in consequence of the improvements made by the company, and designing to injure them for his own benefit, contrived and attempted to deprive them of the large sums they had paid for the equity, and to prevent any redemption; that the company had always been ready to pay the sum due on the mortgage, when they could ascertain the same, and requested *Cutts* to state the amount thereof which he utterly refused to do; and that they tendered to him the full amount believed to be due, which he refused to receive. They aver that they can have adequate relief only in a court of equity; they pray that *Cutts* may be enjoined from further prosecuting his said suit at law; or that none but a conditional judgment be rendered; that *Cutts* should be required to state and exhibit an account of the sum justly due on the mortgage, and pro-

duce all books and papers relative thereto; and be required to receive the amount of the company, and release all claim to the premises under the mortgage. The bill was filed and a subpœna issued *April* 12, 1839, and was served upon the defendant on the next day.

To this bill *Cutts*, on *Sept.* 10, 1839, put in a demurrer and plea in bar. The demurrer was — "that as to so much of said bill as prays or seeks relief from or against this defendant in and upon the premises set forth therein, this defendant doth demur in law." Several causes of demurrer were assigned, being the same taken as points to be supported in the argument.

The plea in bar was verified by the oath of the party, and alleges that *Cutts*, "as to so much of the bill as seeks any discovery from this defendant upon the matters and things and allegations set forth in said bill and inquired of thereby, and prays the introduction and exhibition of all books, papers, receipts, memorandums and entries, doth plead in bar thereto." The plea then states the commencement of his writ of entry against the company; gives a copy of the declaration, and a copy of the plea and brief statement of the company, wherein they say, "that on *Oct.* 27, 1819, *Richard Cutts* was lawfully seized of the demanded premises in fee, and then conveyed the same to said *Dominicus Cutts* by deed of mortgage, to secure the performance of certain conditions in the same deed mentioned; and further, that they are lawfully possessed of the right which the said *Richard Cutts* had to redeem the said mortgaged premises, and are entitled by law to redeem the same; and that if any judgment ought te be rendered in said action in favor of said *Dominicus Cutts*, it should be a judgment as upon a mortgage only;" gives a copy of the replication thereto by brief statement, stating, that he, for special matter in support of his said action, "says, that the right which the said *Richard Cutts* had to redeem the premises demanded, has long since been foreclosed; and that neither the said *Richard*, nor any one under him, has any right to redeem the demanded premises; and that an unconditional judgment for the possession of the demanded premises should be rendered for him;" gives a circumstantial history of the case, stating the first trial, first law question, the second trial and the verdict for *Cutts* in these words; "The jury find, that the *York Man-*

ufacturing Company did disseize the demandant in manner and form as set forth in the writ — and they further find, that the said *York Manufacturing Company* are not entitled to redeem in manner and form as they in their brief statement have alleged;" that law questions were reserved, and a motion for a new trial made: and concludes the statement of facts thus — "whereupon the said suit or action was continued in said Court by order of said Court to the next term thereof, to be holden at *Alfred* aforesaid, on the last *Tuesday* of *April*, 1839, and at said *April Term*, said motion and exceptions were argued by counsel for the parties, and heard by the Court, and said action was further continued by said Court for advisement thereon, and still is pending in said Court upon the questions of law aforesaid."

A. G. Goodwin, for *Cutts*, had prepared his argument before his decease, and afterwards, at the *April Term*, 1840,

Bradley argued for the defendant, chiefly from the minutes of *Mr. Goodwin*.

These complainants have a plain, adequate, sufficient, certain and complete remedy at law, and one adapted to the relief prayed for. 2 *Barbour and Harrington's Eq. Dig.* 28; *ib.* 15; *ib.* 112; 1 *Vern.* 176; 3 *Johns. Ch. R.* 355; 2 *B. & Har. Dig.* 21; *ib.* 15; 1 *Story's Eq.* 14; *Com. Dig. Chancery*, 3, *F.* 8.

The Supreme Judicial Court, as a court of law, has first taken cognizance of the subject matters set forth in said bill of complaint, to whose jurisdiction these complainants have submitted, as appears by their pleadings to said action, the substance of which is set forth in their said bill of complaint. *Smith* v. *McIver*, 9 *Wheat.* 533; 1 *Mad. Chan.* 127; 2 *Kent*, 125; 2 *Barb. & Har. Dig.* 24; 1 *Story's Eq.* § 599, 616; 2 *ib.* § 889; *Emery* v. *Goodwin*, 13 *Maine Rep.* 14; *Homer* v. *Fish*, 1 *Pick.* 439.

This bill is brought to change the forum, and therefore should be dismissed. 1 *Story's Eq.* § 74; *French* v. *Sturdivant*, 8 *Greenl.* 251; *Hunt* v. *Maynard*, 6 *Pick.* 489; *Given* v. *Simpson*, 5 *Greenl.* 303; *Mad. Chan.* 201.

Where no circumstances of surprize, accident, or fraud appear to have intervened to prevent a party from having a full hearing in a court of law, where the suit is brought, upon the points which

form the ground of his application to the court of equity, an injunction will not be granted. 2 *Barb. & H. Dig.* 29, 110; *Penny* v. *Martin*, 4 *Johns. Ch. R.* 566; *Eden on Injunctions*, 34; 7 *Cranch*, 332; 2 *Story's Eq.* § 894; 1 *Mad. Ch.* 130.

Discovery and relief are never given after a trial at law, when the matter was available at law, unless the party seeking it, avers and proves, that he was ignorant of the defence at the time of the trial. 2 *Barb. & H. Dig.* 48; *Jeremy's Eq. Jur.* 261; *Com.* v. *Pejepscot Proprietors*, 7 *Mass. R.* 423; 3 *Johns. Ch. R.* 45; 16 *Johns. R.* 592; 1 *Johns. Ch. R.* 543; 4 *ib.* 409; 1 *Mad. Chan.* 198, *note* 1; 1 *Story's Eq.* § 146; 2 *ib.* § 895; *Potter* v. *Titcomb*, 2 *Fairf.* 218.

J. Shepley, for the plaintiffs, contended, that the *plea in bar*, going only to so much of the bill as prayed for a discovery, formed no obstacle to the maintenance of the bill. 1. Because the discovery, the contents of the papers sought, were not essential to the support of the bill, and of no importance, but in ascertaining the amount due on the mortgage, after the right to redeem was established. 2. Because the verdict, set forth in the plea, had judgment been rendered upon it, merely negatived the right of the plaintiffs to redeem, that is, decided in the opinion of the jury, that they had not such an interest as would enable them to redeem, and not that the right was lost by a foreclosure of the mortgage. 3. Because a verdict on which no judgment has been rendered, cannot operate as a bar. 4. Because as there was no allegation on either side, that any tender had been made, it was a merely speculative issue, whether the company had the right to redeem, if they wished, and could determine only the right to the possession, to which *Cutts* was entitled in any view of the case, even if he had not paid the debt of *Richard*, as his surety.

Nor should the defendant prevail on his demurrer. The allegations in the plea, although to be received as true for the purposes of the argument on that part of the case, are to be laid aside in the hearing of the demurrer. That goes to the relief sought in the bill, and is to be determined upon the facts stated in the bill alone. That states, that *Cutts* was attempting to injure the plaintiffs by bringing and prosecuting a writ of entry now pending.

The verdict is not stated in it, and if it were, it would be of no avail, until judgment rendered upon it, if ever.

The material question presented on the demurrer is, whether the commencement and pendency of a writ of entry by the mortgagee against the mortgagor takes away the right of the mortgagor, during its pendency, to make his tender and bring his bill in equity to redeem the mortgage?

Before the money is paid or tendered, the mortgagor cannot resist the right to possession under the mortgage with success. The mortgagee is entitled to his judgment, to obtain the profits, or to commence a foreclosure. If the judgment had been actually obtained in the suit, the mortgagor could then make his tender, and bring and maintain his bill in equity. Why should the pendency of the suit take away the right, which would clearly exist after judgment? The writ of entry must be brought at law. The process to obtain a decree or judgment enabling him to redeem, and have a reconveyance of the estate, is only in equity. They are separate and independent suits, and seek different objects in different courts, and may proceed together.

Besides, the bill alleges, that the suit at law was commenced and prosecuted with the fraudulent design to injure the plaintiffs, and to obtain their property unjustly. This is admitted by the demurrer. A suit commenced and prosecuted for such purposes is to be considered and treated like any other fraudulent act, of no force or effect. The plaintiffs therefore had not a remedy at law, and could not obtain the relief sought in the bill, in defence of the suit, or in any other mode than by bill in equity. The important fact on which the bill is based, the tender of the amount due on the mortgage, did not take place until after the commencement of the suit of law, and could not even in a court of equity have been of any avail, in a suit commenced prior to the tender.

Daveis and *D. Goodenow*, on the same side, replied to the argument of the defendant, and insisted that the bill could be maintained.

The opinion of the Court was by

Weston C. J. — The cause having been argued upon the plea and the demurrer the averments in the plea in bar arising from

the proceedings had in this Court, in the suit at law by the defendant in equity against the present plaintiffs, must, for the purpose of considering their legal effect, be taken to be true. They have been submitted to the consideration of the whole Court, upon the legal questions raised in that suit. We are called upon to determine, whether they do not legally preclude the plaintiffs from the prosecution of their bill, so far as it seeks a discovery of facts, supposed to be available for their benefit.

The suit, to which we have referred, was a writ of entry to recover seizin and possession of the premises, which the plaintiffs now claim the right to redeem, as the assignees of the original mortgagor. The plaintiff there did not declare as mortgagee, with a view to obtain judgment as on mortgage; and the defendants in that suit were under no obligation to interpose their claim, as assignees of the mortgagor, to restrict the plaintiff to such a judgment. They might do so, according to our practice; and thus bring before the court the question, whether they had any subsisting right of redemption. This was formerly done by special plea, for which the general issue, with a brief statement is now by law substituted.

The present plaintiffs, then defendants, availed themselves of this privilege; and by their brief statement set up their right to redeem; and thereupon insisted, that the plaintiff could be entitled only to a conditional judgment. This opened and presented the whole field of inquiry, as to the facts and principles, legal and equitable, upon which this right was based. The facts controverted were then settled, upon a fair trial before the jury, to whom the cause was submitted; and every legal objection to their verdict has been discussed, examined and overruled. By a reference to the opinion of the court, last delivered in that case, *ante p.* 190, it will be perceived, that in their judgment the claims of the present plaintiffs have not been sustained.

Unless then the court shall open the controversy for further examination, their rights must be regarded as foreclosed. We do not accede to the doctrine, that the plaintiffs can proceed in equity, upon the same subject matter, which they have once submitted to the decision of a court of law. And more especially is this true, where every fact and principle, upon which they rely, as in the

case before us, was equally available in both courts. The case of *Emery* v. *Goodwin*, 13 *Maine R.* 14, is in point; and it is sustained by numerous authorities, cited for the defendant.

The facts have been definitively settled by the proper tribunal. The plaintiffs have had ample opportunity to present their case to the consideration of the jury and of the Court. In our opinion the plea in bar, if the averments therein are not controverted, is decisive against the right of the plaintiffs to maintain their bill for the discovery of facts, based upon the assumption, that their right to redeem has not been foreclosed. In chancery proceedings however, the plaintiff in equity, if he shall be so advised, may controvert the averments in the plea, and compel the defendant to prove them. "If the defendant file a plea in bar, and the plaintiff set it down for argument, he necessarily admits the truth of the plea; as much so, as if he had demurred to it; for otherwise, the legal effect of the matter pleaded could not be decided. And yet if the plea be allowed by the Court, the plaintiff may, notwithstanding his implied admission, reply to the plea, and deny the truth of the facts contained in it, and put the defendant to establish them by proof." *Crawford & al.* v. *Penn*, 3 *Wash. C. C. Rep.* 484, and the authorities there cited.

In regard to the demurrer, in our judgment, it is well pleaded. The bill sets forth the suit brought by the defendant, to recover seizin and possession of the premises in controversy, and that the plaintiffs thereupon pleaded their right to redeem with a prayer, that if any judgment should be rendered against them, it should be a conditional judgment only, as on mortgage. It thus appears from the bill, that the equity of the case was opened and submitted to this Court in that suit. How far it had advanced, or what further proceedings were had, is not to be ascertained from the bill. But enough does appear to show, that the plaintiffs have a plain, adequate and certain remedy at law, adapted to the relief prayed for; and that the whole matter had been submitted to a Court of law, and was in a train for final adjudication.

This being disclosed in the bill, we perceive no sufficient reason to permit the plaintiffs to pursue at the same time a concurrent remedy in this Court, as a court of chancery. It could be admissible only, where the merits could not be fairly tried in a court of

law. The question is, whether the plaintiffs have a subsisting right in equity, or whether it has been legally foreclosed. That is a point, the determination of which is incident to the powers expressly given by statute to a court of law, when set up and pleaded in a suit brought to recover an estate, in which a right of redemption is claimed. Such was the course of proceedings at law in relation to this estate, as disclosed in the plaintiff's bill. And upon the whole case we are satisfied, that the matter therein set forth, to which the demurrer extends does not entitle them to relief in this Court, sitting as a court of chancery. The plaintiffs may however, if they shall so determine, reply to the defendant's plea in bar.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD, MAY TERM, 1841.

JAMES EVANS *& al. vs.* JAMES OSGOOD *& al.*

An illegal partition of lands, held by the proprietors of a township as common lands, does not give such seizin to one to whom a portion was thus assigned, as to enable him to recover against one in possession without title.

Where it is required that a proprietor's meeting shall be called "by a petition signed by twelve of them at least," a less number than twelve proprietors cannot legally call a meeting, although they may own twelve rights or shares.

Where a statute provides that the proprietors may by vote direct the mode of calling meetings, and where they vote, that the petition for the warrant, and the warrant issued thereon, shall contain each article to be acted upon at the meeting, no legal partition of the proprietor's lands can be made under a general article — "to transact any other business said proprietors may think proper, when met."

The seizin of land thus held is in the propriety, and the several proprietors own only as corporators. No individual proprietor can, therefore, maintain a writ of entry for his share of the land, until it is legally assigned to him to hold in severalty.

WRIT of entry to recover a tract of land in *Fryeburg*. The land originally belonged to the proprietors of *Fryeburg*. The demandants contended, that the land in controversy was assigned by the proprietors to *David Evans* their ancestor, in 1821, to hold in severalty. To prove this they offered the records of the proprietors of *Fryeburg*, and the original application and warrant to call the meeting at which the assignment was alleged to have been

made. The application was signed but by eleven proprietors. There were the same three articles in the application and the warrant. 1. To choose a Moderator. 2. To see if the proprietors would release a tract of land, different from the demanded premises, to the town for a training field, meeting-house and burying ground. 3. "To transact any other business said proprietors may think proper when met." On *Sept.* 19, 1774, the proprietors of *Fryeburg* passed a vote as follows. "Voted and determined that in future all meetings of the proprietors of said township shall be called in the following manner, viz. Whenever hereafter any of said proprietors shall think a proprietors' meeting is necessary, they shall apply to their clerk by a petition signed by twelve of them at least, which petition shall contain not only their request that he issue his warrant for warning such meeting, but each article such warrant shall contain, for said proprietors, (when met,) to act upon. And said clerk in pursuance thereof shall issue his warrant for warning said meeting by posting up," &c.

The counsel for the defendant objected to the admission and sufficiency of the application and the warrant, and contended, that no legal meeting of the proprietors could have been holden under them — first, because the application was not signed by twelve proprietors — and second — because the application and warrant contained no article under which the proprietors could legally act to divide and assign their undivided and unappropriated lands.

The demandants' counsel contended, that the true construction of the vote was, that the term twelve proprietors meant the owners of twelve rights, the township being divided into sixty-four; and offered to show the records of three meetings, held in 1797, 1798, and 1799, that the warrants for calling those meetings recited, that "whereas application had been made by the owners of more than twelve sixty-fourth parts of the common and undivided lands in the township of *Fryeburg*." The plaintiffs' counsel also contended, that the third article in the warrant was sufficient; and that the objection could not be made by the defendant, who had not proved or offered proof, that he claimed to hold the land under said proprietors, or under any one of them.

Shepley J. before whom the trial was, ordered a nonsuit, subject to the opinion of the whole Court.

Deblois, for the demandant, argued in favor of the positions taken at the trial, and cited *Colman* v. *Anderson*, 14 *Mass. R.* 105.

Howard, for the defendant, argued in support of the objections made at the trial, and cited 2 *Mass. Laws*, 995, 1035; 2 *Stark. Ev.* 563; 14 *Mass. R.* 20; 7 *Greenl.* 146; 9 *Pick.* 23; 13 *Pick.* 24.

In answer to the objection, that the tenant could not set up in defence the want of title in the demandant, it was said, that mere possession was sufficient against one without title. It is only where a *prima facie* case is made out by the demandant, that the principle applies. *Stearns on Real Actions*, 233, 239; 6 *Mass. R.* 419; 4 *Pick.* 156; 16 *Pick.* 186.

The opinion of the Court was by

Weston C. J. — The demandants must prevail, if at all, upon the strength of their own title. They are bound to prove the seizin, upon which they declare. They rely upon the assignment of the lot in question, by the *Proprietors of Fryeburg*, to the original right of *David Evans*, the elder, their ancestor. If the assignment was a regular corporate act of that propriety, their title is legally deduced. To the validity of this act, two things are essential; that the meeting should be duly called, and that there should be an appropriate article in the warrant.

The general law had prescribed the mode of calling these meetings, and had also invested such proprieties with the power of determining in what manner future meetings should be called. 2 *Mass. Laws*, 995, 1035. In pursuance of this power, this propriety appointed the mode which appears by their vote, set forth in this case. The application was to be made and signed by twelve at least of the proprietors. The vote contains no reference whatever to the amount of proprietary interest, which would justify the movement. To decide that one proprietor, if he was the owner of twelve shares, could require the calling of a meeting, would do violence to the plain intent and meaning of the vote. It manifestly required, that there should be twelve signatures to the application. And this provision became a law to the corporation, with which we have no power to dispense. It results, that the applica-

tion, not being made by the requisite number, the meeting had no regular legal existence.

The same vote further required, that the application should embody each article, upon which the proprietors were to be called to act. The only sensible construction, which can be given to this clause is, that it should call the attention of the proprietors to the particular subjects, intended to be brought before them. In the application under consideration, there was no allusion to any contemplated division or assignment of land to the individual proprietors. It is supposed to be embraced under the third article, which was to transact any other business, the proprietors might think proper. To sustain this construction, would defeat altogether the clause in their by-laws referred to, and remove entirely the necessity of any specification whatever. In our judgment therefore, the assignment was not justified by the warrant, if the meeting had been legally called.

The seizin of the land in controversy remains in the propriety. The several proprietors have a right, which they can enjoy only as corporators. It would defeat the object of their association, to suffer any one to interfere as an individual, at least until his interest should be severed by partition.

Nonsuit confirmed.

Lyman Rawson *vs.* David F. Brown.

Since the additional militia act of 1837, *c.* 276, the copy of the record of a court martial, certified by the president, and a duly authenticated copy of the order convening the court, are conclusive and sufficient evidence to sustain an action of debt, brought for the recovery of a fine imposed by the sentence of a court martial.

There is no provision of the constitution, which forbids the legislature to confer on courts martial the power to punish by fine.

Exceptions from the Western District Court, Whitman J. presiding.

The action was debt brought by the plaintiff, as Division Advocate, to recover a fine of thirty dollars imposed upon *Brown*, as lieutenant and commanding officer of a company of militia, by the

judgment of a court martial. The plaintiff offered in evidence an authenticated copy of the order convening the court martial, and a copy of the judgment of the court certified by the president, finding *Brown* guilty of the offence charged, and sentencing him to pay the fine, and there rested.

The defendant then offered to go into evidence behind the record of the court martial, to show that the doings and judgment were erroneous in point of fact and law. The Judge ruled that the judgment was conclusive, and rejected the evidence. The defendant further objected, that the provisions of the several statutes, on which the doings of the court martial and the proceedings in this case are founded, are unconstitutional and void, as depriving a citizen of the right of trial by jury. The judge overruled this objection; and when the verdict for the plaintiff was returned, the defendant filed exceptions.

Codman, for the defendant, contended, courts martial must act within the authority given them by law, or their proceedings will be void. Such courts can take no power by implication. *Vose* v. *Howard*, 13 *Maine Rep.* 268. If we cannot go behind the record, the party is without remedy, as no process to reverse the proceedings will lie. But if the court goes beyond its jurisdiction, the proceedings are void. *Brooks* v. *Adams*, 11 *Pick.* 441.

If the position we have taken be not true, then the provisions of the militia acts authorizing courts martial to punish by fine, are unconstitutional and void, because they deprive the citizen of his right to a trial by jury. *Charles River Bridge* v. *Warren Bridge*, 7 *Pick.* 367; *Mountfort* v. *Hall*, 1 *Mass. R.* 458, *note.*

Rawson, pro se.

The additional militia act, *st.* 1837, *c.* 276, § 10, provides, that a copy of the record of any court martial certified by the president of the court, with a duly authenticated copy of the order convening the court shall be conclusive and sufficient evidence to sustain any action for the recovery of any fine. Such was the evidence in this case.

The section of the constitution which provides for trials by jury, does not embrace this class of cases. It excepts "cases where it has heretofore been otherwise practised." For many years before the adoption of our constitution no appeal from a justice had been

permitted in militia fine cases, and of course there could be no trial by jury. *Dunbar, ex parte,* 14 *Mass. R.* 393.

The opinion of the Court was by

WESTON C. J. — The order convening the court, an authenticated copy of which is in evidence in the case, proves its legal existence and jurisdiction. The copy of the record of the court, certified by the president, details the preliminary proceedings, as well as the doings of the court. From this it appears, that the defendant was charged with a military offence, and that the requirements of the law, regulating the militia, had been pursued. By the statute of 1837, *c.* 276, § 10, these copies are made conclusive and sufficient evidence, to sustain an action of debt, brought for the recovery of a fine imposed by the sentence of a court martial. It is competent for the legislative power, to regulate the law of evidence. It may give to the records of courts martial, in a matter within their jurisdiction, the verity and conclusive efficacy, which belongs to the records of courts of common law. It was competent also for the same power, to give to the judgments of courts martial a definitive and final character.

It is insisted, however, that the law, upon which this action is founded, transcends the consitution of this State, *art.* 1, § 20, as it renders the defendant liable to the payment of money, without the benefit of a trial by jury. That section secures that right, in all civil suits, and in all controversies concerning property, except in cases where it has heretofore been otherwise practised. The prosecution before the court martial was not a civil suit, nor was it in any proper sense a controversy concerning property. Besides, courts martial are never attended by a jury, and they had properly cognizance of military offences, before the formation of the constitution. We are aware of no constitutional provision, which forbids the legislature to confer on such courts the power to punish by fine. The sixth section of the first article, which secures to the accused, in criminal prosecutions, the right of trial by jury, expressly excepts trials by martial law. This was a trial by martial law, being before a court martial, and for a military offence.

Exceptions overruled.

JOHN KNIGHT *vs.* DANIEL BEAN *& al. Adm'rs.*

When an appeal is claimed from a verdict or judgment rendered in the District Court, and time is given, under the *st.* 1831, *c.* 505, to enter into a recognizance to prosecute the appeal before a Justice appointed for that purpose, the recognizance must not only be taken, but *must be filed in the clerk's office*, within ten days after the adjournment of the court, or the appeal cannot be sustained.

IN this case, the verdict in the District Court was for the defendants, and the plaintiff claimed an appeal. Special sureties were required, and on motion of the plaintiff, the Court allowed the time permitted by law, ten days, to perfect the appeal, and appointed a Justice to take the recognizance. The Court adjourned on the sixteenth of *November*, the recognizance was entered into on the twenty-fifth, and filed in the clerk's office on the twenty-ninth. The plaintiff entered his action at the next term of the S. J. Court, when —

Howard, for the defendants, moved to dismiss the action, because there had been no legal appeal. Before the *st.* 1831, *c.* 500, the appeal must have been perfected before the adjournment of the Court. To have brought his case within that statute, the plaintiff should have filed the recognizance in the clerk's office within ten days from the adjournment.

Deblois, for the plaintiff, contended, that the provision respecting the filing in the clerk's office was merely directory, and that it was sufficient if the recognizance was entered into within the ten days, and filed before the entry of the action in the S. J. Court.

The action was continued *nisi*, and at the term in *Franklin*, the Court, by SHEPLEY J. remarked, that the *st.* 1831, *c.* 500, § 2, required that the recognizance should not only be taken, but should be filed in the clerk's office within ten days next after the adjournment of the District Court. As no recognizance was entered into during the sitting of the Court, and none filed in the clerk's office within ten days after the adjournment, the action must be dismissed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN, MAY TERM, 1841.

JOHN EVANS *vs.* WILLIAM CHISM, 2*d*, *& al.*

If the testimony of a witness has a tendency to lighten a burden which the same testimony has first placed upon him; or if it has the effect to enable the party calling him to obtain his rights so perfectly from the other party to the process as to leave him less interested to proceed against the witness, and at the same time raises a liability to the adverse party on a covenant of special warranty sufficient to counterbalance it; these being matters not of certain interest in the event, affect the credibility, not the competency of the witness.

The Court will not, in a bill in equity, as a general rule, proceed to a decree, until all parties whose rights are to be affected, are before it; but if the want of proper parties be not apparent on the face of the bill, and be not presented by a plea or answer; and the Court does not perceive that it cannot proceed, and by a final decree do justice to all parties before it without affecting the rights of others, it will not regard the objection.

Courts of equity do not consider any of the provisions of the statute of frauds as violated by giving effect to a trust, not originally created, but afterwards proved or admitted to exist, by some written document; and will protect the rights of a party so proved to be equitably interested.

If a party take a conveyance of land with knowledge of the equitable rights of others thereto, he will not be considered in a court of equity as a *bona fide* purchaser, and will be adjudged to hold subject to those equitable rights.

BILL in equity, heard on bill, answers and proof. *Evans* states in his bill, that he was seized of the premises in question, and on *Jan.* 11, 1826, mortgaged the same to one of the respondents and the father of the other, whose title he claims; that the mortgagees in *June* following assigned the mortgage to *Lithgow*, who sued

the mortgage, obtained judgment, and entered under it to foreclose, *Aug.* 24, 1832, and on *March* 10, 1833, reconveyed to the respondents; that on *July* 15, 1833, *Evans* demanded an account which was refused, and on *August* 21, 1835, tendered the amount due on the mortgage, which was not received; that *Chadwick* recovered judgment against *Evans*, procured the equity of redemption to be sold *June* 7, 1828, for $85,23, and became himself the purchaser; that during the year ensuing, *Evans* made an arrangement with *John Bartlett* and *Act Plummer* to pay *Chadwick* and redeem the land; that they paid or secured *Chadwick*, and on *June* 15, 1829, by consent of parties, *Chadwick* gave to *Bartlett* and *Plummer*, his deed of release as collateral security for the money by him advanced for *Evans;* that *Evans* afterwards repaid to them the money advanced for him, and the deed from *Chadwick* to them not having been recorded, it was understood and believed by all concerned that a delivery of the same deed to *Evans* would be equivalent to a delivery back to *Chadwick*, and a new one from him to *Evans*, and thereupon the deed was so delivered to *Evans* with the intention to restore to him his rights to the land by way of redemption of the equity sold to *Chadwick;* that all these proceedings were had before the defendants pretended to have acquired any interest in the equity; that the respondents, with the intention to defraud *Evans*, *Oct.* 21, 1833, applied to *Chadwick* to give them a deed, well knowing all the facts, and that *Chadwick* at length gave them a deed of that date, at the same time stating, that he had before conveyed the same to *Bartlett* and *Plummer;* that *Nov.* 9, 1833, *Bartlett* made a deed of his pretended right to one of the respondents, and on *Aug.* 4, 1835, *Plummer* made a similar one to the other, each being given for a nominal consideration only, and both respondents having been distinctly informed by *Bartlett* and *Plummer*, that they had no interest in the land; and that the aforesaid deeds to the respondents were fraudulently procured by them.

The substance of the answers, and the facts in the case, sufficiently appear in the opinion of the Court.

Mellen and *Reed* argued for the complainant, and contended, that the depositions of witnesses objected to, ought to be received; that the facts alleged in their bill were proved; that they were en-

titled to relief thereupon ; and that the attempt set up by the respondents, had wholly failed. They cited *Webber* v. *Webber*, 6 *Greenl.* 127; *Royce* v. *Burrell*, 12 *Mass. R.* 395; 1 *Story's Eq.* § 61; 2 *ib.* § 1195; 10 *Ves.* 581; 3 *Mason*, 347.

F. Allen and *Abbott* argued for the respondents. The grounds urged by them in defence, appear in the opinion of the Court.

The opinion of the Court thereon was by

SHEPLEY J. — The plaintiff on the eleventh day of *January*, 1826, conveyed in mortgage to one of the respondents and to the father of the other the premises, which he now claims to redeem. On the first day of *June* following the mortgage was assigned to *Lithgow* who entered under a judgment for condition broken on the twenty-fourth day of *August*, 1832; and on the tenth day of *March*, 1833, conveyed to the respondents. On the seventh of *June*, 1828, the plaintiff's right to redeem the estate was sold to *Chadwick*, who on the fifteenth of *June*, 1829, consented to receive his money paid for it and to convey it by a release deed to *John Bartlett* and *Act Plummer*. *Chadwick*, *Bartlett* and *Plummer*, have all released their rights to the respondents or to one of them. The plaintiff alleges, that these releases were made and received with a knowledge, that he then had an equitable right to the equity of redemption, and that they cannot therefore be set up against him. And he proposes to prove it as well by *Bartlett* and *Plummer* as by other witnesses. And the first objection taken by the respondents is to their competency to testify. It is not perceived, that they are interested in the event of this suit. The decree cannot be evidence in any litigation between the plaintiff and them. If their testimony can be said to lighten a burden, it is only one, which the same testimony has first placed upon them. If it should have the effect to enable the plaintiff to obtain his rights so perfectly from the respondents as to leave him less interested to proceed against them, it may also raise a liability to one of the respondents on their covenants of special warranty quite sufficient to counterbalance it. These, being matters not of certain interest in the event, affect their credibility, not their competency.

Another objection is, that they should have been made parties to the bill. The rule is, that all persons are to be made parties,

who are legally or beneficially interested in the subject matter and result of the suit. That the Court will not proceed to a decree until all parties, whose rights are to be affected, are before it, is also a general rule subject to certain exceptions. But if the want of proper parties be not apparent on the face of the bill and be not presented by plea or answer; and the Court does not perceive that it cannot proceed and by a final decree do justice to all parties before it without affecting the rights of others, it will not regard the objection. *Robinson* v. *Smith*, 3 *Paige*, 222. *Bartlett* and *Plummer* have parted with all their rights to the estate, and have no such interest to be affected by a decree, as prevents the Court from doing justice between the parties now before it.

These questions being disposed of the rights of the parties are presented on the merits. *Bartlett* and *Plummer* both state in substance, that they received the deed from *Chadwick* as security, and agreed upon the plaintiff's paying the money for which they were liable, that the estate should return to him. This they seem to have erroneously supposed would take place by their delivering to him the deed from *Chadwick*, or if not by his surrendering it to *Chadwick* and taking a deed from him. It appears, that the plaintiff paid to *Weeks* all but a small sum, and that he paid to *Bartlett*, who paid it to *Weeks*. And that the deed from *Chadwick* to *Bartlett* and *Plummer* was in fulfilment of that agreement, delivered to the plaintiff in the year 1832; and he thus became equitably entitled to the estate, subject to the mortgage. The legal title remained in *Bartlett* and *Plummer*, and there is a full admission in writing signed by them, that they no longer had any beneficial interest in it. Courts of equity have not considered any of the provisions of the statute of frauds as violated by giving effect to a trust not originally created, but afterward proved or admitted to exist by some written document. And they have protected the rights of a party so proved to be equitably interested. *Foster* v. *Hale*, 3 *Ves.* 696; *Steere* v. *Steere*, 5 *Johns. Ch. R.* 12; *Rutledge's Adm'r* v. *Smith's Ex'r*, 1 *M'Cord's Ch. R.* 119. If the respondent, *William Chism*, can be regarded as a *bona fide* purchaser of the equity for a valuable consideration and without notice of the trust, he may set up that title against any equitable interest, which the plaintiff can establish. He states in his answer

that "he was in no way privy to any obligation, that said *Plummer* and *Bartlett* were under to convey the same to said *Evans*, but he supposed, that said *Plummer* and *Bartlett* had the legal and equitable title to said equity of redemption." He could not acquire any interest by the release of *Chadwick*, for the deed declared, that he had before conveyed to *Bartlett* and *Plummer*. And when he obtained the release from *Bartlett* on the nineteenth of *November*, 1833, he was informed by him, that he had no interest in the land. About twenty days before the right to redeem would be extinguished by lapse of time, he obtained on the fourth day of *August*, 1835, a release from *Plummer*. He had employed an assistant, and had applied a number of times before he obtained it, and was informed by him, that he had no right, and that he had given up the deed to *Evans*. And his assistant, *Jones*, was informed, that he had offered to convey to *Evans* for ten dollars, and that *Evans* insisted, that four dollars only ought to be paid to him. *Plummer* says, that *Chism* insisted on a quitclaim deed, and at last he gave him one and told him he had no right or title, and if he took it, he must run his own risk. What then in fact was *Chism's* knowledge? He knew, that the plaintiff had owned the estate and mortgaged it to him and his father, that his right to redeem was sold to *Chadwick*, who had conveyed to *Bartlett* and *Plummer*, and that they did not pretend to have at that time any interest in it, and had surrendered their deed to the plaintiff; and that the plaintiff claimed to have a release on the payment of four dollars. And the conclusion must follow, that so far as they were concerned, the right was equitably at least in the plaintiff. And how can his answer be respected, which states, that he supposed that *Plummer* and *Bartlett* "had the legal *and equitable* title?" When he concluded to pay one hundred dollars for it, he did it with a knowledge of all these facts. The testimony of *McDaniel* and *Glidden*, taken in connexion with the other testimony, and with the whole course of conduct on the part of the plaintiff, is not sufficient to satisfy the mind, that he designed to permit *Plummer* to sell to *Chism* without his being a party to the sale, and the one to receive the benefit of it. *Plummer* does not and did not profess to sell under such a license.

The respondents cannot therefore be considered as *bona fide*

purchasers of the equity without notice; and they must be adjudged to hold it subject to the equitable rights of the plaintiff. *Daniels* v. *Davison*, 17 *Ves.* 433; *Wadsworth* v. *Wendell*, 5 *Johns. Ch. R.* 231. They did not acquire any title to it under the sale of *John Plummer;* for that was made on the sixteenth day of *July*, 1831, before the plaintiff had obtained even an equitable title by the final payment of the money to *Weeks*. At that time the legal as well as the equitable title was in *Bartlett* and *Act Plummer*, and nothing passed to *John Plummer* by the sale on his execution.

The tender was made in season and was apparently sufficient. A decree is to be entered, that the plaintiff is entitled to redeem, and that the respondents, upon payment of the amount which shall be found due to them on an adjustment of the account for rents, profits, and expenditures, convey all the title which they have acquired to him. A master is to be appointed to take the account and the case is in all other respects reserved for further hearing until his report shall come in.

JACOB BORNEMAN, *Adm'r vs.* CHARLES SIDLINGER *& al.*

If a note against a third person, with a mortgage given to secure its payment, passed from the intestate to donees as a *donatio causa mortis*, the administrator can be but a mere nominal party to a suit upon the mortgage, and has no right to interpose, but for the benefit of the donees and at their request. And if he bring a suit, the Court has power to restrain him from prosecuting it, although the note may be justly due. And if the interest in the note and mortgage be found to be in the donees, and they repudiate the suit, the Court would not suffer it to be prosecuted by a mere nominal party.

If, therefore, this defence be set up, as it must necessarily be made for the benefit of the donees, they are not competent witnesses for the tenant.

THIS action was originally tried in the Court of Common Pleas, and came before this Court on exceptions to the ruling of the Judge of that Court. The case on the exceptions, is reported in 15 *Maine Rep.* 429. At the trial in this Court before EMERY J., the tenants, for the purpose of proving that the intestate gave the

note and mortgage to his daughters and their representatives, as a *donatio causa mortis*, and delivered the same over for their use, called *John Welt*, *Christian Schweir* and *Archibald Robinson*, the husbands of the surviving alleged donees, and offered the deposition of a daughter of one of the alleged donees, who had deceased. The plaintiff objected to their admission, but the objection was overruled, and they were received to testify. Evidence was offered to the jury by each party, tending to prove or to disprove, that the intestate gave the note and mortgage to his surviving daughters, and the children of a deceased daughter, as a *donatio causa mortis*. The special plea of the tenants by brief statement, stated, that the note and mortgage were given, as before mentioned, and "that said donees accepted said gift, and that the defendants assented thereto, and made payments to the several donees in part payment of said note and extinguishment of said mortgage."

One of several requests for instruction by the counsel for the demandants was, that if the jury found any thing due on the mortgage and note, the demandant was entitled to a verdict in this action, as against the tenants, even though they should find that the mortgagee gave the note and mortgage, *causa mortis*, to other persons than the defendants, as they contend.

The Judge did not give the instructions precisely as requested, but did instruct the jury, that if from the evidence they were satisfied that the said intestate in his lifetime, while of sane mind and memory, in his last sickness, and in view and contemplation of his death, did give and deliver to the said *Sally Sidlinger* said note and mortgage, to be by her equally divided to the said deceased's daughters living, and the children of *Mrs. Robinson*, deceased, and the same gift was accepted and ratified by the parties interested in the gift, the property so given would pass to the donees, as a good *donatio causa mortis*. If the testimony was improperly admitted, or if the requested instructions withheld ought to have been given, or if the instructions given were erroneous, the verdict for the tenants was to be set aside.

Several points argued by the counsel were not noticed in the opinion, as a new trial was ordered on the first objection.

Ruggles and *Bulfinch*, for the plaintiff, contended, that the per-

sons objected to as witnesses, being beneficially interested in the event of the suit, ought to have been excluded. *Williams' Executors*, 506.

The defendants are not the alleged donees, and are bound to pay at least the balance due on the note to some one. An action can only be brought in the name of the administrator, and he is to account for the amount collected to those entitled to it by law. If the alleged donation be made out, still it furnishes no defence in this action.

Reed, for the defendants, contended, that the witnesses objected to, were only interested in the subject matter, and not in the event of the suit, and therefore properly admitted.

As the note and mortgage did not belong to the deceased at the time of his death, the administrator cannot himself bring a suit. It must be instituted by those beneficially interested. He cannot maintain a suit against their consent, although they may against his.

The opinion of the Court was drawn up by

WESTON C. J. — This is an action brought to recover land, conveyed in mortgage to the plaintiff's intestate, to secure the payment of a note due from the defendants. It is not pretended that the note has been wholly paid; and the lien created by the mortgage is still in force for the security of the balance. Whether the beneficial interest in the debt and the mortgage, by which it was collaterally secured, remains in the estate, or was passed by the intestate in his lifetime to his daughters as donees, as is alleged by the defendants in their brief statement, the legal remedy, either upon the personal or real security, must be prosecuted in the name of the representative of the estate. Whatever he may recover he would hold in trust, to be legally disposed of as assets, or for the use of the donees, if their right is established. If the defence had been, that the whole debt had been rightfully paid to the donees and this had been proved, a verdict for the defendants might have been sustained; but if they are still liable, and that liability is to be enforced, the remedy is properly prosecuted by the administrator.

The ground upon which the facts in the brief statement were in-

tended to defeat the action, do not appear in that statement, nor in the report of the last trial. When this case was under consideration before, on exceptions from the Common Pleas, the right of the donees was alleged as it now is; and it further appeared, that the defendants offered to prove, that the suit was brought against the will of the donees, and solely for the benefit of the estate.

The note was the principal security. To this the mortgage was collateral and ancillary. If the note had passed to donees, the administrator, the representative of the estate, is merely a nominal party, and has no right to interpose, but for their benefit and at their request. If he thrusts himself in adversely to them and this fact is made to appear, the Court have power to restrain him from prosecuting his suit, as they would the assignor of a chose in action, or his representative, who might bring a suit against the interest or wishes of the assignee. It is in this way only, that the facts relied upon could be brought to bear against the action. It is of no moment to the defendants, whether they are liable for the benefit of the estate or of the donees. It is manifest, that in setting up the facts in the brief statement, they are acting in behalf of the donees. If the interest is found to be in them, and they repudiate the suit, the Court would not suffer it to be prosecuted by a mere nominal party. *Same* v. *same*, 15 *Maine R.* 429.

This inquiry as to the beneficial interest, which is a mere collateral question, so far as the defendants are concerned, must be raised purely for the benefit of the donees. Hence the Court say in this case, before cited, if "it should be made to appear, that the donees are the real party in interest, the plaintiff will not be permitted to prosecute this suit against their will, and still less for the benefit of the estate." They are alone interested in the facts, alleged in the brief statement. We are therefore of opinion, that they cannot be verified by their testimony. The donees, or their husbands, were not legally admissible as witnesses. And upon this objection, the verdict is set aside and a new trial granted.

JOHN STANIFORD *vs.* SAMUEL H. FULLERTON.

If the extent of an execution be made upon the whole of any particular part of a tract of land, holden by the debtor as a tenant in common with others, the levy will be void as against a co-tenant, or his grantee.

WRIT of entry. The title set up by the demandant was under a levy upon the land as the property of *John S. Trott*, subject to a life estate therein of *Mahitable Trott*. Her death, before the commencement of the suit, was proved. The levy was made *June* 5, 1818, upon the whole of the tract of land described in the levy, but not embracing all the land of which *John S. Trott*, and *David G. Trott*, were then seized as tenants in common. The tenant proved and introduced a deed from *David G. Trott* to him, covering this and the whole of the land of which he claimed to be the owner, dated *Aug.* 17, 1837. Each party claimed the whole, and much evidence was introduced in relation to the titles of *John S. Trott*, *David G. Trott*, and *Benjamin Trott*. It appeared however, that if the title was as claimed by the demandant, that *David G. Trott*, at the time of the levy, and until he conveyed the same to the tenant, was seized of a share of the whole land levied on, as a tenant in common. With the general issue the tenant filed a brief statement, that if *John S. Trott* was seized of the land, or any part thereof at the time of the levy, it was as tenant in common with *D. G. Trott*, whose title the tenant has.

A verdict was taken by consent for the tenant, subject to the opinion of the Court upon a report of the facts of the case.

Mitchell, for the demandant, contended, that the levy was good to vest in the creditor all the right which *J. S. Trott* had in the land, if *D. G. Trott* was then a tenant in common. The levy gave a seizin to the creditor, and a title good against all but the rightful owner. The levy was upon the whole common estate, and transferred all the title of the debtor to the creditor, as effectually as a deed would have done. The tenant may have partition with the demandant, as well as with his former co-tenant.

Tallman argued for the tenant.

A greater estate than the one described in the levy cannot pass by it, although a less one may. *Litchfield* v. *Cudworth*, 15 *Pick.*

29. There has been no proof that *Mehitable Trott* had a life estate in the land.

But there is another and a fatal objection. *John S. Trott* was only a tenant in common of the farm with the other heirs, one of whom is represented by the tenant. The levy is not upon the whole farm, but only upon a part of it. This is clearly void as against a co-tenant. *Bartlett* v. *Harlow*, 12 *Mass. R.* 348; *Baldwin* v. *Whiting*, 13 *Mass. R.* 57; *Hasty* v. *Johnson*, 3 *Greenl.* 288; *Blossom* v. *Brightman*, 21 *Pick.* 283.

The opinion of the Court was drawn up by

WESTON C. J. — Assuming that *John S. Trott*, the execution debtor, had an interest, as tenant in common, in the land levied upon by the demandant, at the time of the levy, from *Benjamin Trott*, the father, through *Josiah Trott*, and also a share therein as one of the heirs of *Benjamin Trott*, which is however controverted, there is a fatal objection to the maintenance of the title of the demandant against the tenant.

The levy was upon the whole estate, described by metes and bounds, subject to the life estate of *Mehitable Trott*. This may be good against the debtor, or against strangers, but is void as against other co-tenants in common. This is a principle fully supported, by the authorities cited for the tenant. Their effect is attempted to be avoided by the counsel for the demandant, by the assumption, that the deed from *David G. Trott* to the tenant was void. But this is not sustained by the facts in the case. *David G. Trott* had been long in the possession of the farm, claiming and occupying it as his own. He had a seizin then either by right or by wrong, which he might lawfully convey, and which the tenant might lawfully purchase. He was the undoubted owner of a part of the estate in common, as one of the heirs at law of *Benjamin Trott*. This passed to the tenant, and entitles him to avoid the levy. That right may be exercised by any co-tenant, whether his proportion be great or small. But if necessary, the evidence might justify a jury in finding, that *David G. Trott* had ousted all the other heirs, except *John* sufficiently long to bring his seizin, thus acquired, under the protection of the statute of limitations. And if the levy is avoided, as it may be by the tenant his title to

the share of *John* may have become indefeasable, upon the same principle,

Judgment on the verdict.

Nicholas Nichols *vs.* William Patten *& al.*

If the chattels described in a bill of sale were, at the time it was made, upon the land or within the buildings of the vendee, and the vendor had no longer possession or control of the land or buildings, and they were within the exclusive control of the vendee or his agent, the sale is complete, and no formal delivery is necessary.

A conveyance of chattels fraudulent and void as to creditors of the vendor, is still binding upon the parties to it; they cannot set up the fraud upon creditors, as against each other; the doctrine, *in pari delicto*, does not there apply; and the vendee, losing his title to the property by the acts of the vendor, may recover its value against him.

The vendor therefore, where the conveyance is alleged to be fraudulent, may be a witness, as well to defeat as to sustain the conveyance, his interest being a balanced one in either case.

To constitute an attachment, it is not necessary that the officer should handle the goods attached, but he must be in view of them, with the power of controlling them and of taking them into his possession. And in case of an attempt by another to interfere or take possession, he should take such measures as to prevent it, unless resisted.

The return of an officer, where he is a party, is *prima facie* evidence, and only so, of an attachment.

To preserve an attachment when made, the officer must by himself or his agent retain his control and power of taking immediate possession in all those cases in which the property is capable of being taken into actual possession, except in those where our statute prescribes a different rule. And if he does not do this, the attachment will be regarded as abandoned and dissolved.

The mere request to a person to give notice, would not be sufficient, unless he consented to assume the trust of taking charge of the goods for the officer.

An attachment does not deprive the debtor of the right to convey his property subject to it, and any merely formal act of delivery, which does not resist or deprive the officer of the actual control of it, is no violation of his rights, and will not subject the purchaser to an action.

Nor would the continued operations of mechanics upon the property attached, if not objected to by the officer or his keeper, be considered a trespass against him. But any act whatever which deprives the officer or his keeper of the control of the property, or the removal of any portion of it from the place where he chooses to have it deposited, would subject the person committing the act to an action.

Fraud is not to be presumed; and the burthen of proof to establish it, is upon the party asserting it.

TRESPASS for a quantity of saw-mill gearing, hoops, &c. The plaintiff claimed the property under an alleged attachment thereof as the property of one *Rogers*, *Jan.* 16, 1837. The defendants claimed under a bill of sale, dated on *Jan.* 14, 1837. *Erastus C. Wheeler* was called by the plaintiff, and testified, that on the morning of *January* 16, 1837, he went to the mill-yard of the defendants in *Phipsburg*, over which and in the workshops and sheds, the property in controversy, being gearing for several saw-mills, some of it partly finished, was scattered, and met the plaintiff, coming from the yard, but then upon it, who told him he had attached the property *there*, turning round towards it, and asked him, if he was going to stay about there. Witness told him he was a "spell," and the plaintiff then asked him to forbid any one taking the things away; that he did not promise so to do; that he was not appointed keeper of the property, and neither receipted for it, or promised to keep it; that no writs were exhibited to him, and no schedule was furnished and no specification made by the plaintiff of what property he claimed to have attached, except in manner aforesaid; that one *Baker* worked after that time in the principal shop, and sometimes kept the key, and sometimes some of his, *Baker's* men, kept it; that *Baker* and his men continued to occupy the shop and work upon the gearing, after *Jan.* 16, as before that time, for several days, and until he had completed his job, without any apparent change in the business, though he was not the exclusive occupant of it; that the greater portion of the articles were light and moveable; that he, the witness, continued to work in the yard and on the mills, boarding about one fourth of a mile from the yard, until *February* 4*th*, when he left *Phipsburg* for *Waterville*, and did not return until *March* 18; that about *Jan.* 18, one *Davis*, acting as the agent of the defendants came into the yard, and removed some of the articles and put them

under cover, not interfering with *Baker;* that while *Davis* was removing the articles, he, the witness, said to him, "I forbid the removal of these things;" that he probably advised how to remove some of the things; that the plaintiff did not interfere with the property; that the witness did not have any compensation for keeping the property, and did not agree to take charge of it, unless as stated; that when he saw the plaintiff on *Jan.* 16, at the yard, *Rogers* and *Davis* were there, and the plaintiff came from them; that he could not state that either the plaintiff or the witness ever notified *Davis*, the agent of the defendants, of any attachment; and that in *July* following, the plaintiff called on him to make a schedule and estimate of the property in the yard, shops, &c., at the time of the alleged attachment, and that he did so.

The other facts in the case sufficiently appear in the opinion of the Court.

After the plaintiff had introduced his testimony in relation to the attachment, the defendants requested EMERY J. presiding at the trial, to rule as matter of law that the evidence, if believed, did not show an attachment of the property claimed, and a preservation of the attachment, such as would entitle the plaintiff to recover in this suit, and moved the court to direct a nonsuit. The Judge declined.

The counsel for the defendants objected, that it had not been legally proved, that the plaintiff was a deputy sheriff, duly qualified to act as such.

The Judge left it to the jury to determine, whether they might not fairly rest satisfied that he was a deputy, as he was found acting in that capacity, and is recited as such in the writ, and no call was made in the earlier stages of the testimony for any proof of that fact, and ruled, that these facts were *prima facie* evidence of his authority as a deputy. The Judge then instructed the jury, that as to what acts constituted an attachment of personal property, depended upon the kind of property and its situation, and a variety of other circumstances; that the general principle was, that the officer should have the general control of it by himself or a keeper; and that if the keeper should go off and abandon it, such abandonment would dissolve the attachment; that in this case it appeared, that the plaintiff was at the yard where the property was, at three o'clock on the morning, to make his attachment, and

that his return was *prima facie* evidence of the attachment ; that this was corroborated by the testimony of *Wheeler ;* and if the jury were satisfied, that the plaintiff did make an attachment at that time, and did put *Mr. Wheeler* in keeper, or to forbid the removal, the attachment would be sufficient for that time ; that some time should be allowed to take the property away.

The counsel for the defendants requested the Judge to instruct the jury and to rule as matter of law : —

1. That the evidence in the case, if believed by the jury, did not show an attachment of the property.

2. That if no account or schedule of the property, was made at the time, and no actual possession of it was taken by the plaintiff or by some one for him, there was no attachment.

3. That if there was an attachment on the morning of *Jan.* 16, yet if no special charge was taken of the property by the plaintiff or some one under him, and it was so left for several days, the attachment was lost.

4. That if after the attachment of property, moveable and easily moved, it was left for several days in the possession of the debtor or others, so that they continued to work upon it and finish it the same as before, the attachment was thereby lost.

5. That if there was no keeper of the property, the attachment of the moveable property would be lost, unless removed by the plaintiff as soon as it could be done in the exercise of reasonable diligence ; and that if the testimony in the case is to be believed, no keeper was appointed.

6. That whether the bill of sale is good or not by the contract, the agent, *Davis*, on his return in a week or several days after, finding the property in the same situation as he left it, without a keeper, had a right to take possession of it, as the attachment was relinquished and lost.

7. That if the property was liable to injury from exposure to the weather, or to be lost by plunder, and the plaintiff took no means to protect it, the attachment, if ever made, was abandoned.

8. That if *Wheeler* did notify *Davis*, that he was requested to forbid the removal of the property, that notice is not evidence of an attachment or a continuance of it.

9. That if any of the articles in question were unfinished at the

time of the alleged attachment, and were at that time being built by *Mr. Baker*, who continued to work on the same a long time afterwards without any objection from the plaintiff, and having completed the same, delivered them to the defendants or their agent, this action cannot be maintained for those articles.

10. That if the property was not demanded of *Davis* within thirty days after judgment, the attachment was lost.

The Judge declined to give the *first*, but submitted it to the jury under the general directions already given, whether there was an attachment and a preservation of it. As to the *second*, the jury were instructed, that a mere schedule would not be sufficient, but if there was actual possession, that would make the attachment good. The *third* was given. The *sixth* was given substantially. The *fourth, fifth, seventh, eighth* and *ninth* were not given; the Judge deeming it unnecessary to give any more definite instructions, as to these points than had already been done. The *tenth* was given, with the addition, that the burden of proof was on the plaintiff. With regard to the defendants' title to the property, the Judge instructed the jury, that if they were satisfied of the advances made to *Rogers* beyond the amount they were required by the contract to have paid when the bill of sale was made, and that the contract had not become annulled, such advances constituted a good consideration for the bill of sale, and for which they had a right to take security; that the possession taken by *Davis*, recognized by *Rogers*, if believed by the jury, was a sufficient delivery; that if the bill of sale however was a mere contrivance to prevent the creditors of *Rogers* from attaching the property, and to delay and defraud his creditors, it would be wholly void; and the burden of proof was on the defendants to prove, that the bill of sale was a fair transaction, and not for the purpose of delaying or defrauding creditors.

The verdict was for the plaintiff, and was to be set aside, if in the opinion of the Court any of the instructions given were erroneous in matters of law; or if under the circumstances and facts proved in the case, instructions ought to have been given to the jury which were withheld; or if the verdict was against law.

J. W. Bradbury and *Tallman*, for the defendants, argued in support of the grounds taken at the trial, and cited *Watson* v.

Todd, 5 *Mass. R.* 271; *Lane* v. *Jackson*, *ib.* 157; *Sanderson* v. *Edwards*, 16 *Pick.* 144; *Carrington* v. *Smith*, 8 *Pick.* 419; *Knapp* v. *Sprague*, 9 *Mass. R.* 258; *Train* v. *Wellington*, 12 *Mass. R.* 495. 1 *Stark. Ev.* 398.

Mitchell and *Groton*, for the plaintiff, contended, that there was no error in the refusal to give instructions, and that those given were correct; and cited *Bruce* v. *Holden*, 21 *Pick.* 187.

The opinion of the Court was by

Shepley J. — Both parties claim the property under *William R. Rogers;* the defendants as purchasers by a bill of sale executed on the 14th of *January*, 1837, and the plaintiff by an attachment made by him as a deputy sheriff on several writs on the 16th of the same month. It appears from the testimony, that the property was on the land or within buildings belonging to the defendants, and that after the bill of sale *Rogers* no longer had possession or control of the lands or buildings, but that they were within the exclusive control of the defendants or their agent. The sale was therefore complete before the attachment, and the formal delivery or marking on subsequent days was unnecessary. *Carrington* v. *Smith*, 8 *Pick.* 419. Their title would be good if the sale was *bona fide* and for a valuable consideration. This was denied and the plaintiff called *Rogers* as a witness, and he being objected to was permitted to testify, that the design in making the bill of sale was to prevent an attachment of the property by his creditors. *Rogers*, having on the 24th of *March* preceding entered into a contract to build a dam and mills for the defendants, had proceeded to accomplish the undertaking, and had received advances earlier and beyond the amount due, and made the bill of sale of the materials provided, as the defendants allege, to secure them for such advances. The position of the witness was like that of a vendor of personal property, who having received his pay for it, testifies to a fraud between himself and the vendee, and thereby enables his own creditors to apply the property to the payment of his debts, thus securing to himself the benefit of it twice. It is said, that his interest is still balanced because he thereby incurs a new liability to the vendee, who may recover of him on the contract of sale the value of the property. In the case of *Bailey* v. *Foster*, 9

Pick. 139, it was decided, that one thus situated would not be a competent witness for the purpose of proving the fraud. The decision appears to rest upon the position that the vendor having received payment, and testifying in such a manner as to enable his creditor to apply the property to the payment of his debts, obtains the value twice; without noticing that he would thereby incur a liability to refund to the vendee. In the case of *Rea* v. *Smith*, 19 *Wend.* 293, it is admitted, that such liability would arise, but it is denied that he would be a competent witness, because it is said the vendee could not recover against him on the contract of sale for two reasons; 1. Because his title would not be destroyed by one paramount and so the case would not come within the warranty; and 2d, Because to make out his case against the vendor he must necessarily prove a fraud in both the parties to the contract and thereby place himself *in pari delicto*. When a creditor recovers against the vendee, he does so because the law regards him as having the better title. And the vendee loses his title through the fault of the vendor in neglecting to pay his debt and thereby extinguishing the creditor's prior right to have the property applied in payment of it. It is not clearly perceived why the creditor's should not be regarded as the paramount title; or why the vendor, who has caused the title of the vendee to be defeated, has not by that act violated his contract assuring the title to the vendee. If this be the true position of the parties, the first objection would prove insufficient to prevent a recovery. The second objection is to be examined. The statute of 13 *Eliz. ch.* 5, from which we derive our law respecting conveyances fraudulent as against creditors, provides, that only against creditors and others whose actions shall thereby be defrauded or delayed, they shall be of none effect; leaving them impliedly valid as respects the parties to them. The case of *Hawes* v. *Leader*, *Cro. Jac.* 270, *S. C. Yel.* 196, decided that the deed remained good against the parties, though void as to creditors. And this was recognized as a correct exposition of the statute in the case of *Osborne* v. *Moss*, 7 *Johns. R.* 161. In *Drinkwater* v. *Drinkwater*, 4 *Mass. R.* 357, *Parsons C. J.* says, "a conveyance to defraud creditors is good against the grantor and his heirs and is void only as to creditors. For neither the grantor nor his heirs claiming under him can avail them-

selves of any fraud to which the grantor was a party to defeat any conveyance made by him. The intention of the law in establishing this principle is effectually to prevent frauds by refusing to relieve any man or his heirs from the consequences of his own fraudulent act." In *Randall* v. *Phillips*, 3 *Mason*, 388, *Mr. Justice Story*, speaking of such a conveyance, says, "it is good as between the parties, and binds them and their privies. It may be avoided by any third persons, whose interests are intended to be defeated by it, but it is not absolutely void. The general doctrine is, that a conveyance in fraud of the law binds parties, and cannot be acted upon, so far as respects them as a nullity." According to these authorities the conveyance remaining good and binding upon the parties to it, they cannot set up the fraud upon creditors against each other, and the doctrine *in pari delicto*, does not apply; and the vendee losing his title by the acts of the vendor may recover against him. The vendor therefore may be a witness as well to defeat as to sustain the conveyance, his interest being a balanced one in either case.

To constitute an attachment, it is not necessary, that the officer should handle the goods attached, but he must be in view of them with the power of controlling them and of taking them into his possession. And in case of an attempt by another to interpose or take possession, he should take such measures as to prevent it, unless resisted.

The return of an officer where he is a party is *prima facie* evidence, and only so, of an attachment. *Bruce* v. *Holden*, 21 *Pick.* 187; *Sias* v. *Badger*, 6 *N. H. R.* 393.

To preserve an attachment when made, the officer must by himself or his agent retain his control and power of taking immediate possession in all those cases in which the property is capable of being taken into actual possession, unless our statute establishes, as it does in certain cases, a different rule. If he does not do this, the attachment will be regarded as abandoned and dissolved. *Sanderson* v. *Edwards*, 16 *Pick.* 144.

The application of these principles to the present case, as now presented by the testimony, would decide that the attachment might be sufficient, if followed by the continual presence of the officer or of some one on his behalf. There is no evidence of any contin-

ued control or of any attempt to retain it, unless *Wheeler* can be considered as undertaking to act for the officer. The mere request to *Wheeler* to give notice would not be sufficient unless he consented to assume the trust of taking charge of the goods for the officer. His acts and declarations taken together place him in a position so equivocal, that the jury should decide whether he did consent to act for the officer, and if so to what extent he did so act and continue the officer's control over the property. There can be no doubt, that he ceased to have any such connexion with it as would preserve the attachment after the 4th of *February* following. If the defendants had not interfered against the rights of the officer or his keeper before that day, the plaintiff cannot recover. And so far as they had before that time resisted and taken from his or his keeper's control any of the property, to such extent he may recover. It becomes therefore proper to examine their acts in relation to the property after the attachment. An attachment does not deprive the debtor of the right to convey his property subject to it, and any merely formal act of delivery, which does not resist or deprive the officer of the actual control of it, is no violation of his rights, and will not subject the purchaser to an action by the officer. It does not occasion any injury or deprive him of any right. *Bigelow* v. *Willson*, 1 *Pick.* 492. Nor would the continued operations of the mechanics upon the property, if not objected to by the officer or his keeper, be considered as a trespass against him. But any act whatever, which deprived the officer or his keeper of the control or removed any portion of the property from the place where he chose to have it deposited, would subject them to an action for such property.

The principle that fraud is not to be presumed and that the burthen of proof to establish it is upon the party alleging it, was recognized by the Court in the case of *Blaisdell* v. *Cowell*, 14 *Maine R.* 370.

It is not perceived, that the Court can properly come to any more definite conclusion upon the rights of the parties without the assistance of a jury, to which the matters of fact must again be submitted.

Verdict set aside and a new trial granted.

NATHANIEL BRYANT *vs.* THE DAMARISCOTTA BANK.

The *st.* 1838, *c.* 326, § 3, additional to the act regulating banks and banking, is prospective in its operation, and is to be applied only to bills, the payment of which might be subsequently demanded.

A bank bill, like any other note of hand, payable on demand, but *having no place of payment appointed therein*, may be sued, and the action may be sustained, without proof of any special demand.

The true construction of the eleventh section of *st.* 1831, *c.* 119, to regulate banks and banking, is, that if the officers of a bank refuse or delay payment, in gold or silver money, of any bill demanded and presented for payment at the bank, in the usual banking hours, the corporation is made liable, after fifteen days from such demand, to pay the additional damages of twenty-four per cent. per annum.

If the demand upon the bank be proved to have been *for specie for the bills* presented, the jury are authorized to infer, that the demand was intended, and understood to have been for such coin as constitutes a legal tender.

A demand of payment merely, is sufficient, and it may be made by an agent, the agency being avowed, and the principal disclosed.

THE action was assumpsit, on divers bills of the bank, amounting in the whole to the sum of four hundred dollars. There was a special count on each bill, wherein the plaintiff described the bill, alleged ownership in himself, a demand of payment thereof at the counter of the bank, in usual banking hours, a refusal to make payment at that or at any other time, that a delay of more than fifteen days had taken place, and that in consideration thereof, and by force of the statute in such case made and provided, the defendants became liable and promised to pay the amount of the bill, and damages, at the rate of two per cent. per month from the time of the demand.

At the trial before EMERY J. as the report states, "the demand of the specie for those bills at the counter of the defendants' banking house or room, in the usual banking hours, was proved to have been made by the plaintiff's agent, for the plaintiff, of the cashier of the bank on the third day of *July*, 1837, and that no payment was then or ever made, nor any tender of payment thereof, to the plaintiff or his agent, nor any other presentment and demand of payment, than was proved to have been then made." This bank paid specie for a time after the general suspension of specie payments by the *New-England* Banks, but on *May* 25, 1837, the di-

rectors voted, not to pay specie until the Banks generally in *Boston* resumed specie payments. After this the cashier paid no specie. The bank surrendered its charter, and the surrender was accepted by the legislature in *March,* 1838. The stock had been divided among the stockholders before the trial. It did not appear in the report, whether the bills were made payable at the bank, or not; but it was said in the argument that no place of payment was fixed.

The counsel for the defendants, requested the Judge to instruct the jury: —

1. That if no demand was made by the plaintiff, or his agent for the payment of the bills in suit, prior to the bringing of the action, it cannot be maintained.

2. That to constitute a demand, it is necessary that it should be so plainly and distinctly made, that the person upon whom it is made, shall understand that payment is demanded.

3. That if the jury shall be satisfied, that a demand was made at the time and in the manner stated in the deposition, and that no other demand has been made at any time, the plaintiff is entitled to recover only the amount of the bills and interest at the rate of six per cent.

The Judge declined to give the first and third requested instructions, but gave the second: — and further instructed the jury, that if from the evidence in the case, they were satisfied, that the bills mentioned in the plaintiff's declaration were by his agent presented at the counter of the defendants' banking house in usual banking hours, and payment of the specie therefor demanded, it would authorize them to find for the plaintiff the principal of the notes declared on, and two per cent. per month interest, as damages.

The jury found for the plaintiff, for the amount of the bills with damages, at the rate of two per cent. per month. The verdict was to be set aside, if the instructions requested and withheld, should have been given, or if those given were erroneous.

J. Holmes, for the defendants, contended: —

That the demand being made for *specie,* was not legal. It is not a demand for *gold or silver,* as the statute requires. Gold and silver are made a legal tender in payment of bills presented, but gold and silver are not always specie. The plaintiff claimed to be

paid in a manner he was not entitled to, and his demand was therefore of no effect. A suit even for the six per cent. interest cannot be maintained, much less one for the penalty.

The demand was not legal, because made by an agent. The demand must be made by the holder of the bills, and not by proxy. The tender is to be made only to the person making the demand

By the statute of 1838, *c.* 326, § 3, thirty days are allowed in which the bank may pay the money, and a second demand must be made, before the penalty of two per cent. per month attaches. This applies to all cases. It either repeals the former statutes on this subject, or is explanatory of them. The re-enactment of the same subject matter is a repeal. 4 *Bac. Ab.* 645; 1 *Inst.* 381.

This is a penal statute and is to be construed strictly. It is called a penal statute in the act, and it is penal in its provisions.

The legislature has power to take away any right given by statute. The power exists to take away penalties incurred at any time before judgment. *Medford* v. *Learned*, 16 *Mass. R.* 216; *Patterson* v. *Philbrook*, 9 *Mass. R.* 151; *Thayer* v. *Sevey*, 2 *Fairf.* 284; 6 *Wend.* 526; 4 *Wend.* 210.

Groton and *Tullman*, for the plaintiff, contended, that where a bill is payable on demand, and no place of payment is fixed in the bill as in this case, that a suit for the six per cent. might be maintained without any demand. *Bailey on Bills*, 197; 3 *Wendell*, 21.

This is not a penal statute, but a remedial one. It merely gives to the party injured by the delay an additional interest.

The statute of 1838 does not in terms repeal the prior statutes on this subject, and is merely prospective. But if it did, it would be inoperative, as the legislature had no more right to take away the forty-eight dollars of interest which had accrued, than the four hundred dollars of principal. *Story's Conflict of Laws*, 251.

A demand may at any time be made by an agent. There is nothing in this statute requiring a different demand from what is usual in ordinary cases.

The demand for specie was distinctly understood to mean a demand to be paid in the legal currency, and so the jury have found, under the instruction given by the Court at the request of the counsel for the defendants.

The opinion was by

WESTON C. J. — The statute of 1838, *c.* 326, contains no repealing clause affecting any question presented in this case. In our opinion the third section is prospective in its operation, and is to be applied only to bills, the payment of which might be subsequently demanded. It did not therefore affect such as might have been previously demanded, or any right of action, which had accrued, under any former law.

A bank bill, like any other note of hand payable on demand but appointing no place of payment, may be sued, and the action may be sustained, without proof of any special demand, and the judge was right in declining to instruct the jury, that proof of such demand was necessary to the maintenance of the action.

With regard to the right of the plaintiff to recover damages, at the rate of twenty-four per cent. as found by the verdict, in our judgment, it is sustained, whether the action is to be understood to have been brought under the statute of 1831, *c.* 519, § 11, or under that of 1836, *c.* 233, § 1. The latter gives damages at the rate of two per cent. per month, if payment of the bank bills of any bank shall have been delayed or refused, beyond the period of fifteen days, after payment of the same shall have been demanded, at the counter of the bank. The former gives the same damages, being at the rate of twenty-four per cent. per annum, "in case the officers of any banking corporation aforesaid in the usual banking hours shall refuse or delay payment after demand made at the bank, in gold or silver money of any note or bill of said corporation there presented for payment." A more accurate pointing, and a little different collocation of sentences, would have removed all possible obscurity as to the meaning of the legislature; but it appears to us sufficiently obvious, as it stands. If the officers of the bank refused or delayed payment, in gold or silver money, of any bill demanded and presented for payment at the bank, in the usual banking hours, the corporation is made liable after fifteen days from such demand, to pay the additional damages. On the one hand the holder is to demand payment of the bill, and on the other, the officers of the bank are to make payment in gold or silver money. It is not made necessary that the holder should demand payment in

gold or silver money; a simple demand of payment is all, which is required of him.

But a demand of payment merely, has the same effect; gold and silver money being the only currency, which can amount to a legal tender. By the constitution of the *United States, art.* 1, § 10, clause first, no State can make any thing, but gold and silver coin a tender in payment of debts. The bank then could have no right to pay in copper, or in uncoined gold or silver bullion. Nor does it appear to us, that a demand of payment in specie, impairs the right of the plaintiff. Specie may be well understood to mean such coin, as constitutes a legal tender. The Judge instructed the jury, at the request of the counsel for the defendants, that to constitute a demand, it is necessary that it should be so plainly and distinctly made, that the person upon whom it is made, shall understand that payment is demanded. And the jury were justified from the evidence in finding this fact. The demand might be made by an agent, the agency being avowed and the principal disclosed.

We perceive no error, on the part of the presiding Judge, either in giving or withholding instructions.

Judgment on the verdict.

Denny Kelly *vs.* John Low.

In an action upon the covenants of a deed of warranty, where at the time the deed was given, the premises were incumbered by a mortgage made to secure the payment of a sum of money, the plaintiff is entitled to recover in damages, the amount he was compelled to pay to redeem the mortgage, although the payment was not made until after the commencement of the suit.

The action was for breach of the covenants of a deed of warranty of certain real estate.

At the time the deed was given, the premises were incumbered by a mortgage to secure the payment of a sum of money. When the suit was brought, the money was payable, but no entry had been made by the mortgagee. After the action was entered in court, the plaintiff paid the amount due on the mortgage.

Tallman, for the plaintiff, claimed to have as damages the amount thus paid, with interest thereon; and cited *Brooks* v. *Moody*, 20 *Pick.* 479.

Groton, for the defendant, insisted, that the suit should not be maintained, or that but nominal damages should be recovered. The notes may be transferred, and the defendant may be compelled to pay them again.

On the last day of the term, the Court, by SHEPLEY J. remarked, that the principle contended for by the plaintiff's counsel, was recognized in *Gardiner* v. *Niles*, in *Penobscot*, (16 *Maine R.* 379,) as well as in the case cited. Judgment was ordered to be made up for the amount paid by the plaintiff to redeem the mortgage and interest.

EDMUND B. BOWMAN, *Adm'r vs.* LOUIS HOUDLETTE, *Adm'r & Trustee.*

A mortgage of land was made to secure a debt of less amount than the value of the land; the mortgagor became insolvent, and so continued for many years, but the creditors did not take the equity to satisfy their debts; just before the foreclosure of the mortgage, the estate was conveyed to certain persons who had given their security to raise the money to pay the mortgagee; a son of the mortgagor paid the money thus raised, and took a conveyance from the grantees of the mortgagee for his indemnity; the son conveyed the estate to his mother, the wife of the mortgagor, and took from them a bond to pay the amount by him paid; the father assigned to the son a debt due from a third person to be appropriated in part payment of the sum due to him; a suit was brought against the father by a creditor, and the person from whom the debt assigned was due, was summoned as trustee; and on trial the jury negatived any fraudulent intention: —

It was held, that the transaction was not *in law* a fraud upon creditors.

THE action was upon a note dated *May* 3, 1823, given by the defendant's intestate, *Samuel Bishop*, to *Margaret Bridge*, on whose estate the plaintiff is administrator. Both *Mrs. Bridge* and *Bishop* were alive, at the commencement of the suit, and one *Chism* was summoned as the trustee of *Bishop*. *Chism* admitted that a sum was due from him to *Bishop* on account, and disclosed,

that he had been notified of an assignment thereof from *Samuel Bishop*, to *Charles C. Bishop*. The validity of this assignment was denied by the plaintiff, and *C. C. Bishop* was summoned in, and an issue was framed to try whether the assignment was, or was not fraudulent, and the questions arose on this trial, the original defendant having been defaulted.

At the trial before EMERY J. the counsel for the plaintiff, requested the Judge to instruct the jury, that the consideration expressed in said assignment, being the money paid said *Dole*, the assignee of the mortgagee, that if they should find the said *Charles* had been already paid the said sum by a conveyance of said land, that in that case, said assignment was in law fraudulent as to creditors. The Judge gave the instruction as requested. No other request was made, and no other instruction was given. The report states, that "the whole evidence, which was in some measure conflicting, was submitted to the jury." The facts sufficiently appear in the opinion of the Court. Neither the report of the case, nor any paper referred to, shows which way the verdict was, or how the issue was framed.

F. Allen, for the defendant.

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

The opinion of the Court was by

WESTON C. J. — It appears that the defendant's intestate, who had been insolvent for many years, mortgaged an estate, worth over five hundred dollars to one *Hathorne* as security for a debt of somewhat more than two hundred. The equity was liable to be taken by the creditors of the intestate; but their indulgence was such, that they never interfered to make it available for their benefit. Just before the foreclosure of the mortgage the estate was conveyed to certain persons, who had given their security to raise the money to pay *Hathorne*. This arrangement may have been made for the benefit of the intestate, but it must be presumed with the acquiescence of his creditors, who might have taken the property. *Charles Bishop*, the son, having paid the debt, for which the grantees of *Hathorne* stood responsible, took a conveyance of the estate for his indemnity. The substitution of *Charles* placed the creditors in no

worse situation; and if they chose to be passive, there is no just reason to impute fraud to him in this part of the transaction.

He thus became the owner of the estate, with liberty to dispose of it at pleasure. He conveyed it to his mother, the wife of the intestate, thus putting within the reach of his creditors, the life estate, which had enured to him, in virtue of that conveyance. The son had a right to stipulate, that the money he had paid should be refunded to him. He would otherwise be a loser of all he had paid. As a partial reimbursement, the debt in controversy was assigned to him. The consideration for the assignment, as recited, refers to the original advancement by the son, although in truth it was for the conveyance of the land which he had received in payment. The jury have negatived fraud; and upon the evidence reported, we perceive no sufficient reason to disturb the verdict.

JONATHAN EASTMAN *vs.* SAMUEL HILLS *& al.*

The *st.* 1834, *c.* 137, concerning pounds, &c. does not require, that the impounder of beasts should personally drive them to the pound, or deliver them to the pound keeper, and he may employ others to perform that service; but the certificate which is to be *sent or delivered* to the pound keeper, must be the personal act of the impounder, or if he employs the hand of another to make the certificate, it should be done in the name of the party impounding.

The certificate left with the pound keeper determines who is to be regarded as the impounder, and the action of replevin for the beasts may be rightly brought against the person who signs such certificate in his own name.

THE action was replevin for seven cows, alleging that the defendants took the cows, the property of the plaintiff, and detained them in the town pound. The defendants in their brief statement alleged, that *D. F. Harding* took and detained the cattle in the town pound, and that *Harding*, being infirm and unable to travel, they drove the cattle and did whatever was necessary to commit them to the pound as the agents of said *Harding*, and that the action ought to have been brought against said *Harding*, as the

impounder, according to the statute. The certificate left with the pound keeper was as follows.

"To the pound keeper of *Union*. The undersigned *Samuel Hills*, a field driver of *Union*, herewith commits to pound seven cows, (describing them) taken up in the inclosure of *D. F. Harding*. And the said *Harding* demands thirty dollars for damage, and the charges for impounding the same. *Samuel Hills.*"

The defendants produced a receipt from the pound keeper, showing that *Harding* paid the fees for impounding.

J. S. Abbott, for the plaintiff, cited and relied upon *Eastman* v. *Rice*, 2 *Shepl.* 419 ; and *Hills* v. *Rice*, in this county, (17 *Maine R.* 187,) as decisive of the present questions. The certificate was signed by *Hills*, as the impounder, and the suit is rightly brought against him.

Harding, for the defendants, contended, that the decisions in the cases referred to, were founded upon a different state of facts, and therefore were not decisive of this. Here the certificate is not signed by *Hills* as field driver. The damage demanded is by *Harding*, and he pays the pound keeper his fees. *Hills*, acting but as *Harding's* servant, is not liable to the suit.

The opinion of the Court was drawn up by

Weston C. J. — It being understood, that there was no legal justification for impounding the cattle, replevied in this case, the only question presented is, whether the action should not have been brought against *Daniel F. Harding*, as the impounder, in pursuance of the statute of 1834, *c.* 137, section eighth. It is not necessary, that the impounder should in person take the cattle and drive them to the pound, or deliver them to the pound keeper. He may employ agents to do this service. *Hills* v. *Rice*, 17 *Maine Rep.* 187. But the fifth section of the statute requires, that the impounder shall send or deliver to the pound keeper a certificate of the same purport with the form, there prescribed. This is to be a personal act, or if the party impounding employs the hand of another to make the certficate, it should be done in his name. In our opinion, that paper determines who is to be regarded as the impounder, and is the proper evidence of that fact. In the certificate, which is made part of this case, the defendant *Hills*, and not *Harding*,

represents himself as the impounder. He speaks of himself as field driver, but that affords him no protection, as was decided in *Hills* v. *Rice*. The averment in the brief statement, that *Harding* was the impounder, not being sustained, and no other defence being set up, according to the agreement of the parties, the defendants are to be defaulted, and judgment rendered for the plaintiff for the damages agreed, and costs.

JOSEPH R. NEWALL *vs.* BACHELOR HUSSEY.

By the law of this State a debt due on account is considered as paid, and the contract extinguished by taking a negotiable promissory note for the amount; while the common law regards it only as security for an existing debt.

As the original contract no longer exists after the taking of such note, it follows that the note must be a new cause of action; and in our practice, amendments are not permitted to introduce a new cause of action.

It is within the discretion of the Judge of the District Court to permit amendments in all cases where by law the writ or declaration is amendable, and this Court does not revise that exercise of discretion. But if an amendment be permitted, which the law does not authorize, the party has a right to except.

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

The declaration was only on an account annexed to the writ. After the action had been entered in Court, and continued several terms, the plaintiff offered as amendments, under a general leave to amend entered at the first term — 1. The money counts. 2. *Insimul computassent.* 3. A count on a note given by the defendant to the plaintiff, or his order payable on demand, with interest, dated *Aug.* 22, 1838. The defendant resisted the proposed amendments, and objected to the introduction of the note. It was admitted, that the note was given in settlement of the account in suit. REDINGTON J. allowed the plaintiff to file a count for money had and received, and one upon the note. To this the defendant excepted.

J. S. Abbott, for the defendant, cited *Vancleef* v. *Therasson*, 3 *Pick.* 12; *Howe's Prac.* 373, 380.

Reed, for the plaintiff, cited *st.* 1821, *c.* 93, § 16; *Young* v. *Adams*, 6 *Mass. R.* 182; *State Bank* v. *Hurd*, *ib.* 172; *Ball* v. *Claflin*, 5 *Pick.* 303; *Haynes* v. *Morgan*, 3 *Mass. R.* 208; *st.* 1822, *c.* 193, § 8; *Phillips* v. *Bridge*, 11 *Mass. R.* 242.

The opinion of the Court was by

SHEPLEY J. — By the law of this State, a debt due on account is considered as paid and the contract extinguished by taking a negotiable promissory note for the amount. While the common law regards it only as security for an existing debt, the note is here evidence of a new and different contract unless the contrary is made to appear.

The letter of the defendant, under date of 21st *November*, does admit that the note originated from the account sued; it does not however rebut, but rather confirms the presumption of law, that it was received in discharge of the previous contract.

If the original contract no longer existed after taking the note, it would seem to follow, that the note must be a new cause of action. And so it has been decided to be in *Massachusetts* where the like rule of law prevails. *Vancleef* v. *Therasson*, 3 *Pick.* 12.

In our practice amendments are not permitted to introduce a new cause of action. It is within the discretion of the Judge of the District Court to permit amendments in all cases where by law the writ or declaration is amendable; and this court does not revise that exercise of discretion. But if an amendment be permitted, which the law does not authorize, the party has a right to except.

This amendment must be regarded as unauthorized, because it introduces a new cause of action.

Exceptions sustained and plaintiff nonsuited.

JOHN MCNEAR & *ux.* *vs.* GEORGE BAILEY.

Parol evidence cannot be received to vary a written submission or award.

An award *may be good* when it does not embrace all matters submitted by the parties, as it will be presumed that the matters not named in the award, were not made known to the arbitrators.

But when it does appear that other existing causes of action submitted, and not named or acted upon by the award, were made known to them, the general rule is, that the award is bad for the whole. And parol evidence may be received to show, that such other causes of action were made known to the arbitrators.

When there is no clause in the submission, providing that the award shall be made on all the matters in difference, or points submitted; if the matters omitted are not connected with those decided, so that injustice will be done, the award may be sustained. But it will not be, if the matters omitted are so connected with those decided, that injustice will be done.

It is the settled construction of the statute, authorizing submissions before a justice, that a submission under it cannot authorize a decision upon the title to real estate.

But where the remedy for enforcing the award is not by a judgment of court, but by a bond between the parties, a submission of all demands would authorize a decision upon the title.

When the submission authorizes a decision upon the title to real estate, equity will decree a specific performance of the award.

DEBT on a bond from the defendant to the plaintiffs, dated *Aug.* 22, 1838. The condition was, that whereas the parties "have submitted all their demands to the determination of (three referees named;) now if the said *Bailey* does well and truly perform on his part, according to the award and determination of the aforesaid referees, whose award is to be published without being returned to any Court of Common Pleas, then, &c." The submission signed by the parties was made in the form prescribed in the statute, and was acknowledged before a justice of the peace. They therein submitted "the demand hereunto annexed and all the demands of both parties." The demand annexed was this. "*Washington, Aug.* 8, 1838. *John* and *Sarah L. McNear* to *George Bailey* Dr. To damage in not performing their contract. $300."

The plaintiff made a statement in writing, of his claim for money paid and services rendered, and damages incurred. The facts

in the case, (relating to the points decided,) sufficiently appear in the opinion of the Court.

At the trial before EMERY J. after a parol agreement had been proved, that the referees might determine respecting real estate, the defendant contended, that no parol agreement could authorize the referees to award the conveyance of real estate; and that the deeds tendered by the plaintiff were not conformable to the award; and if the referees had power to award that the defendant should convey his real estate, they had no power to direct him to convey the real estate of another person.

The Judge was of opinion that the plaintiffs upon this evidence could not maintain their action; and by consent of parties, directed a nonsuit, to be set aside if the whole Court should be of opinion that the action could be maintained.

F. Allen and *Reed* contended, that a parol submission was good. True it could not be enforced, if the award directed the conveyance of real estate, if it stood alone. And for that reason the bond in suit, under the hands and seals of the defendant, was made to compel the performance of it. But the bond shows that all demands between the parties were submitted, including of course the title to real estate. *Norton* v. *Savage*, 1 *Fair.* 455; *Bowes* v. *French*, 2 *Fairf.* 182; *Tyler* v. *Dyer*, 1 *Shepl.* 41; *Homes* v. *Aery*, 12 *Mass. R.* 134; *Newburyport Mar. Ins. Co.* v. *Oliver*, 8 *Mass. R.* 402; *Kyd on Awards*, 262; *Ford* v. *Clough*, 8 *Greenl.* 334.

E. Smith, for the defendants, contended, that the bond was merely to secure the performance of the award of the referees upon the matters submitted to them. The submission and award are both in writing, and parol evidence is inadmissible to alter or explain them. *Bac. Abr. Arbitrament, E*; *Kyd on Awards*, 143; 2 *Atkyns*, 384; *Phillips' Ev.* 496.

The award is uncertain, and is not and does not pretend to be a final adjustment of the matters submitted to them, and is therefore void. *Selby* v. *Russell*, 12 *Mod.* 139; *Wharton* v. *King*, 2 *B. & Adol.* 528.

The referees had no power to award that the bond for the support of the defendant should be given up.

The award is invalid, because the referees against the protestations of the defendant persisted upon adjudicating on the coming as well as the past damages, and yet have not stated in the award that this subject was decided on by them. *Kyd on Awards*, 141, 208. And the same objection exists as to the claim made by the defendant against the plaintiff for the amount of the outstanding mortgage to *J. M. Bailey*, which the plaintiff admitted before the referees and agreed to pay.

The award is not only void, because being on a submission under the statute, the referees have no power to decide upon the title to real estate, but void even on a submission at common law, because it directs the conveyance of real estate by the defendant, which did not belong to him. *Lee* v. *Elkins*, 12 *Modern*, 585; *Kyd on Aw.* 187, 189.

The opinion of the Court was by

SHEPLEY J.—The defendant conveyed his real and personal estate to his daughter, the wife of the plaintiff, and at the same time took from the plaintiffs a bond with a condition for the support of himself and wife during their lives, and a mortgage of the same real estate to secure performance. Before these conveyances were made, the defendant had conveyed his real estate in mortgage to *John M. Bailey*, one of the referees, to secure a debt, which remained unpaid. As usual, difficulties arose between them, which they were desirous of adjusting, and of dissolving the contract. For this purpose, they entered into a reference of all demands under the statute. The referees thinking, that their award might not be conclusive upon these claims or titles to the estate, caused a bond to be executed by the defendant, which recites, that they have submitted all their demands to the referees, and obliges him to perform the award. The referees made their award in writing, directing the plaintiffs to release to the defendant their title to certain portions of the real estate described; and the defendant to release to them all his interest in the remaining portion. If the award had been performed by the execution of these releases, their respective rights in the real estate would have been finally determined, and the rights of the defendant as mortgagee would have been annihilated. The bond providing for the maintenance was

not named in the award; nor the debt or mortgage to *John M. Bailey;* nor the respective claims for non-performance by one party and for improvements by the other. Nor is there any thing in it, which indicates, that the releases of the real estate were to be made in satisfaction of all or any of these claims, or that it was a decision of all matters of difference, or that it was upon or respecting the premises. Unless parol evidence can be admitted to explain or vary the award, some, if not all of these matters may be the subjects of future litigation. But such evidence cannot be received to vary a written submission or award. *Barlow* v. *Todd,* 3 *Johns. R.* 367; *De Long* v. *Stanton,* 9 *Johns. R.* 38; *Efner* v. *Shaw,* 2 *Wend.* 567. An award may be good, when it does not embrace all the matters submitted by the parties. It will be presumed, that the matters not named in the award were not made known to the arbitrators. When it does appear, that other existing causes of action submitted and not named or acted upon by the award were made known to them, the general rule is, that the award is bad for the whole. And parol evidence may be received to show, that such other causes of action were made known to them. *Barnes* v. *Greenwel, Cro. Eliz.* 858; *Risden* v. *Inglet, ib.* 838; *Middleton* v. *Weeks, Cro. Jac.* 200; *Bradford* v. *Bryan, Willes,* 268; *Hawkins* v. *Calclough,* 1 *Burr.* 277; *Randall* v. *Randall,* 7 *East,* 81; *Mitchell* v. *Stanley,* 16 *East,* 58. Where there is no clause in the submission providing, that the award shall be made on all the matters in difference or points submitted, if the matters omitted are not connected with those decided, so that injustice will be done, the award may be sustained. *Simmonds* v. *Swaine,* 1 *Taunt.* 549. In this submission, if the bond may be so regarded, there is no such clause. But the matters before named as omitted, are so connected with the title to the estate, that it is very apparent, that injustice will be done by permitting them to remain unadjusted, if the award be sustained. It is contended, that the bond has reference to the submission under the statute, that it was intended only to enforce the award, that might be made by virtue of it, and that it does not therefore authorize the referees to decide upon the title to real estate. It has been the settled construction of the statute, that submissions under it cannot authorize a decision upon the title to real estate. *Fowler*

v. *Bigelow*, 8 *Mass. R.* 1. The argument is not without force derived from the language of the bond, that it was intended only to enforce a performance of the award upon the submission under the statute, and that it was not designed to be a new and distinct submission. If it may be so regarded, all demands having been submitted, it would authorize a decision upon the title. *Marks* v. *Marriot*, 1 *Ld. Raym.* 114; *Sellick* v. *Addams*, 15 *Johns. R.* 197; *Byers* v. *Van Deusen*, 5 *Wend.* 268. And when the submission authorizes a decision upon the title, equity will decree a specific performance of the award. *Bouck* v. *Wilber*, 4 *Johns. Ch. R.* 405; *McNeil* v *Magee*, 5 *Mason*, 245. It is not however necessary to decide upon the effect of the bond, for in whatever light it may be regarded the award cannot be sustained for the reasons already stated.

Nonsuit confirmed.

Hubard Philbrick *vs.* Jedediah Preble.

An award not involving the title to real estate may be good without being reduced to writing.

An award in writing may bind the parties at common law, although it decides upon a difference respecting real estate; but the title to real estate cannot be affected by any agreement or award not in writing.

When the part of an award which would be otherwise good, is so connected with that which is void, as to show that justice might not be done by suffering it to have effect, the whole is void.

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

Trespass for an assault and battery. The facts in the case, so far as they have reference to the questions of law, will be found in the opinion of this Court.

The District Judge ruled, that if the submission was fairly entered into, and the parties had a full and fair hearing, and the referees acted fairly, and the parties, after knowing the award, deliberately and understandingly agreed to abide by it, which questions he would submit to the jury, the defendant was entitled to a verdict.

Whereupon the plaintiff by consent became nonsuit, with leave to file exceptions, which were filed.

Rundlett, for the plaintiff, contended : —

The award of the referees cannot operate as a bar to the plaintiff's action, because the submission was under the hands and seals of the parties, and the award was by parol only.

The referees were to establish the line between the land of the parties. This operates upon the title to real estate. A verbal award in relation to real estate, is void. If the referees could not establish a division line between the parties, then the remaining portion of the award, "that the defendant should perform three days labor for the plaintiff," is also void. The decision in relation to the labor being dependent upon that upon the line, both are void, if one is. 1 *Greenl.* 300 ; 6 *Greenl.* 247 ; 2 *Saund.* 293, *note* 1.

But as there has been no performance, if the parol award is valid, it is no bar to the action, and could only be given in evidence to fix the amount of damages. *Eaton* v. *Arnold*, 9 *Mass. R.* 519.

F. Allen, for the defendant, contended, that the award, though but by parol, was good at common law, and was a bar to the action. *Kyd on Awards*, 262 ; *Homes* v. *Avery*, 12 *Mass. R.* 134 ; *Newb. Mar. Ins. Co.* v. *Oliver*, 8 *Mass. R.* 402 ; *Norton* v. *Savage*, 1 *Fairf.* 455.

Nor is it necessary that the award should be that the party should pay money. It may well be to perform some other act. 1 *Shepl.* 41 ; 7 *Mass. R.* 399 ; 10 *Mass. R.* 253.

This action is for an injury to the person merely. The award was that the defendant should perform certain labor in satisfaction of the injury. Neither has any connexion with real estate, and the award is a bar to the action.

The agreement to abide by the award, is a sufficient acceptance of it.

The opinion of the Court was by

Shepley J. — It appears from the bill of exceptions that the dividing line between the lands of the parties had been in dispute ; that the plaintiff attempted to remove a part of the fence on to

land occupied and claimed by the defendant; and that this occasioned a personal conflict. The parties agreed by a writing under their hands and seals to refer "all disputes and quarrels or differences that now exist respecting the establishing the line or partition fence" and all other disputes to referees.

The referees thus selected heard the parties, decided upon the line, and made their award verbally to the parties, with which they declared themselves satisfied. If the award had been in writing, it might have bound the parties although it decided upon a difference respecting real estate. And an award not involving the title to real estate may be good without being reduced to writing; but the title to real estate cannot be affected by any agreement or award not in writing.

If the award was void as to so much of it as related to the real estate, the Court cannot decide, that it was good so far as it related to the personal injury; because one or the other of the parties might be more or less in the wrong according to the decision, which should be made respecting his title to the real estate.

When the part of an award, which would be otherwise good, is so connected with that which is void, as to show that justice might not be done by permitting it to have effect, the whole will be void. *Exceptions sustained.*

CHARLES ROGERS *& al. vs.* SAMUEL D. REED.

Two or more persons who are not partners, may take a note payable to themselves by their surnames only, which will be good evidence of a debt, upon sufficient proof of identity. And to establish the identity, it is not necessary to prove that they were partners at the time of the date of the note.

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

Assumpsit on a note of which a copy follows.

"*Bath, Oct.* 31, 1833. Twelve months after date, I promise to pay *Messrs. Rogers & Cutler* and *George W. Drinkwater*, or order, one hundred twelve dollars, for value received of *Eveline Rogers.* *S. D. Reed.*"

The note was wholly in the handwriting of *Reed*, and was given to *Eveline Rogers*, to be by her transferred to the payees in payment of debts due them. They refused to accept the note, but permitted her to proceed with it in their names.

In the writ, the defendant was summoned "to answer unto *George L. Drinkwater* and *Charles Rogers, Jr.* both of *Portland* in the county of *Cumberland*, merchants, and *Samuel Cutler* of *Boston*, &c. in a plea of the case, for that the said *Reed*, at, &c., on, &c., by his note under his hand of that date, for value received, promised to pay to the said *Drinkwater*, by the name of *George W. Drinkwater*, and to said *Rogers* and *Cutler* or order, the sum of, &c."

In the course of the trial the counsel for the defendant objected, that the note being payable to Messrs. *Rogers & Cutler* and *George W. Drinkwater*, did not support the declaration, and that it did not appear that the three plaintiffs were the persons to whom the note was made payable. Thereupon the plaintiff offered testimony tending to prove "that by the name *George W. Drinkwater*, mentioned in the note, was meant *George L. Drinkwater*, and that the plaintiffs, *Charles Rogers, Jr.* and *Samuel Cutler*, at the time of giving the note, were merchants residing in *Portland*, and there doing business under the firm and style of *Rogers & Cutler*."

The counsel for the plaintiff requested the Judge to instruct the jury, that if they were satisfied that the defendant signed the note, and that the body of it was in his handwriting, that in the absence of all opposing proof, it was sufficient evidence of a recognition by said defendant of said plaintiffs as a firm, as to supersede the necessity of any further proof on their part, of the existence of such firm at the time of the date of said note.

The Judge instructed the jury, that it was incumbent on the plaintiffs to prove that these were the persons to whom the note was made payable under the name of *Cutler & Rogers* and *George W. Drinkwater*; that the existence of the firm of *Cutler & Rogers* in *January*, 1833, was not of itself sufficient evidence; that they might however consider the testimony of *Mr. Clapp*, of the conversation which he heard between the defendant and *Eveline Rogers* in *June*, 1838; that as she spoke of the firm as being in

existence when she offered them the note, which must of course be subsequent to its date; and as the defendant did not object to the existence of such firm, the jury might infer, if they thought proper, from that and the other evidence in the case, that the firm existed at the date of the note, in which case they would find for the plaintiff; but otherwise for the defendant. The verdict was for the defendant, and the plaintiffs filed exceptions.

F. Allen, for the plaintiffs, said there was no question as to variation between declaration and proof; that there was no allegation, that the plaintiffs, or any of them, were partners; and that the evidence in relation to the partnership of *Rogers & Cutler*, was merely to show their full names, and prove their identity. The instruction of the Judge, therefore, that the plaintiffs must prove the existence of a partnership, when the note was given, was erroneous. Had the note been made to *C. Rogers, & Co.* instead of *Rogers & Cutler*, the instructions might have been proper.

Groton, for the defendant, contended, that the instruction of the Judge was right, and that it was a mere question of weight of evidence, of which the jury were the sole judges. If there was a firm of *Rogers & Cutler* at one time, of which the plaintiffs were members, it is not proof that the same firm existed, and was composed of the same persons long afterwards, when the note was given.

The opinion of the Court was by

Weston C. J. — *Rogers* and *Cutler*, two of the plaintiffs, do not declare as partners, although they are named in the note in a manner, which usually indicates the existence of a firm. It appears that they had been partners, so as to leave no question of the identity of the persons intended. This being established, it was not necessary to prove the continuance of the partnership up to the time of the date of the note. Two or more persons, who are not partners may take a note payable to them by their surnames only, which will be good evidence of a debt upon sufficient proof of identity. We are of opinion therefore, that the plaintiff was not bound to prove, as the jury were instructed, that *Rogers* and *Cutler* were partners, at the time of the date of the note.

Exceptions sustained.

James Cook *vs.* Zenas Lothrop *& als.*

Where a writ is made to run against the body of the defendant, when it is not warranted by law, he may take the objection to the form of the process by plea in abatement; or if it appear on the face of the writ, by motion.

As this is an immunity granted to the defendant, he may waive it; and if the objection be not made before a general continuance of the action, it will be considered as waived.

If the defendant in replevin recovers judgment for costs of suit, and the plaintiff neglects to make payment thereof, it is a breach of the condition of the replevin bond, and an action may be maintained upon it, without first making a demand on the defendant, or sueing out a writ of execution on that judgment.

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

Replevin on a bond given by *Lothrop* and sureties to *Cook*, a deputy sheriff, on serving a writ of replevin of articles attached.

The facts are sufficiently stated in the opinion of the Court.

Harding, for the defendants, contended, that the writ having been improperly made to run against the body, and that appearing on the face of the writ, the Court will *ex officio* abate it. *Stat.* 1835, *c.* 195, § 2; *Greenwood* v. *Fales*, 6 *Greenl.* 405.

The penalty of the bond was to be paid on demand, on failure to perform its condition. No demand of payment was here made before the commencement of the suit. *Agry* v. *Betts*, 3 *Fairf.* 415.

No execution issued for the costs recovered in the replevin suit. An action cannot be maintained on the bond, until after the execution has been issued and has been returned unsatisfied.

Bulfinch, for the plaintiff.

The statute merely says, that the body shall not be arrested, not that the writ shall not run against the body. No injury was done, as no arrest was made. But if there be an error in the writ, it could only be taken advantage of at the first term in abatement.

The bond was broken as soon as the judgment for costs was rendered, and they were unpaid. There was no judgment for a return, and it was needless to issue an execution. *Lindsay* v. *Blood*, 2 *Mass. R.* 518; 5 *Dane*, 531; 3 *Harr. Dig.* 1880.

The opinion of the Court was by

WESTON C. J. — The writ in this case ran against the bodies of the defendants, which was not warranted by law. This was matter which might have been pleaded in abatement; and as it appeared on the face of the writ, the objection might have been taken on motion, if it had been made seasonably.

It is an immunity granted to the defendant. He has a right to object to the form of process, running against his body, or he may waive that objection. The want or omission of an indorser, is apparent upon the writ. But as it is for the benefit of the defendant, if he does not take the objection at the first term, it is considered as waived. It appears to us, that the objection here is of the same character, and not therefore available after a general continuance.

The condition of the bond was, that *Lothrop*, the principal defendant, should pay such costs and damages, as *Cook*, the present plaintiff, should recover against him, in the action instituted by *Lothrop* v. *Cook*. Costs were recovered against him, which *Lothrop* has not paid. Both were parties to the suit. *Lothrop* was as much bound to take notice of the rendition of judgment as *Cook*. Each had the same means of knowledge; and neither had a right to claim notice of the other. If *Lothrop* neglected to pay upon the rendition of judgment, the condition of the bond according to its plain tenor and import, was broken. We have no right to superadd the further condition, that the original defendant, the present plaintiff, should first sue out and prosecute a writ of execution on that judgment.

Exceptions overruled.

James Hunnewell, Jr. *vs.* William R. Young.

The *st.* 1839, *c.* 368, § 3, respecting trustee process, must be construed in connexion with the prior legislation upon the same subject; and is not imperative upon a judge of the district court to continue the action, when after a verdict, and before judgment, the defendant has been summoned as the trustee of the plaintiff.

The law presumes, that a judge of a court of record has good reasons for all his decisions; and when the law entrusts to him the exercise of a discretionary power, he is not obliged to state the reasons upon the record.

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

The facts appear in the opinion of the Court. The defendant excepted to the refusal of the Judge to order a continuance. No reasons are given for the refusal to continue the action.

F. Allen, for the defendant, cited the *stat.* 1834, *c.* 95, and *stat.* 1839, *c.* 368, § 3, and contended, that the Judge was bound by law to continue the action, when a trustee process is instituted before judgment. The statute is imperative, unless in certain cases, where the Judge upon good reason shown may order it. It must be shown upon the record, that it appeared to the Court, that good reasons had been given, or the Judge has no discretion on the subject.

Foote, for the plaintiff.

The trustee process, by the first statute, would not lie after suit brought. 2 *Mass. R.* 91; 3 *Mass. R.* 121; 4 *Mass. R.* 238; 15 *Mass. R.* 185. The *st.* 1834, *c.* 95, permitted the process to be served at any time before trial, but did not extend to cases where a verdict had been rendered. The *st.* of 1839, *c.* 368, left it discretionary with the Court, whether the action should be continued, that the defendant might have an opportunity first to answer in another suit, where he was summoned as trustee of the plaintiff.

The opinion was by

Shepley J. — The defendant, after the verdict was rendered against him, was summoned as the trustee of the plaintiff; and moved for a continuance of the action on that account; and it was

refused. It is contended, that he was entitled to it by virtue of the act of 1839, *c.* 368, § 3; or that it could be refused only for good reasons, which should have been stated. The statute of 1839 must be construed in connexion with the prior legislation on the same subject, otherwise the course and effect of the proceedings could not be ascertained. When one discloses and is adjudged trustee, the statute, *c.* 61, § 11, affords him protection by authorizing him to plead the general issue, and give the act in evidence. If he should be required to pay to a third person after a verdict has been already rendered against him, the statute does not provide for his protection. And this is a sufficient reason for refusing the continuance. When he discloses these facts, they will be sufficient to entitle him to be discharged from the trustee process. The law presumes, that a Judge of a court of record has good reasons for all his decisions; and when the law entrusts to him the exercise of a discretionary power he is not obliged to state them.

Exceptions overruled.

Asa Clapp *vs.* Theodore Paine.

Where the indenture between the parties by which the tenancy is created, has fixed a definite period for its termination, the lessee is not entitled to notice to quit, to impose upon him the legal obligation to give up the estate to his landlord.

By the law directing proceedings in forcible entry and detainer, as it formerly stood, they could not be based upon a mere refusal to deliver possession of land, when demanded; but the *st.* of 1824, *c.* 268, in relation to this process has extended its provisions to an unlawful refusal of the tenant to quit, after he shall have had thirty days notice, requiring him to do so.

To bring the case within this provision of the statute, the tenant must wrongfully hold over for the space of thirty days after his estate is determined; and the notice there provided for is to be given after the tenancy has terminated.

Where the tenancy is limited to a definite period, the landlord may enter immediately upon its termination; and if his entry is forcibly resisted, he may at once avail himself of the remedy provided by this statute, without having given any notice whatever.

Under this statute the cause of complaint must exist before the aid of the law is invoked; and therefore the process cannot be maintained by proof of a forcible detainer after the making of the complaint and warrant, and before the service thereof, upon the same day.

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

This was a process under *st.* 1824, *c.* 268, "directing the proceedings against forcible entry and detainer."

The bill of exceptions did not come into the hands of the Reporter, and the omission was not discovered until it was too late to obtain a copy. From the papers referred to, which only were received, it appears, that the complainant leased to *Paine*, by an instrument under seal, the public house, buildings and grounds at *Owls Head* in *Thomaston*, to hold the same for the term of eight months ending on the last day of *April*, 1838, at a rent of $100, half to be paid in four months and the residue at the end of the term; *Paine* therein agreeing to "quit and deliver up the premises at the end of the term, to the lessor or his attorney, peaceably and quietly, in as good order," &c. More than thirty days before the expiration of the lease, *March* 20, 1838, the complainant in writing, informed *Paine*, that he had leased the house to another person, who was to enter into possession on *May* 1, 1838, and requesting *Paine* to

deliver up the possession at the end of his term. *Paine* remained in possession, and on *May* 22, 1838, a constable of *Thomaston* went to the house with the lease, and with a warrant issued the same day by a justice of the peace and of the quorum, on the complaint which is the foundation of this process, and informed *Paine*, then standing in the door of the house, that he was authorized to take possession for the owner, and requesting that possession should be given. *Paine* refused to give up the possession, and threatened personal violence, if any attempt was made to obtain it. The constable then served the warrant. The ruling of the District Judge does not appear in the papers received; but they were opposed to the maintenance of the process, as the complainant filed exceptions.

H. C. Lowell, for the complainant.

At common law, when the right of entry had not been lost, the lawful owner might enter into his own lands and tenements without the aid of a legal process; and the lessor, upon the determination of the lessee's term, might in the same way, re-enter upon him and regain the rightful possession to himself, even with a strong hand, and the lessee could not lawfully resist him. *Hawk. P. C. c.* 64; 1 *Russell on Cr.* 246, *and notes; Harding's Case*, 1 *Greenl.* 22; *Sampson* v. *Henry*, 13 *Pick.* 36; *Moshier* v. *Redding*, 3 *Fairf.* 483; 4 *Kent's Com. (2d Ed.)* 112.

But as the exercise of this private remedy, while it operated the most speedy justice, was sometimes found to be attended with violations of the public peace, a remedy was early provided in *England*, and the substance has been incorporated into the statutes of *Massachusetts* and *Maine*, with some modifications from time to time, until at length we have the *st.* 1824, *c.* 268, upon which this process is founded. The design of this statute was to restore to the owner the possession of his buildings, withheld from him wrongfully, and is therefore a remedial statute, and is to be construed liberally, and consistently with the purposes of justice between the parties. 5 *Burr.* 2694; 1 *Kent*, 464. The statute provides for two classes of cases. The first section provides for that class of cases only, where the possession has been withheld by force, either express or implied; and by the fourth section this remedy is extended to cases where the tenant after his estate has been determined,

having had thirty days notice for that purpose in writing, has unlawfully refused to quit, though that refusal may not have been attended with force, threats or intimidation.

When the defendant is in under a written lease, as in this case, wherein it is distinctly stipulated that the term shall end at a time certain, he is not entitled either in law or equity, to a notice to quit, for in that case both parties are equally well apprized of their rights and duties; and the lessor may enter on the lessee, when the term expires, without further notice, but if he chooses to adopt this statute remedy, he must give the thirty days notice to quit.

This notice may be given before as well as after the specified term has expired. The statute probably contemplates more particularly the case of tenants at will, or parol leases, and the only object of the notice is to inform the tenant, that it is the will of the lessor to determine the tenancy, and that he is allowed thirty days, within which to obtain another situation and remove his effects, for at that time he will require the possession to be restored to himself. Even in such case the notice is necessarily given during the tenancy and before its termination; for it is but the declaration of the lessee's will to determine the estate in thirty days, and for all practical purposes, the term still continues, and all the rights of the tenant to occupy remain unchanged till the last day of the thirty days; and if on that day he chooses to deliver up the possession, he has but enjoyed his full term, and can in no just sense be said to have held over after his estate is determined; but if he remain a moment longer, then in the language of the statute, he is unlawfully refusing to quit, and having had the thirty days notice, he becomes at once, subject to the process provided by the act. The lessor's will may terminate at one time, and the term end at another time. The notice required by the statute, even under parol leases, must necessarily be given, while there is yet a subsisting tenancy, before the lessor has a right to immediate possession, before the lease is determined, and while the right of possession is clearly with the tenant. This is sustained by the authorities generally. 4 *Kent's Com.* 112. *Coffin* v. *Lunt*, 2 *Pick.* 70, *note.* Nor do the cases in 13 *Maine R.* 209; 16 *Mass. R.* 1; 17 *Mass. R.* 282; and 1 *Pick.* 43, when carefully examined, conflict with this view. Le-

gal notice may be given then, even under a parol lease, before the party has a right to the possession; and if so, it would seem that under a written lease, where the term is to end at a time specified, there can be no objection to a notice thirty days before the arrival of that time, that the tenant would then be required to yield up the possession to the rightful owner. This could operate no injustice or hardship, as it would be but in accordance with the terms of their contract, entered into understandingly, with all the formality of a sealed instrument.

If the notice cannot be given during the pendency of the lease, when can it be legally given? If the tenant holds over by consent express or implied, but for a day, after the determination of his lease, it is held to be a new contract for another term of the same duration. 4 *Kent*, 112. The statute provides, in case of carrying the proceedings to the Common Pleas, that the tenant shall recognize with sureties to pay the rent from that time. The lease may be with sureties, and may secure the rent for the term. The sureties are discharged from all further liability at the expiration of the term. 1 *Pick.* 335; 2 *Greenl.* 42. If the owner must wait until the end of the term before he can give notice, he may wholly lose the rent for the thirty days. If it cannot be given before the end of the term, the law allows the tenant to be a wrongdoer for thirty days, and encourages a party to disregard and violate his own deed. 1 *Kent*, 465; 2 *Bl. Rep.* 1075; 6 *Wheat. Selw. N. P.* 604; 5 *Burr.* 2694.

It was also contended that the process might well be maintained under the first section of the statute. 1 *Russell on Cr.* 247. Here the forcible detainer proved, the date of the process, and the service of it, were all on the same day. A writ may be considered as purchased, or a prosecution commenced, at any moment of the day of its date, which will most accord with the purposes of justice, and the remedy to be enforced. *Badger* v. *Phinney*, 15 *Mass. R.* 341; *Seaver* v. *Lincoln*, 21 *Pick.* 267.

Stevens, for the respondent, admitted that the lease expired *May* 1, 1838, and said, the only question in the case was, whether this process would lie without a written notice, given after the expiration of the lease and thirty days before the complaint to the justice?

This notice in *March* is no better than if given on the day of the execution of the lease, and an acknowledgment of notice might in such case be printed in the form and signed with it. The principle contended for by the counsel for the complainant would repeal the statute. It would enable the lessor to make use of this process on the day after the lease expired. The notice to quit the premises must be given when the occupant has no legal right to remain, and thirty days are given him in which to remove, before the process will lie. *Davis* v. *Thompson*, 13 *Maine R.* 209; *Comm'th.* v. *Dudley*, 10 *Mass. R.* 403; *Gage* v. *Smith*, 14 *Maine R.* 466. It is said that the process may be maintained because *Paine* resisted an entrance on the day the service was made. There are two objections to this. First, nothing taking place after the making of the complaint and issuing of the warrant can give a ground for supporting these proceedings: and second, because no legal notice had been given, and the officer had no legal right to take forcible possession, without a precept authorizing it.

The opinion of the Court was drawn up by

Weston C. J. — The indenture between the parties, by which the tenancy was created, having fixed a definite period for its termination, the defendant was not entitled to notice to quit, to impose upon him the legal obligation to give up the estate to the plaintiff, his landlord. *Ellis* v. *Paige & al.* 1 *Pick.* 43; *Messenger* v. *Armstrong*, 1 *T. R.* 54; *Bright* v. *Darby*, *ib.* 162. The notice given by the plaintiff, prior to the termination of the lease, might properly have the effect to remove any implication, that if the defendant held over, he did so by the acquiescence of the plaintiff. By the law directing proceedings in forcible entry and detainer, as it formerly stood, they could not be based upon a mere refusal to deliver possession of land, when demanded. There must have been some apparent violence in word or deed, or some circumstances tending to excite terror in the owner, and to prevent him from maintaining his right. *Commonwealth* v. *Dudley*, 10 *Mass. R.* 403.

The statute of 1824, *c.* 268, in relation to this process, has extended its provisions to an unlawful refusal of the tenant to quit, after he shall have had thirty days notice, requiring him to do so.

We are of opinion, that to produce this effect he must have wrongfully held over for that space of time, after his estate had determined. Such an unreasonable refusal is made equivalent to a forcible detainer. It appears to us, that the notice there provided for is to be given, after the estate had terminated; and that the liability of the tenant to this process, upon his mere refusal to quit, is qualified by this condition.

It gives no new rights to the tenant, but it extends the remedy of the landlord upon this process farther, than could have been made available under the former law. That such should be the construction, is strongly intimated in *Davis & al.* v. *Thompson*, 13 *Maine R.* 209. This is no restriction of the rights of the landlord. Where the tenancy is limited to a definite period, he may enter at once upon its termination; and if his entry is forcibly resisted, he may at once avail himself of the remedy provided by this statute, without having given any notice whatever. But upon a mere refusal, unaccompanied with force, the remedy is not afforded, until he shall first have given thirty days written notice.

The facts detailed in the testimony referred to, do amount to a forcible detainer; but they are subsequent both to the complaint, and to the time of issuing the warrant. We are of opinion, that the cause of complaint must exist, before it is actually made, and the aid of the law, in this summary mode, invoked. It would lead to an abuse of the process, to permit a complaint to be made and a warrant to issue, upon a mere apprehension that force might be used, leaving it to the discretion of the constable, whether a proper case existed, to justify a resort to the jurisdiction of the magistrates.

By the second section of the statute, a complaint must be formally made in writing, to a justice of the peace and of the quorum, of an unlawful and forcible detainer, before such justice is authorized to issue his warrant. The complaint, thus formally to be preferred, must necessarily be based, upon a prior unwarrantable exercise of force. We do not find in the testimony evidence, which would justify the jury in finding an actual forcible detainer, prior to the complaint; and the instructions, requested of the presiding Judge, that the testimony would warrant such a finding, were properly withheld. *Exceptions overruled.*

Isaac Flitner *vs.* John Hanly, *Ex'r.*

A claim for services rendered by a physician in the last sickness of the testator or intestate, is a preferred debt, and not subject to a payment *pro rata*, under a commission of insolvency.

And if the creditor, before the estate is rendered insolvent, hands such preferred claim to the executor and demands payment, no presumption of law arises, that the creditor intended that the claim should be laid before the commissioners; and he is not bound by any acts of theirs in relation to his claim, thus coming before them from the executor without authority.

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

Assumpsit by the plaintiff, a physician and surgeon, for attendance in that character upon the testator in his last sickness. The plaintiff's account was allowed by the commissioners among the general claims against the estate. The commissioners were directed in their warrant to designate in their report all claims for debts incurred in the last sickness.

The facts appear sufficiently in the opinion of the Court.

The exceptions set forth, that the Judge, in his charge to the jury, stated, that the estate of *Sprague*, the testator, having been represented insolvent, if the plaintiff's account was for services rendered during the last sickness of the said *Sprague*, he had a right to bring his action in this form, or to present his claim before the commissioners, at his election; that if he presented his claim, or caused it to be presented to the commissioners for allowance, he would be bound by their adjudication, unless he had appealed from it; that the commissioners having allowed it, not as a preferred claim, he must be content with a *pro rata* distribution, if it was by his consent that the claim was laid before the commissioners for allowance; that a frequent mode of getting claims before commissioners was to hand them to the executor or administrator to be by him presented; that such act on the part of the administrator was no part of his official duty; that in doing it he was merely the agent of the claimant, and that for any failure in that respect, the estate would not be liable. He therefore directed the jury to find from the testimony, whether the claim was presented to the commissioners for allowance by the consent of the plaintiff; and that if so, he could not recover in this action.

The jury returned a verdict for the defendant, and in answer to an inquiry by the Court, replied, that the services were rendered in *Sprague's* last sickness, and that the plaintiff ought to have proceeded before the commissioners. The Judge then inquired, whether the jury intended to be understood, that the plaintiff consented that his claim should go before the commissioners for allowance, and that therefore he ought to have attended, and shown before them, that his was a preferred claim. The answer was in the affirmative.

The plaintiff filed exceptions, and a motion came up in the case for a new trial, because the verdict was against evidence.

J. S. Abbott, for the plaintiff, cited *Gold* v. *McMechan,* 1 *Mass. R.* 23; *Parsons* v. *Mills, ib.* 431; *Same case,* 2 *Mass. R.* 80; *stat.* 1821, *c.* 51, § 25.

M. H. Smith, for the defendant, contended, that the instructions were right, and that if there were any objections, they were against the finding of the jury. The case comes up under exceptions. The granting or refusing to grant a new trial, is a mere act of discretion not subject to revision here. Insisting upon the exceptions is a waiver of a motion for a new trial. *State* v. *Call,* 14 *Maine R.* 421.

The opinion of the Court was drawn up by

Weston C. J. — The claim of the plaintiff being for services, rendered by him as a physician, in the testator's last sickness, is a preferred debt and not subject to payment *pro rata,* under a commission of insolvency.

It appears that the plaintiff, before the estate was represented insolvent, gave his account to the executor and demanded payment. No other act or declaration of his is proved, until after the decree of distribution. It further appears, that the executor himself laid the account, which he had thus received, before the commissioners. The Judge instructed the jury, that in so doing he must be presumed to have acted as the agent of the plaintiff, who must be understood to have passed the account to him for this purpose.

This is based upon the mere rendition of an account by the plaintiff, before a representation of insolvency; and as the executor would have been justified in paying it at once, and payment

was demanded by the plaintiff, we find nothing to justify the deductions, which the jury were instructed they might draw from this act and the subsequent act of the executor. It does not appear, that when the plaintiff presented his account, he knew or suspected, that there would be a commission of insolvency. And if he did, a demand of payment rather negatives, than justifies the implication, that he intended to submit his account to the judgment of commissioners. It certainly affords no affirmative evidence, that such was his intention.

Exceptions sustained.

JOHN E. MERRILL *vs.* EBENEZER CURTIS.

If an officer be ordered in the writ to attach to a specified amount, and he attaches personal property by him valued at a greater sum, it does not necessarily follow that he acted oppressively or illegally, and a subsequent purchaser cannot set it aside for that cause, but the attaching officer, or his servant, may take the property from the possession of such purchaser whenever he might take it from the possession of the debtor.

Where, upon one day, one party bargained to sell and the other to purchase goods, but there was no delivery, nor payment of any portion of the price, nor memorandum in writing, and on the next day a bill of sale was made, and a note given for the purchase money, the sale did not become valid against third persons before the second day.

To preserve an attachment, under *st.* 1821, *c.* 60, § 34, of the description of property therein mentioned, if left in the possession of the debtor, it is not necessary to prove affirmatively that the receiptor acted at the request of the debtor.

If goods are attached and receipted for to the officer, and the execution is delivered to him and he demands the goods of the receiptor within thirty days of the time when the judgment was rendered, the attachment is not dissolved, nor the goods released therefrom; and the receiptor may, after the expiration of the thirty days, take the goods and deliver them to the officer to be sold on the execution.

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

Trespass for taking and carrying away a pair of oxen, alleged to belong to the plaintiff.

The oxen belonged to one *Severance*, who on *Nov.* 8, 1836, bargained with the plaintiff to sell them to him, but the bill of sale and the note for the price, were not made until the next day. The sale was made two miles from the place where the oxen were, and *Severance* agreed to keep them for the plaintiff for a few weeks until he should send for them. After a few weeks they were sent for by the plaintiff, and by him kept until they were taken away by the defendant.

On *Nov.* 8, 1836, the same oxen were attached by one *Givens*, a constable of *Windsor*, in which town *Severance* lived and the oxen were. Within the writ there was a direction to attach property to the value of sixty dollars, and the damage was alleged to be to that amount. The oxen and other property attached at the same time were valued by the officer in his return at seventy-four dollars. At the time of the attachment, *Severance* was from home, and at the request of his wife, the defendant gave to the officer a written receipt for the oxen, promising to keep them free of expense, and to deliver them to the officer, or his order, on demand; Within thirty days after judgment in the action, the execution against *Severance* was delivered to *Bugbee*, a constable of *Windsor*, *Givens* not being then one, and on *April* 7, 1838, within the thirty days, *Bugbee* demanded the oxen of *Givens*, and on the same day both *Bugbee* and *Givens* demanded them of the receiptor. On *June* 12, 1838, the defendant found the oxen in the pasture of the plaintiff, drove them away, and delivered them to the officer, by whom they were sold on the execution.

The Judge instructed the jury, that *Curtis* rightfully took the oxen, and that their verdict should be for him, provided, *Curtis* receipted for them in good faith for the benefit of *Severance*, and provided *Severance* ratified the act of his wife in requesting *Curtis* to receipt for them, and also ratified the act of *Curtis* in becoming receiptor for the benefit of *Severance*.

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

J. S. Abbott, for the plaintiff, contended:

1. As the officer was directed to attach but to the amount of sixty dollars, and he attached to the amount of seventy-four, he

transcended his authority, and there was no valid attachment. He was a trespasser *ab initio*. 12 *Pick.* 270.

2. The sale was made on the same day of the attachment. The vendor became the agent of the purchaser for a time, and the possession of the agent is the possession of the principal, and is tantamount to a delivery. The jury should have been instructed to inquire whether the sale was prior to the attachment, and if so to find for the plaintiff.

3. The vendor, after he had sold the oxen, could not defeat the claim of the purchaser by ratifying the acts of his wife. There being no legal receipt for them, the attachment was abandoned by leaving them in possession of the debtor, and could not be restored by any act of his.

4. All the acts of the defendant were done by the defendant as receiptor, and to relieve himself from his responsibility, and not as the agent or servant of the officer. He has no such interest or title in the oxen as to justify him in taking them from the possession of the plaintiff at any time. *Ludden* v. *Leavitt*, 9 *Mass. R.* 104; *Warren* v. *Leland*, *ib.* 265.

5. The debtor had a right to sell the oxen, even after attachment, subject to the lien created by it, and the vendee would by such sale acquire a valid title to the property, whether he knew of the attachment or not, subject only to such lien; and upon the attachment being dissolved in any way, the title would become absolute in the vendee. *Bigelow* v. *Wilson*, 1 *Pick.* 485. The attachment here could not continue more than thirty days after the rendition of judgment, and the oxen not being taken within that time, the attachment was void. *Stat.* 1821, *c.* 60, § 1; *Alderman* v. *Phelps*, 15 *Mass. R.* 225; *Wheeler* v. *Fish*, 3 *Fairf.* 241; *Warren* v. *Leland*, 9 *Mass. R.* 265.

Groton, for the defendant, contended, that the law contemplated that there will be an attachment of personal property above the debt enough to secure the costs and expenses, and provides for a return of the surplus to the debtor. The officer cannot tell for what sum the property will sell, and must put some valuation upon it.

The case shows that the sale was not made until the day after the attachment, and it becomes wholly irrelevant to inquire what the law would be on a different state of facts.

The officer acted agreeably to law in leaving the oxen in the possession of the defendant, upon taking a receiptor therefor, and it is immaterial whether the acts of the wife, or the receiptor were ratified by the debtor. *Stat.* 1821, *c.* 60, § 34.

There are cases which show that the receiptor cannot maintain an action for the property, but there are none which forbid the receiptor from taking the property and delivering it to the officer.

It was decided in *Webster* v. *Coffin*, 14 *Mass. R.* 196, that when the execution is delivered to the officer within thirty days, he becomes responsible for the property attached, and that the receiptor is then holden to the officer on demand made within any reasonable subsequent period. Here the execution was delivered and the property demanded within thirty days after judgment.

The attachment might have been dissolved under the laws of *Massachusetts* by leaving it in the possession of the debtor, but by the peculiar provisions of our *stat.* 1821, *c.* 60, § 34, this description of property may be left with the debtor, and the attachment remain good against any subsequent sale by the debtor without notice. *Woodman* v. *Trafton*, 7 *Greenl.* 178. The cases cited for the plaintiff are very good law, where they are pertinent, but they have no application to the present case.

The opinion of the Court was drawn up by

Shepley J. — The officer was directed in the writ to attach property to the amount of sixty dollars, and he returned an attachment of personal property estimated by him to be of the value of seventy-four dollars; and it is alleged that in so doing he acted illegally, and that the attachment is void. At the time of making the attachment the officer might be ignorant whether the property would not be chargeable with the expense of keeping; and if receipted for the value of it might be diminished by depreciation or destroyed by disease. If the officer acted oppressively he might be liable to an action by the party injured, but third persons could not interpose and claim to set aside the attachment. It does not necessarily follow, that the officer acted oppressively or illegally because he attached property estimated by him to be of greater value than the amount required to be attached.

The sale to the plaintiff was not completed between the parties

to it until the ninth of *November*. There was no delivery, nor payment of earnest money, nor any portion of the price, nor was there any memorandum in writing. The attachment was therefore prior to the sale, and the plaintiff could acquire no right, which would not leave the property subject to the attachment and liable to be taken from his possession by the officer or his servant, whenever it might have been so taken from the possession of the debtor. The defendant in taking the property may be regarded as acting in any capacity in which he was legally entitled to act. It does not appear, that his acts in becoming responsible for the safe keeping and delivery of the property were not approved by the debtor before the sale to the plaintiff.

It is contended that the attachment was dissolved by the neglect of the officer to seize the property within thirty days after judgment. The case finds that within the thirty days the execution was delivered to an officer, that he demanded the property of the officer making the attachment, and that they both demanded it of the receiptor. These proceedings preserved the rights of the creditor, and left the attaching officer responsible to him, and the defendant responsible to the officer. To determine that the attachment was under such circumstances dissolved, would be to hold the receiptor liable to the officer and yet deprive him of the power of reclaiming the property from the debtor, for whom he had become surety, unless he could do it within the thirty days. And his own and the attaching officer's liability might not have become fixed until the last of the thirty days. The case of *Wheeler* v. *Fish*, 3 *Fairf.* 241, decides only that the attachment was dissolved by the neglect of the officer until after the expiration of the thirty days to seize the property attached, in a case where it does not appear, that any receipt for the property was taken or that any act was done by the officer to preserve the attachment.

Exceptions overruled.

CHARLES HARRINGTON *vs.* PETER FULLER.

The sheriff is responsible for all official neglect or misconduct of his deputy; and also for his acts not required by law, where he assumes to act under color of his office. But he is not responsible for the neglect of any act or duty, which the law does not require the deputy officially to perform.

Where the deputy takes the goods of one person on a writ against another, and afterwards sells them by the consent of the parties to that suit, the sheriff is liable while the property in the goods, or money received from the sale of them, remains unchanged.

But if the owner of the goods brings trespass against the deputy for taking them, and recovers judgment, and takes out execution, the property is changed, and it becomes a part of the estate of the deputy, and the sheriff is no longer responsible.

As this transfer of the right of property to the deputy is the legal consequence of the act of the plaintiff, it is not held by the deputy as a new fund in his official capacity; the debt due for it becomes the private debt of the deputy by the plaintiff's own election; and the sheriff ceases to be responsible for any after act or neglect of the deputy.

Where more than four years have elapsed after a cause of action has accrued against a sheriff for the misfeasance of his deputy, the operation of the statute of limitations is not prevented by a judgment in favor of the party aggrieved against the deputy, rendered within the four years.

THIS was an action of the case against the defendant, as late sheriff of the county, for the default of *Elkanah Spear, Jr.*, a deputy; and came before the Court on a statement of facts.

The writ was dated *April* 1, 1840. On *Jan.* 12, 1836, *Spear*, then a deputy of the defendant, attached certain goods as the property of one *Hatch*, the same being then in his possession, and on *March* 22d, 1836, sold the same on the writ, as the property of *Hatch*, conformably, as he supposed, to the provisions of *stat.* 1831, *c.* 508, for the sum of $989,43. The plaintiff claimed the goods as his property, and on *April* 11, 1836, commenced an action of trespass against *Spear* for taking them, and at the *August Term* of the C. C. Pleas, 1838, recovered judgment against him, for that cause, for the sum of $1338,62, debt, and $192,38 costs. In *Sept.* 1838, *Spear* paid on an execution issued on that judgment $530, and the residue of the judgment, although the amount was demanded of him, remains unsatisfied. There was no evidence that the defendant had in any way been called on to take upon

himself the defence of the suit against *Spear*, or that he interfered in relation to it. The defendant continued sheriff, and *Spear* continued to be his deputy, until the spring of 1839. The defendant had never been called upon by the plaintiff to pay him until the day before the suit. The first count in the writ claimed to recover by reason of the original taking of the plaintiff's goods by *Spear*, the defendant's deputy. The second count set forth the facts specially, afterwards agreed by the parties.

Abbott and *E. W. Farley*, for the plaintiff, did not contend, that the action could be maintained on the first count, because the statute limiting the liability of sheriffs to four years barred it. But they claimed to recover on the other count. 1. On account of the deputy having received the money on the sale of the goods, and not having paid the same over to the plaintiff, on demand, whose property it was, having been received for his goods. 2. Because the judgment against *Spear* changed the property, and that became his, and the value thereof, being the amount ascertained by the judgment, was money in his hands for the use of the plaintiff. In either view, the defendant is liable. *Marshall* v. *Hosmer*, 4 *Mass. R.* 60; *st.* 1821, *c.* 91, § 1; *Esty* v. *Chandler*, 7 *Mass. R.* 464; *st.* 1821, *c.* 92, § 3.

H. C. Lowell, for the defendant, contended: —

1. The action is barred by the statute of limitations.

The sheriff and his deputy are responsible, each for his own acts, for the term of six years. But by *st.* 1821, *c.* 62, § 16, actions against sheriffs for the misconduct and negligence of their deputies, are limited to within four years "next after the cause of action." The cause of action in this case accrued *Jan.* 12, 1836, and this suit was not commenced until *April*, 1840. The action could have been brought on the day first named, and is therefore barred by the statute. *Miller* v. *Adams*, 16 *Mass. R.* 456; *Jewett* v. *Green*, 8 *Greenl.* 447; *Bailey* v. *Hall*, 16 *Maine R.* 408; *McLellan* v. *Lunt*, 2 *Fairf.* 150; *Same* v. *Same*, 14 *Maine R.* 254; *Brown* v. *Anderson*, 13 *Mass. R.* 201; *Emerson* v. *Thatcher*, 16 *Mass. R.* 428. The sale of the goods took place more than four years before the commencement of the suit; but had it been otherwise, the result would have been the same. The statute of limitation begins to run from the time the

action could have first been commenced. *Brown* v. *Houdlette*, 1 *Fairf.* 399.

2. The sheriff and his deputy are not in law joint trespassers for any act of the deputy, and they cannot be proceeded against jointly. 17 *Mass. R.* 246; 12 *ib.* 499; 1 *Pick.* 62. When an injury is done by the deputy, acting as such, both are liable, but not alike. The deputy is liable, like any other person, for his own acts, and the consequences of them, and the statute does not bar the action for six years. The suit may be brought against either, but not both. The judgment and execution against the deputy operate as a complete bar to the maintenance of a suit against the sheriff for the same cause of action. *Campbell* v. *Phelps*, 1 *Pick.* 62; *White* v. *Philbrick*, 5 *Greenl.* 147; 1 *Rawle*, 121; 4 *Rawle*, 285; 4 *Taunt.* 88; 1 *Johns. R.* 290.

The opinion of the Court was drawn up by

SHEPLEY J. — It is admitted that the plaintiff cannot recover on the first count for taking his goods. If there were no other objection, the statute of limitations is a perfect bar. He claims to recover on the second count for the neglect of the deputy to satisfy the judgment recovered against him.

The sheriff is responsible for all official neglect or misconduct of his deputy; and also for his acts not required by law, where the deputy assumes to act under color of his office. He is not responsible for the neglect of any act or duty which the law does not require the deputy officially to perform. *Knowlton* v. *Bartlett*, 1 *Pick.* 270; *Cook* v. *Palmer*, 6 *B. & C.* 739.

It is said, that the deputy held the money received for the goods in his official capacity, and of course, that his neglect to pay it over in satisfaction of the judgment recovered against him was an official neglect. While the property in the goods or moneys received by the sale of them remained unchanged, the deputy held them in his official capacity. After the plaintiff had recovered judgment against him in trespass, and had taken out execution and collected a part of the amount so recovered the property was changed. It was no longer held in an official character. It became a part of his own estate.

The defendant would be liable for the original act of taking, and

also for any neglect to keep safely so long as the property remained unchanged, but after that time the deputy might do what he pleased with his own, and his superior would have no right to take it from him or to complain of his acts respecting it. There being no money in his hands after that time held in his official capacity, his neglect to pay it over was not an official neglect, for which the defendant is liable. The counsel for the plaintiff would avoid this conclusion by urging, that the right of property was transferred to the deputy in his official character; and that placed a fund in his hands in the like character to pay the judgment recovered against him. He could not however in his official capacity acquire the absolute property in the goods. It is the act of the plaintiff, not the act of the law alone in connexion with his own acts, which has occasioned his becoming the owner in absolute right of property. The plaintiff cannot by his own voluntary act transfer the property from himself to the deputy, and still insist, that such absolute property is held in an official capacity. As soon as the special property, which he held as an officer, was by the election of the plaintiff changed into an absolute title against all persons the custody ceased to be official. The debt due for it became his own private debt by the plaintiff's own election; and the defendant ceased to be responsible for any after act or neglect of the deputy.

Plaintiff nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC, JUNE TERM, 1841.

CYRUS WESTON *vs.* JOHN HIGHT, 2d. *Adm'r.*

In an action against an administrator, if it be shown that a paper given to the intestate was in his hands shortly before his decease, and that due notice was given to the defendant to produce it on the trial, and it is not produced, the plaintiff may give parol evidence of its contents.

The execution and delivery by a child to his father of a paper, not under seal, relinquishing all claim to the father's estate, on receiving a note against a third person indorsed by the father, is a good consideration for such indorsement.

Where a note had been given for the purchase money of a tract of land, and a bond had been given by the payee to the maker to convey the land on payment of the note, and where the note had been indorsed, and the indorser had deceased, and afterwards a partial payment had been made, but the land had not been conveyed; in an action by the indorsee against the administrator of the indorser, *it was held*, that the payee, under these circumstances, was not a competent witness for the defendant.

THIS action is the same in which a case is reported in 17 *Maine R.* 287, and was brought to recover against the defendant's intestate, *Hanson Hight*, as indorser of a note from *Joshua Gould* to him or order, dated *Feb.* 15, 1832, and indorsed as follows. "For a valuable consideration, I hereby assign the within note to my daughter, *Abigail Weston*, and order that the contents of the same be paid to her for her own use and benefit — *March* 22, 1832 — hereby assigning to her the same indemnity which I now have for the payment of said note. *Hanson Hight.*" The note was also

indorsed by *George B. Weston* and *Abigail Weston* thus. "Pay the contents to *Cyrus Weston* or order, without recourse to us for debt or costs." At the trial before EMERY J. the defendant objected, that the note and indorsement should not be given in evidence to support the action. The Judge overruled the objection. The plaintiff then offered *G. B. Weston*, the husband of *Abigail Weston*, as a witness, who testified to certain facts showing, that he made a demand upon *Gould*, the maker of the note, and gave notice thereof to the defendant, and demanded payment thereof, and also the indemnity for the payment thereof, and that the defendant refused. He also testified, that *Hanson Hight* died *Dec.* 18, 1832; that sometime before his death, the wife of the witness brought home the note; that soon after that time, he was at the house of the intestate who brought to him a paper not under seal, which had been signed by *Abigail Weston*, relinquishing all claim she or her husband might have to the estate of her father; that in consideration of the indorsement of this and other notes to his wife he signed this paper, which was taken by said *Hanson* and put among his other papers; that he told said *Hanson*, that his administrator would say there was no consideration for the indorsement of the notes, that *Hanson* replied, that that could not be done, for he had received a full compensation for the notes, that the note was safe, and he had indorsed it so as to hold his estate; that the farm on which *Gould* lived was holden for the payment of the note; and that *Gould* had paid fifty dollars, and was unable to pay more. The defendant objected to proving the contents of the paper by parol. It appeared, that due notice had been given to produce it, and the objection was overruled. *Mrs. Weston*, testified, that her father told her, that he was making a disposition of his property, and proposed giving her $300, and this note was handed to her as part of it; that her father told her, she could have the land or the money, and that he indorsed the note over, and it was holden on his property; and that on account of these notes, she signed a paper relinquishing all claim to her father's estate; and that he said, if *Gould* did not pay the money, either of her brothers would take the land and pay the money for the note. It was proved, that *Hanson Hight* had given *Gould* a bond to convey a farm to him on payment of the notes, but had

not conveyed the land. It was also proved by other testimony, that *Hanson Hight* said he had made a disposition of his property, and had given this note to his daughter. The defendant offered *Gould* the payee of the note, who held a bond from the intestate for the conveyance of the land on payment of the note, as a witness, but the Judge rejected him on the ground of interest. The defendant had objected to the admission of *G. B. Weston* and of *Abigail Weston*, but the objection was overruled by the Judge.

The defendant requested the Judge to instruct the jury, that the indorsement on the note was a contract by which said *Hanson* intended to assign his interest in said note with a right to the same security or indemnity, which said *Hanson* had for the payment of the same; and that said *Hanson* did not intend to make himself liable to pay the money on said note by said indorsement, and that said *Abigail* had a right to the same indemnity, which said *Hanson* had, when she took said note.

The Judge declined to give this instruction, and did instruct them, that if they believed the testimony, there was sufficient evidence of consideration for said indorsement; that the demand and notice were sufficient. The verdict was for the plaintiff, and the defendant excepted to the rulings, instructions and refusal to instruct.

Wells, for the defendant, in his argument, cited *Taylor* v. *Binney*, 7 *Mass. R.* 479; *Parish* v. *Stone*, 14 *Pick.* 198; *Fuller* v. *McDonald*, 8 *Greenl.* 213; *Smith* v. *Sinclair*, 15 *Mass. R.* 171; *Crane* v. *Marsh*, 4 *Pick.* 131; *Woodhull* v. *Holmes*, 10 *Johns. R.* 231; *Hubbly* v. *Brown*, 16 *Johns. R.* 70; *Bayley on Bills*, 465, 586, 591; 2 *Stark. Ev.* 298; *Freeman's Bank* v. *Rollins*, 1 *Shep.* 202.

Tenney argued for the plaintiff, and cited *Bayley on Bills*, 69; *Mead* v. *Small*, 2 *Greenl.* 207; 1 *Stark. Ev.* 356; 1 *Phill. Ev.* 389; *Taunt. &c. Turnp.* v. *Whiting*, 10 *Mass. R.* 327; *Stover* v. *Batson*, 8 *Mass. R.* 431; *Pierce* v. *Butler*, 14 *Mass. R.* 303; 4 *Day*, 108; 2 *Greenl.* 339; 13 *Mass. R.* 472; 15 *Johns. R.* 49; 4 *Mass. R.* 680; 1 *Johns. R.* 580; 4 *ib.* 43; 9 *Wend.* 410; 2 *Story's Eq.* 53; 6 *Johns. Ch. R.* 322; 17 *Mass. R.* 571; 15 *ib.* 90; 7 *Pick.* 274.

The opinion of the Court was drawn up by

EMERY J. — This case is now before us on exceptions. On the former hearing, the original note was lost, and the indorsement was proved by parol. The note, it seems, has since been found. We considered the transaction as not a case of *donatio causa mortis*, and granted a new trial for the purpose of doing complete justice to the parties, under the apprehension that there might have been such a release of the right and interest which *Weston* and his wife had in *Hight's*, the intestate's estate, by way of advancement, as might constitute a good consideration for the indorsement of the note to hold the administrator responsible. We did so, that the real truth might be made manifest.

We think, on the facts now before us, on the exceptions, that *George B. Weston* was rightfully admitted to testify as to the contents of the paper, which he and his wife signed and delivered to the deceased, as due notice was given the defendant to produce it. How far the services of *Mrs. Weston*, she having lived with her father till she was 23 years old, went towards the estimation of the valuable consideration, which the indorsement mentions as received, we cannot undertake to say. But we are satisfied that the relinquishment signed by *Cyrus Weston* and his wife to the estate, together with all the papers taken together, shew an advancement; and that amounts to a good consideration for the indorsement. It was so intended and so accepted.

The requested instruction was rightly declined upon the evidence. There is more difficulty as to the rejection of *Gould* as a witness. He is the maker of the note, and at first blush would seem to have only a balanced interest. Generally to disqualify a witness, he must have some certain benefit or advantage depending on the event of the suit, or the verdict to be rendered must be available by him, either as a defence to some action, which may be brought against him, or in support of some claim to be made by him, or must be such as can be given against him in some action.

In the case 16 *Mass. R.* 118, *Fox* v. *Whitney*, a joint maker of a promissory note who signed as surety, merely, was held a competent witness for the other joint maker, in an action against him by the payee, for being a surety, he cannot be compelled to con-

tribute, if the plaintiff should recover; and the verdict could not be used in evidence in an action against him.

In *Hartford Bank* v. *Barry*, 17 *Mass. R.* 94, which was an action by an indorsee against an indorser, the defence was, that the indorsement was for the accommodation of the maker, and that he subsequently procured the note to be discounted by the plaintiff at a greater than legal rate of interest. The maker was offered by the defendant to prove the usury. He was rejected, on the ground that the note was for all substantial purposes made at the time it was discounted and put into circulation, and therefore the usury was not a fact subsequent to the execution of the note.

So an agent, who signed as such for the promissor, was excluded in a suit by indorsee against promissors. *Packard* v. *Richardson*, 17 *Mass. R.* 122. In *Warren* v. *Merry*, 3 *Mass. R.* 27, in an action by the indorsee against the indorser of a promissory note, the defendant offered the maker as a witness to prove that before the note became due, he paid to the plaintiff fifty dollars on account therof, and gave him a new note for the balance which was received in full satisfaction; *and the defendant having released the witness* from all demands on account of the note, it was held that he was competent.

No release appears to have been given to *Mr. Gould.* If the plaintiff prevails, and *Gould* have paid any thing toward the bond, and the defendant and other heirs should conclude not to convey to *Gould*, we do not perceive but what he may lose what he has paid. And if the defendant should insist on *Gould's* paying first the costs, as in equity he might, we believe that *Gould's* interest is not equally balanced.

For this action might be defeated by his testimony, and after the verdict, the note would be capable of being transferred by this plaintiff, to charge *Gould.* A prior holder may take it and then sue, or the indorsee may surrender it to *Gould.* So that not merely on account of his being the maker, but as having a bond for the conveyance of the estate, for the payment of which, the note was given, will he be in a better condition if he can show it was paid, than if it were not paid. And therefore he was rightly rejected

Exceptions overruled.

JAMES JOHNSON *vs.* INHABITANTS OF WHITEFIELD.

The town has done its duty, when it has prepared a pathway in the road of suitable width, in such manner that it can be conveniently and safely traveled with teams and carriages; but the citizens are not thereby deprived of their right to travel over the whole width of the way laid out, without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path.

To allow the sides of the traveled path to be incumbered by logs or other things unnecessarily placed there, subjects the town to the payment of damages occasioned thereby.

But if the accident happens through the neglect or fault of the person injured, or by reason of any obstacle naturally existing or necessarily placed in the highway, out of the traveled path, he cannot recover against the town.

THE action was case for an injury sustained by the plaintiff, as he alleged, through a defect in the public highway in the town of *Whitefield*. At the trial before WESTON C. J., it appeared, that the plaintiff with his wife was traveling in a chaise drawn by one horse, and while he was driving along the usually traveled path, the horse became restive, threw up his hind legs, and got one of them over a shaft of the chaise; that the plaintiff thereupon reined him out of the traveled part of the road towards the fence on the left hand, with the view to relieve him from the situation into which he had thrown himself, and the horse proving unmanageable run the chaise over a cedar log lying by the traveled part of the highway, which was the immediate cause of the injury. For the space of twenty feet from the log to a stump on the opposite side of the path, the road was smooth and well wrought; wheel tracks were to be found quite near to the cedar log, but there was grass for the space of two feet from the log to the traveled part of the road, where no grass remained. The log was lying upon the side of the ditch or gutter which was next to the road, the ditch at that place being but slightly excavated.

The Chief Justice instructed the jury, that usually in the country, the public convenience did not require, that the whole road between its exterior limits should be wrought and made smooth; that it was sufficient, if so much of it was wrought, as to make it safe and convenient for travelers; that the town however would not be justified in suffering timber, or other deposits to remain in

the road, although out of the traveled path, to the annoyance of travelers; that if in passing other carriages or teams, or by a sudden fright, to which horses might be liable, a carriage might be precipitated upon the log and overset or injured, its being suffered to remain there was a nuisance and defect in the public highway, and if the plaintiff was thereby injured, the action was maintained. It was submitted to the jury whether it was prudent to drive such horse, and whether the plaintiff otherwise managed prudently, and they found for the plaintiff in both particulars.

The verdict for the plaintiff was to be set aside, if the jury were not properly instructed.

Wells and *Child*, for the defendants, contended, that the defendants were not liable, because the accident happened on an obstruction in that part of the road which the defendants were not bound to keep in repair. A town is not under the necessity of keeping the whole of the extent laid out as a road in a state to be traveled upon. *Howard* v. *North Bridgewater*, 16 *Pick.* 189. The owner of the adjoining land may use all the road not wanted for travelers, and it is as private property.

Here the accident was caused by the viciousness of the horse, or the unskilfulness of the driver. The plaintiff voluntarily left the traveled path, and run upon the log. The road was safe, and the injury received by the plaintiff was caused by his own fault or folly. The injury must be occasioned entirely by the defect in the road, to make the town liable, and not partially by that, and partially by the neglect of the plaintiff. *Farnum* v. *Concord*, 2 *N. H. Rep.* 392.

Evans' name was on the docket for the plaintiff, but he was not present, and no counsel argued on that side.

The opinion of the Court was drawn up by

Shepley J. — It is contended, that the owner of land adjoining a public highway may lawfully use that part of it, which is not prepared for the public travel. His ownership and right of use so far as may be consistent with the rights of the public need not be questioned. But it is a mistake to suppose the public rights of travel are restricted to the prepared and usually traveled path. While the town has done its duty, when it has prepared a pathway

of suitable width in such a manner, that it can be conveniently and safely traveled with teams and carriages as required by the statute ; the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out. And they have the right to do so without being subjected to other or greater dangers, than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path. In many parts of the highways these obstacles are small, and in others very great. To allow the sides of the prepared path to be incumbered by logs or other things unnecessarily placed there, would deprive the citizens of the use of the whole width of the way or subject them to unnecessary dangers not contemplated by the laws. It may become necessary to place obstructions upon the sides of it for the purpose of preparing or improving the traveled path by the removal of trees or stones and the like. Beyond this all such obstructions are nuisances, and as unlawfully there, as they would be in the traveled path. If the accident had happened through the neglect or fault of the plaintiff, or by reason of any obstacle naturally existing or necessarily placed in the highway out of the traveled path, he could not have recovered ; but this is negatived by the finding of the jury. The driver may be subjected to injury with the most prudent management by a vicious or irritated horse, without any just ground for complaint against the town ; but in such cases he cannot justly be subjected to the increased danger occasioned by obstacles, which exist only through the illegal act of another person.

Judgment on the verdict.

Joseph Taylor *vs.* George Smith.

The appointment of a member of a militia company, who is not a sergeant, to be *clerk pro tem.* under the *stat.* 1834, *c.* 121, and *stat.* 1837, *c.* 276, is illegal and void, unless all the sergeants have first declined.

This was a writ of error, brought to reverse a judgment of a justice of the peace, imposing a fine upon the plaintiff in error, for neglect to attend a militia training. The facts appear in the opinion of this Court.

Vose & Lancaster, for the plaintiff in error, *as to the first error*, on consideration of which alone the judgment was reversed, cited the militia act of 1837, *c.* 276, and insisted, that the appointment of *Smith*, as clerk, *pro tem.* was void, as he was not a sergeant, and there were sergeants of the company, who had not declined.

Morrill, for the original plaintiff, cited *st.* 1834, *c.* 121, § 12 and 16, and *st.* 1837, *c.* 276, § 3, and contended, that the provision, that the clerk should be a sergeant, applied only to the regular clerk, and not to the appointment of a clerk *pro tem.*

The opinion of the Court was drawn up by

EMERY J. — The plaintiff assigns five errors for which he asserts that the judgment complained of should be reversed. 1st. Because said justice adjudged and decided that the plaintiff was legally appointed the clerk of said company and could maintain this action.

2d. Because said justice adjudged and decided, that the limits of said company were legally proved.

3d. Because said justice adjudged and decided that the said *Taylor* was duly and legally enrolled as a member of said company, and liable to do duty therein.

4th. Because the said justice adjudged and decided that said *Taylor* was legally warned.

5th. Because said justice adjudged and gave judgment accordingly, that the defendant was liable for the penalty demanded, when by law it should have been, that the plaintiff could not maintain this action.

We are satisfied that a fair construction of the 12th and 16th sections of the *stat.* 1834, *c.* 121, and *stat.* 1837, *c.* 276, *sec.* 3, authorizes us to consider that the first error is well assigned. By the twelfth section, the clerk is required to be one of the sergeants of the company, and by the sixteenth section, in case of sickness, absence, or other inability of the clerk of the company, the commanding officer is authorized to appoint a clerk *pro tem.* From the exceptions allowed by the magistrate it appears that it was proved by the captain, called as a witness by the plaintiff, that the plaintiff was not sergeant, and that there were three sergeants in the company at the time of the appointment of the plaintiff as

clerk *pro tem.* and that the captain did not offer it to any other person than the plaintiff. We deem this to have been an unwarrantable exercise of the right of appointment. And for this cause the judgment must be reversed.

We believe that the provision in the 16th section of *stat.* 1834, and the 3d section of *stat.* 1837, is not intended to justify the appointment of any member as a clerk *pro tem.* unless all the sergeants had first declined.

It is unnecessary to pronounce any thing as to the other errors assigned.

Judgment reversed.

Calvin Ward *vs.* Jacob Dennis.

If the clerk of a company of militia is present at a training, and is ready to call the roll, but declines to parade the company because he is not sufficiently familiar with that duty, and for that cause alone, the commanding officer has no power to appoint a clerk *pro tem.*

Error to reverse the judgment of a justice of the peace, imposing a fine for neglect of militia duty, in a suit by *Dennis*, as clerk, against *Ward*, as a private.

At the trial before the justice, the counsel for *Ward* contended, that *Washburn* was still clerk, and consequently that the record, being only attested by *Dennis*, had no legal attestation, and that the action was not rightly brought; and also, that if *Washburn* was not clerk, *Dennis* was not legally appointed clerk until *Sept.* 21, 1838, because a lieutenant cannot appoint a sergeant, this being the province of the captain alone. The justice decided against these positions, and adjudged that the action was maintained.

The case appears sufficiently in the opinion of the Court.

Vose and *Lancaster*, for the plaintiff in error, cited *st.* 1834, *c.* 121, § 44, *art.* 25; 8 *Greenl.* 390; 2 *Fairf.* 31.

Bradbury, for *Dennis*, cited 2 *Greenl.* 431; 2 *Fairf.* 31.

The opinion of the Court was prepared by

Emery J. — The suit originally was for a penalty of four dollars for neglect of military duty on the 15th of *Sept.* 1838, and

also for a penalty of five dollars for the neglect of military duty on 21st of *Sept.* 1838, the former being a company training, and the latter a regimental review and inspection of the north company in *China*, as designated in the return made by the selectmen of said town. The warning and neglect were proved. Lieutenant *Henry Farris* was commandiug officer of the north company in *China* on the 17th *Sept.* 1837. He appointed *Jacob Dennis*, clerk, he having been appointed segeant and had his warrent from *Col. Gray* the colonel of the regiment, dated *March* 30*th*, 1838. It recited the appointment as sergeant by lieutenant *Henry Farris* the commanding officer of the company and said *Farris* administered the usual oath on the 2nd of *April*, 1838.

It was contended, that *Z. Washburn, Jr.* was clerk because on the record of the roll for 1837, in the proper column for the names of non-commissioned officers, was entered *Z. Washburn, Jr.* clerk. Captain *Farris* testified that on the 21st of *September*, 1837, said *Washburn* refused to perform the duties of clerk and he appointed the original plaintiff clerk *pro tem.* at the same time the said *Washburn* however said he was ready as clerk to call the roll, but as to any thing further he knew nothing about the duties of a clerk. *Washburn* being called by the defendant testified that on said 21st of *Sept.* he was willing to perform the duties of clerk, and did call the roll but did not parade the company, because he was not familiar enough with the business, and declined on that account alone.

On the report of the magistrate of the trial in the form of exceptions, the court do not consider that the facts stated authorized the appointment of a clerk *pro tempore.*

The judgment is therefore reversed.

FREEMAN'S BANK *vs.* GEORGE W. PERKINS, JR.

A bill drawn in one State and payable in another, is a foreign bill, so as to make the protest admissible in evidence, although all the parties were residents in the State where the bill was drawn.

Where an indorsed bill is sent to a bank for collection, although the bank has no interest in it, yet for the purposes of making a demand, and of transmitting notices, they are to be considered as the real holders.

Where a bill, drawn, accepted and indorsed by residents of this State, was made payable at a bank in *Boston*, and was indorsed to a bank at *Augusta*, and by that bank transmitted for collection to the bank where it was made payable, and was by the direction of the cashier of the latter 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 were transmitted by the first mail to the cashier of the bank at *Augusta*, and were received by him at ten o'clock in the forenoon, two hours before the daily and only mail of that day to an adjoining town, where the indorser resided, was closed, and where no new notice was made out by the latter bank, but the notice from the notary to the indorser was directed to him and put into the mail after it was closed for that day, thereby causing a delay of one day; — *it was held*, that due diligence had not been used, and that the indorser was not liable.

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

The action was against the defendant as indorser of a bill, of which a copy follows.

"$150. *Augusta, Feb.* 9, 1838.

Sixty days after date, pay the order of *George W. Perkins, Jr.*, at the *Suffolk Bank*, one hundred and fifty dollars, value received, and charge the same to the account of *Russell Eaton.*"

To *Richard F. Perkins, Augusta, Me.*

This was indorsed to the plaintiffs by the defendant. The parties, at the time, all lived within the State of *Maine*, and the bill was drawn and indorsed there. The *Suffolk Bank* was located in *Boston, Massachusetts.*

To prove a protest for non-payment, the plaintiffs produced, and offered in evidence a paper under the hand and seal of a notary public in *Boston.* This was objected to by the counsel for the defendant, as not being legal evidence to prove a demand. The District Judge admitted it. The protest showed that the bill was duly demanded at the *Suffolk Bank*, in banking hours, on the 13th

day of *April*, 1838, and payment refused, on account of no funds being there for the payment thereof. The notary in his protest states, that on the same day, "I sent notice of the non-payment thereof to the drawer, first indorser and acceptor, enclosed to *Benjamin Davis, Esq.* president, per mail, to *Augusta, Me.*, requiring payment of them respectively." The plaintiffs proved by *J. Stanwood*, that he, on *Monday*, *April* 16, 1838, at the request of *B. Davis*, then president and acting cashier of the *Freeman's Bank*, left a notice in due form from the notary with *R. F. Perkins*, and put a similar notice, directed to *George W. Perkins, Jr.* at *Hallowell*, where he then resided, into the post office at *Augusta*, after the western mail had left that place on that day. The only mail communication to *Hallowell* is by the western mail. The *Suffolk Bank* and other *Boston Banks* closed business at two o'clock, P. M. The *Boston* mail for *Augusta*, then closed each day at twelve o'clock at noon. The mail from *Augusta* for the west, passing through *Hallowell*, was then also closed each day at twelve o'clock at noon. It was not usual in *Boston* to protest bills until near the close of banking hours. By the usual course of the mail, at that time, a letter put in the office in *Boston* in season for the mail of the fourteenth, would reach *Augusta* post office on the next day between the hours of six and eleven in the afternoon. The letter from the cashier of the *Suffolk Bank* to *Davis*, enclosing the bill, protest and notices, was in fact received by *Davis* on *Monday*, *April* 16, 1838, at ten o'clock in the forenoon. There was no other evidence to show that the bill had been left in a bank for collection. It was objected by the defendant, that this was not sufficient. The Judge ruled that it was. The counsel for the defendant also objected, that there was not sufficient evidence of notice to the defendant to charge him as indorser. This objection was overruled. The verdict was for the plaintiffs, and the defendant excepted.

Vose, for the defendant.

Being an inland bill, the parties all living in this State, the protest is not evidence. In *Green* v. *Jackson*, 15 *Maine Rep.* 136, the bill was drawn in this State on a person in another State, and therefore that case does not apply here.

Here the notice came from the notary at *Boston*, all made out,

and should have been forwarded by the first mail. This was not done, and the indorser is discharged. *Mead* v. *Engs*, 5 *Cowen*, 303; *Mitchell* v. *Degrand*, 1 *Mason*, 176; *Robinson* v. *Ames*, 20 *Johns. R.* 146; *Sewall* v. *Russell*, 3 *Wend.* 276.

Whether reasonable diligence to give notice has been used, is a question of fact for the jury.

Bradbury, for the plaintiffs.

When a bill is drawn in one State payable in another State, the protest is evidence. *Green* v. *Jackson*, 15 *Maine R.* 136.

Each party to a bill has one day to give notice to the party next immediately liable. There can be no settled rule, unless a day is given. If less than that is required, it will be a question of fact in each case, how much time is necessary to prepare and give the notice. *Chitty on Bills*, 316, 319, *note* 1; *Bayley on Bills*, 173; *Geill* v. *Jeremy*, 1 *Moody & M.* 61; *Whitwell* v. *Johnson*, 17 *Mass. R.* 449; 3 *Conn. R.* 489; *Scott* v. *Lifford*, 9 *East*, 347; *Darbishire* v. *Parker*, 6 *East*, 10.

Where there is no dispute about the facts, it is for the Court to determine whether due diligence has been used.

The opinion of the Court was drawn up by

WESTON C. J. — This being a bill drawn in one State, and payable in another, is a foreign bill, so as to make the protest admissible in evidence. *Buckner* v. *Finley & al.* 2 *Peters*, 586, *ibid.* 688, opinion of *Washington J.* *Phœnix Bank* v. *Hussey*, 12 *Pick.* 483; *Green* v. *Jackson*, 15 *Maine R.* 136. The bills under consideration in those cases, were drawn by persons in one State upon persons resident in another. But the principle which governed those decisions, applies with equal force to bills drawn in one State and payable in another; although all the parties might be residents in the same State. The statute of 1821, *c.* 88, allows damages on such bills, upon protest.

From the protest in the case it may be understood, that the cashier of the *Suffolk Bank*, as such, was resorted to by the plaintiffs, to obtain payment of the bill. He is to be considered then, as it respects the time of causing a protest to be made and of giving notice, as a distinct holder or party to the instrument. *Chitty on Bills*, 521, 9th *Am.* from 8th *London Edition*, and the cases

there cited. On the day of the maturity of the bill, he caused it to be protested for non-payment and notices to be forwarded to the drawer, indorser and acceptor, which were mailed the next day. And this was using all the diligence, which the law requires. *Chitty*, 513.

The cashier of the *Suffolk Bank* would have done his duty, if he had caused notice to be given to the plaintiffs, of whom he received the bill. And upon the receipt of such notice by them, the defendant, the indorser, living in another town, notice from them to him would have been seasonable by the mail of the succeeding day. This rule, for the sake of uniformity, has generally been adopted; although it might be hazardous to neglect to send by the next convenient or practicable mail. *Mitchell* v. *Degrand*, 1 *Mason*, 176. In this case two hours only elapsed, between the receipt of the notice and the close of the next mail. To hold that the plaintiffs, by their president, who it appears acted also as cashier, should give notice by that mail would be requiring a degree of strictness, not warranted by the decisions. But the plaintiffs gave no notice of their own to the defendant. They only forwarded the notice prepared for him by the notary at *Boston*, at the instance of the cashier of the *Suffolk Bank*.

If either knew the residence of the indorser, his notice should have been sent to him directly at *Hallowell*, through which the mail passes in its transit to *Augusta*. But if the cashier of the *Suffolk Bank* was ignorant of his residence, which may have been the fact, his notice was properly enclosed to the president and acting cashier of the *Freeman's Bank*. He knew the indorser's residence; and he had nothing to do but to put the proper direction upon his notice, and to leave it in the post office. Sending no notice of his own, but merely forwarding that, which was prepared by the notary, it appears to us that it should have been sent by the mail of that day. There was ample time for this purpose. This not having been proved, due diligence by the holder is not made out.

Exceptions sustained.

STEPHEN FAIRBANKS *& al. vs.* GEORGE W. STANLEY.

A general authority to commence suits, will warrant an attorney in commencing a suit and attaching property, and will render the client responsible for any damages occasioned thereby.

When one institutes a suit, he may set forth his cause of action in any manner which the law allows; and if he does so by general counts, and is enabled without amendments to maintain his suit, the law will not deprive him of any right, because he has adopted one mode of declaring in preference to another.

Property can be attached only to secure the demand sued; and if other demands are afterwards introduced, the attachment will not be good against subsequent attaching creditors.

When a writ contains the money counts, there may be some difficulty in determining what demands were put in suit. But in the absence of all contradictory proof, those will be considered as in suit, which the plaintiff then owned, and which were due and payable and liable to be introduced, without amendment, and which were in fact so introduced, and judgment rendered thereon.

But by *st.* 1838, *c.* 344, § 4, *(Rev. St. c.* 114, § 33,) no attachment of *real estate* can be valid, unless the plaintiff's demand, on which he founds his action, and the nature and amount thereof, are substantially set forth in proper counts, or a specification of such claim is annexed to such writ.

A note given in payment for goods purchased, may be introduced in evidence under the money counts.

Where new counts are introduced, they will be regarded as introducing new causes of action, unless they appear to be for the same cause.

In an action against an officer for neglecting to levy an execution on goods attached by him on the writ, he cannot defend himself by showing that he had previously sold the goods, without the consent of the creditor, and received money therefor.

THE parties agreed upon a statement of facts for decision of the Court thereon, if the Court should deem the evidence admissible, the plaintiffs objecting thereto.

This is an action on the case against the late sheriff of the county of *Kennebec*, for the neglect of *Henry Johnson*, one of his deputies. The writ bears date *July* 24, 1838. The plaintiffs are merchants in *Boston*, and on the 15th day of *May*, 1837, had a note against *Emerson & Wing* of *Waterville*, given to the plaintiffs, for certain hardware previously purchased of them, said note dated *Oct.* 29, 1836, for the sum of $518,49, and interest after

six months, payable to the plaintiffs in six months, and which was therefore over due. On that day (*May* 15, 1837,) a writ was sued out against said *Emerson & Wing*, in due form of law in favor of the plaintiffs containing two counts — 1. For money had and received $700. 2. For goods, wares and merchandize before that sold and delivered, &c. The plaintiff's attorney had a general authority from them to act for them, and to commence such suits as he might think for their interest; and on the 18th day of *May*, 1837, the plaintiffs ratified and approved of said suit and forwarded the note above described to him. Said writ was duly delivered to said *Johnson* with special orders to attach, &c., and he as deputy of said sheriff served it on the day of its date, and attached personal property to a much larger amount than the debt due to the plaintiffs. The action was entered and continued in Court until *Dec. Term*, 1837, when judgment was obtained against said *Emerson & Wing*, for the sum of $538,12 debt, being the exact amount due on said note, and $7,48 costs, which note is on file in the case, and no bill of particulars appears. There is no evidence of any fraud or collusion between the parties in said suit, but the judgment was *bona fide*. The plaintiffs took out execution *Dec.* 23, 1837, and on *Jan.* 5, following, delivered the same to said *Johnson*, then deputy of said sheriff for service, with written directions to the officer to apply the property attached on the writ, or the avails thereof to the satisfaction of said execution. Before the commencement of this action, the plaintiffs made several demands on said *Johnson* for the settlement of said execution, but said *Johnson* did not pay any part thereof, nor has it been paid, nor has the execution been returned. On the said 15th day of *May*, 1837, (after the said writ against *Emerson & Wing* was sued out and an attachment made thereon as aforesaid in favor of the plaintiffs) the *Ticonic Bank* sued out a writ against said *Emerson & Wing* to recover a debt due, declaring therein, 1st. upon a note of hand which was described in the usual form, and 2nd an account for $1800, money had and received, and afterwards on the same day gave the writ to said *Johnson* who served the same and returned thereon as attached the same personal property "subject to the previous attachment made by him on the plaintiffs' writ." The suit in favor of said *Ticonic Bank* was against *Emer-*

son & Wing and two sureties, and was duly entered and judgment obtained on said note at *Dec. Term*, C. C. Pleas, 1838, for $415, 06 debt, and $8,51, costs, and within 30 days execution issued thereon and was placed in the hands of one *Rice*, a new deputy of a new sheriff, who demanded the same property of said *Johnson*, or the proceeds thereof. Notice was given by the *Ticonic Bank* to said *Johnson* that they claimed the proceeds of the property attached in preference to the plaintiff, so far as necessary to satisfy their execution; on the ground that their attachment was entitled to priority over the plaintiffs' in consequence of the *general money* count being inferior to the specific count in their writ, there being no specific cause of action set forth in the plaintiffs' writ, other than the two general counts as above specified; and said *Johnson* was notified not to pay the proceeds to the plaintiffs. And said *Johnson* never has paid the same to any person, but holds the same pursuant to said notice, being indemnified by the said sureties for so doing, and no return of said property has been made on either execution. The personal property attached, being a stock of goods, was sold at public auction by said *Johnson* (while a deputy) by the written consent of said debtors and of the *Ticonic Bank*, but not of the plaintiffs. The amount received was more than enough to pay either of said executions, but not sufficient to pay both. *Emerson & Wing* at this time are insolvent and have no property to be attached. Upon this state of the case, the question is submitted to the Court as to the amount and extent of the defendants' liability, the plaintiffs being willing to waive any claim to statutory interest.

Evans and *I. Redington*, for the defendant, contended: —

That the plaintiffs were entitled to but nominal damages. The debtors were insolvent, and therefore a mere nominal sum can be recovered for neglect to return the execution. 14 *Mass. R.* 352; 15 *Mass. R.* 10; 16 *Mass. R.* 5; 4 *Mass. R.* 498; 2 *Shepl.* 83.

If there be any ground for claiming more than mere nominal damages, it is because the officer should have taken and applied the property attached on the writ to the satisfying of the execution of the plaintiffs. This is a mere question between two sets of creditors, each claiming the same fund. The plaintiffs are not entitled to any priority, unless they have obtained it by a compliance

with the provisions of the law. The attachment of the *Ticonic Bank* is entitled to the priority, because the writ was sued out without authority; and because the vagueness and generality of the plaintiffs' original writ against *Emerson* and *Wing* is such, that it is to be considered but as a blank declaration, and no return of an attachment thereon can be valid against the attachment of another creditor. It gave no information to the debtor, or to any other creditors, of the precise ground of action, or of the amount claimed and intended to be secured. An attachment to be valid against other attachments, must be made on a writ which discloses exactly the claim to be covered. *Willis* v. *Crooker*, 1 *Pick.* 205. If there be no count in the writ, when served, there can be no attachment. *Brigham* v. *Este*, 2 *Pick.* 420. A writ under a general money count, merely discloses the nature of the action, whether trespass, debt, case, &c. The claim or cause of action for the plaintiff of which a creditor obtains his lien by attachment, should be clearly indicated in his writ and declaration. *Ball* v. *Clafflin*, 5 *Pick.* 303; *Fairfield* v. *Baldwin*, 12 *Pick.* 388. The rights of subsequent attaching creditors are always respected, and they are allowed to take advantage of any erroneous proceedings of the prior creditor. *Berry* v. *Spear*, 1 *Shepl.* 187.

There were no items filed in the second count for goods, wares and merchandize, and nothing was due for goods purchased. A negotiable note had been given for the full amount, and that is a discharge. *Whitcomb* v. *Williams*, 4. *Pick.* 230; *Varner* v. *Nobleborough*, 2. *Greenl.* 121.

This note could not be given in evidence under the money counts. This can only be done when money has in fact been received. It must be cash and not bills. *Barnard* v. *Whitney*, 7 *Mass. R.* 358; 3 *Bibb*, 378; 2 *Stark. Ev.* 106; *Chitty on Con.* 182; 5 *Burr.* 2589; *Chitty on Bills*, 362; *Page* v. *Bank of Alexandria*, 7 *Wheat.* 35. The note here was given for hardware, thus showing that money was not received. The *st.* 1838, *c.* 344, § 4, provides that no attachment shall be valid without the claim intended to be proved is specifically set forth in some way in the writ. This is merely declaratory of what the law was before.

Nor does the vacating of this attachment impeach the judgment. The judgment may be good between the parties, and is equally so,

whether the attachment is void as to an after attaching creditor, or not.

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

The return of the officer on mesne process is conclusive evidence of his attachment of the goods. *Gardner* v. *Hosmer*, 6 *Mass. R.* 325. By that attachment he acquired a special property in the goods, while the general property was in abeyance, liable to be defeated by the contingency of the plaintiff's failing in the suit, or neglecting to sue out his execution within thirty days after judgment, or by receiving satisfaction. 11 *Mass. R.* 211; 9 *Mass. R.* 112; 2 *Mass. R.* 514. Each deputy has such a special property in the goods attached, that they cannot be attached by another officer, or by the sheriff himself. 2 *Greenl.* 270; 5 *Greenl.* 313; 5 *Mass. R.* 271; 13 *Mass. R.* 114; 14 *Mass. R.* 270. And he may have an action against any person who violates his possession, or that of his agent. 9 *Mass. R.* 104; *ib.* 265; 15 *Mass. R.* 310. Even the removal of the goods beyond the limits of the State does not affect the right of possession. 1 *Pick.* 232. All the goods are considered as in his custody from the attachment until thirty days after judgment, and he is responsible for them. 11 *Mass. R.* 242; 12 *ib.* 163; 15 *ib.* 10; 16 *ib.* 5. If the officer seasonably receives the execution, he is bound to levy it on the goods attached, and if he delays to do so, he is liable for the damages. 14 *Mass. R.* 473; 1 *Pick.* 521; 9 *Mass. R.* 269. And it is because the officer is supposed to have the property attached in his custody and within his reach, that he is released from his liability, if the same is not demanded within thirty days after judgment. 12 *Pick.* 202; 2 *Shepl.* 429. When the goods are sold by consent of parties the proceeds of the sale are held in the same manner, as if the goods had remained specifically in the hands of the officer. *St.* 1831, *c.* 508. And having the money in his hands, the officer is liable, if he neglect to apply it in satisfaction of the execution. 1 *Cranch*, 133; 16 *Pick.* 567.

An officer, it is true, is not bound to execute a void writ, but he cannot set up mere errors in the judgment or process in defence. 15 *Johns. R.* 155; 3 *Stark. Ev.* 1349; 8 *Mass. R.* 79. The only ground upon which he can defend, is that the plaintiff's judgment was obtained by fraud or collusion. He cannot otherwise im-

peach it. 5 *Greenl.* 288; 6 *Greenl.* 196. Here was no fraud or collusion. The judgment and record are supposed to have been based on good and sufficient evidence, and the Court will presume it good, while the judgment stands unreversed. The evidence therefore ought not to be admitted.

But if the evidence is admitted, then the plaintiffs and the *Ticonic Bank* stand alike. The judgments in both were general. Ours on a count for money had and received, and for goods sold; theirs, on a note, and money had and received.

The plaintiffs' note would have sustained their count under all the circumstances. The cases cited for the defendant were here reviewed, and it was contended were either inapplicable, or did not oppose the principle sought to be established. After fully considering this question and examining the law, the Court in *Payson* v. *Whitcomb*, 15 *Pick.* 212, have fully settled the law in *Massachusetts*. The following cases clearly favor the doctrine of *Payson* v. *Whitcomb*. The notes offered in evidence in several of the cases were given for something besides money. 6 *Mass. R.* 182; 3 *Mass. R.* 403; 11 *Mass. R.* 66; 17 *Mass. R.* 560; 14 *Mass. R.* 121; 15 *Mass. R.* 35; 8 *Pick.* 48; 11 *Pick.* 316; 9 *Pick.* 93; 7 *Cowen*, 662; 4 *Dall.* 234; 10 *Wheat.* 333; 1 *H. Black.* 239; 14 *East*, 587.

It is believed that the law is well settled; and if in practice, difficulties should arise, it is not for the Court to apply the remedy. To do it, would be to pass an *ex post facto* law. It is for the legislature to apply the remedy, and they may act prospectively. Since the commencement of the plaintiffs' suit against their debtors, the legislature have checked the practice, by making the attachment of real estate in such cases void; and it may be extended to personal property. *Stat.* 1838, *c.* 344, § 4.

Can a case be found, deciding that a writ with a money count only is void? It is not even so contended. A host of authorities would prove the contrary. These inferences follow. 1. The writ being good, contained in itself sufficient notice of the cause of action. 2. Being good, the officer was bound to serve it, and his attachment was good. 3. Once valid, it has continued good; for no amendments have vacated it.

The general authority was sufficient to warrant the commence-

ment of the suit. And were it otherwise, the subsequent prompt ratification was equivalent to a prior authority.

The opinion of the Court was drawn up by

SHEPLEY J. — The case finds, that "the plaintiffs' attorney had a general authority from the plaintiffs to act for them and to commence such suits, as he might think for their interest." The authority appears to be sufficiently extensive, and it is not perceived, that the plaintiffs would be at liberty to deny it; or that they could be excused from answering in damages for making the attachment, if there had been no sufficient justification for commencing the suit.

When one institutes a suit, he may set forth his cause of action in any manner which the law allows; and if he does so, and is enabled without amendment to maintain it, the law will not deprive him of any right, because he has adopted one mode of declaring in preference to another. It does not hold out to him the right of election and then punish him for the exercise of that right.

Property can be attached only to secure the demands sued, and if other demands are afterward introduced, the attachment will not be good against subsequent attaching creditors. When the writ contains the money counts there may be difficulty in determining what demands were put in suit. Those which the plaintiff then owned, and which were due and payable and liable to be introduced without amendments, and which were so introduced, and judgment obtained upon them, cannot be regarded in the absence of all contradictory proof as not in suit, without depriving the party of his election as to the mode of declaring. The statute of 1838, *c.* 344, requiring all liens on real estate created by attachment and the amount of them to appear on record, made it necessary to deprive the party of the right to prove under the money counts any demand not specifically designated. The effect was to restrict the party to a certain definite mode of declaring or to limit his proof. This the legislature might properly do, while the Court could not, unless by a previously established general rule regulating the mode of declaring.

The suit against the debtors appears to have been instituted by the plaintiffs' attorney to secure any debt due to them in what-

ever form it might exist. A note over due and unpaid would come within the demands contemplated to be secured. The case of *Payson* v. *Whitcomb*, 15 *Pick.* 212, shews that although given for goods purchased it might be introduced in evidence under the money count. The cases of *Willis* v. *Crooker*, 1. *Pick.* 203, and *Fairfield* v. *Baldwin*, 12 *Pick.* 388, decide that where new counts are introduced, they will be regarded as introducing new causes of action, unless they appear to be for the same cause. And the remarks in the latter case respecting the propriety of designating by a bill of particulars annexed the bills or notes to be offered in evidence under the money counts, appear to refer to the necessity of doing so, when new counts are to be introduced, that the record may shew, that the new counts are for the same cause of action. None of the cases cited decide, that an attachment would be considered as vacated by proving a promissory note under a money count originally inserted in the writ.

The second count in the writ against the defendant appears to be sufficient to enable the plaintiffs to recover. The officer cannot defend himself by shewing, that he sold and parted with the possession of the goods without their consent. They were entitled to regard him as holding them to satisfy their execution; and they are entitled to recover the amount due upon it.

Emily Woodward *vs.* John B. Shaw.

On the trial of a bastardy complaint, the admissions of the respondent that he was the father of the child, and his promise to marry the mother, although not of themselves sufficient to sustain the prosecution, may be given in evidence in corroboration of the testimony of the complainant.

The provision in the statute, that the mother of the bastard child "shall be constant in such accusation," refers only to the man accused; and a variance as to the time, place, or circumstances stated in her accusation, goes to her credit, but not to her competency.

Under the bastardy act, it is not necessary that the complaint and the examination should be separate instruments.

If a certified copy of a paper be used at the trial in the District Court, when the original was the legal evidence, *without objection from the opposing party*, no advantage can be taken of it in this court, on exceptions to the rulings of the District Judge on other points.

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

Complaint under *st.* 1821, *c.* 72, for the maintenance of bastard children. The declaration alleged that the complainant was delivered of a child, *Oct.* 13, 1837, which was begotten on or about the 1st of *May*, 1837, in the sitting room of *Daniel Woodward*, in *Augusta*. "The complaint and voluntary examination and accusation," was taken by a magistrate on *Oct.* 6, 1837, and was in one paper, signed and sworn to but once, and alleged the facts as stated in the declaration. A certified copy of the examination was introduced in evidence. No objection was made at the trial to the admission of this copy. The counsel for the respondent contended, that the complaint must be a separate document from the accusation and examination, and that both should be introduced on the trial. The Judge ruled, that it was unnecessary that they should be separate instruments. The attending physician was examined, and testified that the child, at its birth, was full grown, and stated that in some females the course of nature was not changed for some months after conception, and that such would not for months, know when pregnancy had taken place. The respondent contended, that the complainant was not a competent witness under the circumstances. She was admitted to testify, and stated that the child was begotten in the bedroom adjoining the kitchen in *Daniel Woodward's* house the first of *Febuary*, 1837, and afterwards said it was about that

time. She stated that the course of nature continued until about the first of *May*, and then stopped, and that her mistake arose from that cause. The counsel for the respondent then contended, that owing to the wide variance between her present and former statement, and the impossibility of the occurrence stated by her in her examination to have taken place in *May*, she ought not to be allowed to give her testimony. The objection was overruled. Two brothers of the complainant testified, that in *September*, 1837, the respondent admitted to them, that he was the father of the child, and expressed his willingness to marry the complainant, and procured one of them to cause the intentions of marriage to be published, which was done.

The Judge ruled, that the admissions, if believed, were not of themselves sufficient evidence to sustain the prosecution, but that they might be used in corroboration of the testimony of the complainant. He instructed the jury, that the part of the statute which relates to the complainant's being constant in her accusation, refers only to the man accused, and not to the time or place or other circumstances stated in her accusation; and that such variance may properly be considered by the jury, as affecting her credibility; that they are to judge of the degrees of credit to be given to her under such circumstances; and that if they believed her testimony as to the defendant's being the father of the child, they would find for her; and otherwise for the respondent.

The verdict was against the respondent, and he filed exceptions.

H. W. Fuller, Jr., for the respondent, said, that to sustain the prosecution, the complainant must pursue the statute strictly; that they partake of both a civil and criminal process; that they sound in damages and convict of crime; that they become records of guilt, while under *st.* 1838, *c.* 338, they make a lawful heir to the property of the respondent.

He contended, that the complaint and accusation should be separate and distinct acts, and should be separate papers.

That the copy was erroneously used instead of the original. She was bound to introduce the original paper.

That a material variance in time and place breaks up the allegation of constancy. The allegation of constancy refers not only

to the man accused, but to the time and place and other circumstances. She ought not to have been permitted to testify.

But when admitted, her evidence did not support the declaration. The transaction was different in time and place, and constituted an entirely different charge. No action or complaint can be sustained, unless the facts as alleged are proved, and are such as to constitute a good cause of action. 1 *Stark. N. P. Cas.* 67; 1 *Saund.* 259; 2 *B. & P.* 155; 4 *East,* 343; 13 *Petersdorff,* 369; *Yelv.* 93; 1 *T. R.* 316; 5 *East,* 244; 2 *Ld. Raym.* 994; 8 *East,* 193; 12 *East,* 550. The true rule is, that while the complainant shall not be held to prove the precise day alleged, she must allege and prove a day within the limits of physical possibility, and cannot change the venue or give evidence of any other connexion. Having made that time and place a part of the description of the event, she must abide by it. The respondent had notice of no other. *State* v. *Noble,* 3 *Shepl.* 476.

Vose and *Lancaster,* for the complainant, contended, that the complaint, examination and accusation, were the same, or rather were in one instrument. This was precisely the form in *Davis'* Justice.

If there was any objection to the use of the copy, it should have been made at the trial. It was not a point made there, and is not now open.

As to the objection, that she was permitted to explain why she made a mistake as to time, have always understood that want of constancy applies only to the *person charged,* and not to the time or place. And even constancy as to the person is applicable only to the time after the examination has taken place. *Maxwell* v. *Hardy,* 8 *Pick.* 560.

The opinion of the Court was drawn up by

EMERY J. — Possibly the course of decisions on questions of law, raised in cases of bastardy, may have gone quite as far against the deductions to be made by juries, as they ought to proceed, but probably not further than they should, in order to prevent an undue influence of sympathy with the deserted and unfortunate female.

Whenever exceptions are presented, it is not for the Court to run out in a crusade after any omission of some supposed material

allegation which the ingenuity of counsel may illicit upon a very hypercritical examination. The Court must confine their attention to the exceptions only as they come up, and naturally from the Court before whom the jury trial was conducted. For it might well be concluded, that had objection been made in season, a motion to amend or producing an original instead of a copy might have done away the semblance of any well grounded dissatisfaction. No objection was made to the introduction of the copy. We cannot fail to reflect, that there may be facilities for association, in a continued courtship, which the jury could understand and appreciate, and in the details of the evidence a conviction in their minds follow, that the truth had been communicated by the complainant with all convenient and just particularity of time, and place and circumstance, including all active and passive agency of which the subject was capable in its developement.

It is true, that courts will take notice of the ordinary course of nature. And so will jurors. But it is peculiarly the duty of the latter, to settle the virtue and extent of seeming exceptions, and one ingredient in coming to a right estimation on this point may be the evidence of the consciousness of the defendant, as demonstrated by his admission, that no injustice was done to him, by the designation of the complainant that he was the man, who had given her occasion to remember him, in this matter, and his willingness to marry her. If inaccurate as to time and place it might be a subject of argument and commentary to the jury and justly, but if the constancy in the accusation as to the man, was maintained, and the jury should be satisfied of its justness, notwithstanding a faintness of disclosure or recollection of the precise day and hour, it would be doing violence to the object of the statute, which is to procure a right application upon the verdict of a jury, for the Court to set the conclusion of the jury all aside, upon such grounds as have been suggested in the argument upon these exceptions. The reason of her mistake seems to be not unnatural, according to the testimony of the physician.

It is objected that there should be a separate paper for the complaint, and examination. The statute makes no such precise provision.

As to the affect of the statute, *c.* 338, passed *March* 22, 1838,

making the product of the illicit connection an heir, it is such a consequence as the legislature have seen fit to create. Whether it be really calculated to produce a deeper respect for the marriage relation, time alone can determine. It is at least an experiment to do some justice to an unoffending being, brought into the world by the the ardent original efficiency of man, not under the sanction of the marriage covenant. How far the hope of providing for the offspring of the woman may affect her credibility is also a subject for the consideration of the jury. It constitutes no reason for additional security of construction as to the proceedings.

Exceptions overruled

Elizabeth Jones *vs.* John Jones, Jr.

Where a certificate, signed by a person holding the office of justice of the peace and also of judge of a municipal court, shows that a marriage was solemnized by him, and that he held both of those offices at the time, but does not state in which capacity he acted, the law will regard him as acting in the capacity in which he lawfully might perform the duty.

The *st.* of 1838, *c.* 310, giving to one Justice of the Supreme Judicial Court jurisdiction in cases of divorce, also gives to one Justice jurisdiction in questions of alimony.

Under that statute, there is no appeal upon a question of fact. His decision is as conclusive as the finding of a jury, and is no more open for a revision by the law Court.

In questions of divorce, a written motion to dismiss the libel for causes stated, may be equivalent to pleading the same matter in abatement.

The *wife*, although under the age of twenty-one, may in her own name, without acting by guardian or next friend, file her libel for a divorce, and obtain relief.

General words in a statute are to receive a general construction, unless there be something in it to restrain them.

This was a libel for a divorce from bed and board, for the alleged cruelty of the husband. The libellee pleaded not guilty, and the issue was referred to the determination of the Court. To prove the marriage, the libellant introduced the following certificate. "I certify, that I married *John Jones* of *Hallowell* to *Elizabeth*

Lyon, Dec. 17, 1837; that I was then a justice of the peace for the county of *Kennebec*, duly qualified, and also judge of the municipal court of the town of *Hallowell. Oct.* 23, 1839. *S. K. Gilman.*" *Mr. Gilman's* commission as justice of the peace, was dated *Jan.* 26, 1832, and as municipal judge, *Feb.* 19, 1835, and he was duly qualified upon both. One of the questions raised at the trial before WESTON C. J. was, whether legal proof of the marriage was adduced. Judge *Gilman* was, at the time of the marriage and since, an inhabitant of *Hallowell.* It appeared, that at the time of the filing of the libel and at the time of the trial, the libellant was under twenty-one years of age, and because she had not appeared by *prochein ami*, or by guardian, the counsel for the libellee submitted a motion in writing, that the libel should be quashed or dismissed. Much testimony was introduced by the respective parties to prove and to disprove the allegation of cruelty of the husband, as alleged in the libel; but as it is not material, on the view taken by the Court, to the elucidation of any question of law, it is omitted.

The counsel for the libellee insisted, that the libel was not sustained by the testimony, but it appeared to the Chief Justice that it was, on the ground of cruelty. It was insisted by the counsel for the libellee, that the violence proved, did not amount to the cruelty, which would be legal cause for a divorce, especially if intended as a correction of the wife for her faults, although by accident and without deliberate design, it exceeded what could thus be justified; that the violence was provoked by the wife, and therefore no cause of divorce; that the marriage was void, because the magistrate had no power to solemnize the same within the town of *Hallowell;* that it was not prosecuted by *prochein ami*, or guardian, and that one judge had no jurisdiction of the question of alimony. A divorce was decreed, when the counsel for the libellee filed exceptions, and the whole matter was submitted to the determination of the Court, upon the legal points taken.

Clark, for the respondent, argued in support of the points made at the trial, and cited *st.* 1835, *c.* 146, establishing the municipal court in *Hallowell; Willard* v. *Willard*, 4 *Mass. R.* 506; *Winslow* v. *Winslow*, 7 *Mass. R.* 96; *Broadstreet* v. *Broadstreet*,

ib. 474; *Baker* v. *Lovett*, 6 *Mass. R.* 78; *Miles* v. *Boyden*, 3 *Pick.* 219; *Commonwealth* v. *Moore*, *ib.* 194; *Dewey*, *Pet'r*, 11 *Pick.* 268; *Maxwell* v. *Hardy*, 8 *Pick.* 562; *French* v. *French*, 4 *Mass. R.* 587; *Slater* v. *Nason*, 15 *Pick.* 347; *Hill* v. *Hill*, 2 *Mass. R.* 150; *Hannen* v. *Edes*, 15 *Mass. R.* 347.

He also contended, that the merits of the case in matter of fact, whether the averments in the libel had been proved, were open to revision; and that the evidence was not sufficient to authorize a decree in favor of the libellant.

Whittemore, for the libellant, contended, that as the certificate of marriage was certified both as justice of the peace and as municipal judge, if the magistrate was authorized to marry in either capacity, the marriage was good. He had commissions in force in both, and seems to have the proper authority in both; but must have in one or the other.

This process partakes more of a criminal than a civil one, and the rules of special pleading do not apply. *Barber* v. *Root*, 10 *Mass. R.* 265. The statute on which it is founded, *stat.* 1821, *c.* 71, requires, that the libel shall be by the party seeking the divorce. A guardian, or *prochein ami*, has no right to interfere in such cases. It is no part of his duty. *Willard* v. *Willard*, 4 *Mass. R.* 506; *Winslow* v. *Winslow*, 7 *Mass. R.* 96.

As to granting alimony, it is enough that the Judge did not undertake to grant it in this case. But it is implied in the power of granting a divorce, and is attendant upon it. The statute giving the power to grant divorces to a court holden by one Judge, of necessity, gives all the necessary authority in relation to the subject to give effect to the provision.

Personal violence is a sufficient cause for a divorce, and that was abundantly proved. *Warren* v. *Warren*, 3 *Mass. R.* 321.

The opinion of the Court was drawn up by

SHEPLEY J. — Several objections were taken to the proceedings in this case. The first is, that the parties were not legally married. The act establishing a municipal court in the town of *Hallowell*, *stat.* 1835, *c.* 146, provides, that the Judge shall have exclusive and original jurisdiction within that town over all such matters and things as justices of the peace for that county may by law

take cognizance of and exercise jurisdiction over. *Mr. Gilman*, who married these parties, held that office, and also that of justice of the peace for the county, and was duly qualified. He might lawfully marry them as a justice of the peace, unless he was deprived of that power in consequence of his exclusive jurisdiction as a a judge. He does not state in what capacity he acted in performing the service, but the law will regard him as acting in the capacity in which he lawfully might perform the duty. It may well be doubted, whether the terms cognizance and jurisdiction do not refer to such matters only as are of a judicial character, leaving other duties to be performed by justices of the peace. But whatever construction the act may receive the marriage will be legal.

Another objection is that one judge has not jurisdiction to decide upon a question of alimony. The act regulating divorces, *st.* 1821, *c.* 71, speaks of questions of divorce and alimony, while that giving the jurisdiction to one judge, *st.* 1838, *c.* 310, speaks only of questions of divorce. That alimony in our law is regarded as an incident to divorce is apparent from the provision of the *st. c.* 71, § 5, which creates a lien on the estate of the husband for the performance of any order, which the court may make in a suit for divorce. A division of the jurisdiction would be a virtual repeal of that provision. The legislature could not have intended to give jurisdiction over the principal question to one judge, and require the cooperation of a majority in the minor one of alimony, at the same time depriving the party of the intended security to enforce a decree in his favor.

The act giving this jurisdiction provides, that any person aggrieved at the opinion of said justice upon a question of law may file his exceptions to the same. The language of the act and the design of the legislature in passing it clearly indicate the intention, that there should be no appeal from a decision of the Judge upon a question of fact. His decision is as conclusive as the finding of a jury, and is no more open for revision by the court of law.

Another objection has reference to the capacity of the infant wife to maintain this process. Before the *stat.* 21 *Jac.* 1, *c.* 13, if an infant plaintiff or defendant appeared by attorney and not by guardian or next friend, it was error. That statute cured the defect on the part of the plaintiff after verdict; and it became neces-

sary to plead infancy in abatement. 2 *Saund.* 212, *and notes*; *Schermerhorn* v. *Jenkins*, 7 *Johns. R.* 373; *Dewey, Pet.* 11 *Pick.* 268.

In this case the counsel for the libellee submitted a written motion that the libel should be quashed or dismissed because it was not prosecuted by guardian or next friend. Considering the nature of the process this may be regarded as equivalent to a plea in abatement. And in the case of *Wood* v. *Wood*, 2 *Paige*, 108, it was decided, that an infant should so prosecute or defend in a suit for divorce. That decision however appears to have been founded upon the provisions of the statute and upon the rules of practice established there. *Wood* v. *Wood*, *idem* 454. An infant may at common law bind himself and others in many cases. He has ability and may lawfully bind himself by an act for his own benefit. *Gouch* v. *Parsons*, 3 *Burr.* 1801. And of this description the law regards the marriage contract. Before the *statute of* 38, *Geo.* 3, *c.* 87, an infant at the age of seventeen might be an executor and receive moneys and give acquittances. A female infant can lawfully contract marriage, and in doing it can bar herself of dower, and dispose of her personal estate. *Earl of Buckinghamshire* v. *Drury*, 3 *Bro. P. C.* 570; *Harvey* v. *Ashley*, 3 *Atk.* 613. So she may maintain a suit on a promise of marriage. *Holt.* v. *Ward*, *Fitzgibbon*, 175; *idem*, 275; *Holt* v. *Ward*, *Stra.* 937. Whether an infant executor could sue without a guardian or next friend occasioned a difference of opinion. The right to do so was admitted in *Rutland* v. *Rutland*, *Cro. Eliz.* 378; *Bade* v. *Starkey*, *id.* 541; *Coan* v. *Bowles*, 1 *Show.* 165; *Foxwist* v. *Tremaine*, 2 *Saund.* 212. And denied in *Cotton* v. *Wescot*, *Cro. Jac.* 441; *Keniston* v. *Friskobaldi*, *Fitzgibbon*, 1. There would seem to be an inconsistency in allowing the acts of an infant executor to be legal, and at the same time subjecting him to the control of a guardian, or next friend while in the act of performance. If the law permits a female infant to enter into the marriage contract, does not the larger include the less power, and enable her to do any act, which may be necessary to its perfection, or may arise incidentally out of it? And is it not upon this principle, that she is allowed to bar herself of dower and dispose of her property by such a contract? Will the law enable her to as-

sume the duties and acquire the rights of support and protection which that contract gives, and refuse to her the power of enforcing those rights. Is the right to shield herself from the oppressive and cruel acts of the husband less incident to, or connected with the contract, than dower or the disposal of personal effects? But whatever may be the conclusion at common law, the language of the *statute c.* 71, § 5, regulating divorces of this description is general, enabling any wife, without exception as to age, to file her libel and obtain relief. And general words in a statute are to receive a general construction, unless there be something in it to restrain them. So inflexible was this rule considered, that the *Statute of Wills*, 32 *Hen.* 8, having authorized all and every person or persons to devise their lands, it was feared, that it might enable infants and insane persons to do it; and the *statute of* 34 *Hen.* 8, was passed to introduce these exceptions. *Beckford* v. *Wade*, 17 *Ves.* 88. The same principle was recognized in the decision, that the *Statute of Fines*, 4 *Hen.* 7, *c.* 24, bound infants. *Stowell* v. *Lord Zouch*, 1 *Plow.* 369. It is admitted to apply to statutes of limitation. *Demarest* v. *Wynkoop*, 3 *John. Ch. R.* 129. The statute regulating divorces should accordingly receive such construction as would enable any wife without regard to age to institute such a process. And the reasons, which would lead the mind to clothe her with that power by the common law, may justly be brought in aid of such a construction.

Decree confirmed as to divorce, and as to alimony it is reserved for further hearing.

KENNEBEC LOG DRIVING COMPANY *vs.* COLUMBUS BURRILL *& al.*

Where goods have been sold and delivered, and the purchaser has not been molested in the enjoyment of the property, and no other claimant has appeared, the purchaser is bound to fulfil his contract, and cannot defend himself against an action for the price, by showing how the vendor obtained his title, and that the title is defective.

By the words "prize logs," as used in the special act of 1835, *c.* 590, incorporating the *Kennebec Log Driving Company*, and in the additional act of 1838, *c.* 496, are intended only those logs to which, from the loss of all distinguishing marks or evidences of property, no title can be established by any claimant.

Those acts do no more than to interpose the protecting care of the legislature, by enactments similar to those respecting lost goods, rather for the preservation than the destruction of individual property, so far as it could be done after the loss of all the usual evidences of it; and are constitutional.

If the provisions respecting a sale of prize logs at auction, are still in force, it is for the legislature or the proper authorities only, to punish the corporation for a violation; and the purchaser of logs at private sale cannot set it up as a defence to an action for the price.

The corporation, as such derives no benefit from the sale of prize logs, but the benefit is received by those members only who are owners of logs floating to market; it is not required, that the president of the corporation should be a member of it; and the president, having sold out all his logs, after the commencement of the suit and before the trial, is a competent witness for the corporation.

ASSUMPSIT upon an account annexed to the writ, to recover the value of certain logs, called prize logs, sold by the plaintiffs to the defendants at private sale.

At the trial before WESTON C. J. the plaintiffs read in evidence the private act of *March* 20, 1835, *c.* 590, incorporating them, and granting certain privileges, and the additional act of *March* 26, 1838, *c.* 496. The plaintiffs then offered *Stephen Weston* as a witness, and he was objected to by the defendants. He stated that he had owned logs in the river *Kennebec* from the commencement of the action until within a few days of the trial, but was not then an owner. He was then a director of the company and president of the board. He was admitted, and testified. It was proved that the logs had been in possession of the plaintiffs, and had been sold at private sale and delivered to the defendants. The

jury returned a verdict for the plaintiffs, subject to two legal questions. First, whether it was competent for the legislature, by the act, to give title to the company in the logs called prize logs. Second, as there is no provision that the company can hold property, and as the act requires that prize logs shall be sold at auction, whether they can maintain assumpsit upon an express or implied promise, the sale not having been made at auction. If the witness ought not to have been admitted, or if the Court should be of opinion, that the action cannot be maintained upon either of those grounds of objection, the verdict was to be set aside.

Tenney, for the defendants, argued in support of three propositions, and contended, that the verdict should be set aside, if either objection was well taken.

1. *Weston was not a competent witness*, because he was interested, and because he was a party to the record. 7 *Mass. R.* 398; 12 *Mass. R.* 360; 16 *Mass. R.* 118; 7 *Pick.* 62; 3 *Stark. Ev.* 1061; 1 *Wend.* 119; 4 *Wend.* 453.

2. The plaintiffs cannot recover, because they did not pursue the provisions of the statute in selling at auction. A mode being pointed out by statute, they can sell in no other way. 6 *Mass. R.* 40; 2 *Cranch*, 127.

3. It was not competent for the legislature, by these acts, to give title to the company in the logs, called prize logs. The legislature have no power to transfer the property of one to another, even with compensation, and certainly not without. The acts are in these respects unconstitutional and void. *Dickinson* v. *Hall*, 14 *Pick.* 217; *Baker* v. *Page*, 2 *Fairf.* 381; *Savage* v. *Whitaker*, 3 *Shepl.* 24; *Constitution U. States, Art.* 1, § 10; *Const. Maine, Art.* 1, § 1, 11, 19; *Dartmouth College* v. *Woodward*, 4 *Wheat.* 518; *Holden* v. *James*, 11 *Mass. R.* 395; *Little* v. *Frost*, 3 *Mass. R.* 106; *Stevens* v. *Prop'rs Mid. Canal*, 12 *Mass. R.* 466; *Rice* v. *Parkman*, 16 *Mass. R.* 326; *Foster* v. *Essex Bank*, *ib.* 245; *Inhabitants of Milford* v. *Learned*, *ib.* 215; *Stackpole* v. *Healey*, *ib.* 33; 2 *Cranch*, 87; *Society for prop. Gospel* v. *Wheeler*, 2 *Gall.* 105; 7 *Johns. R.* 477; *Pro. Ken. Pur.* v. *Laboree*, 2 *Greenl.* 275; *Lewis* v. *Webb*, 3 *Greenl.* 326; 2 *Kent*, 13, 339; *Allen* v. *McKeen*, 1 *Sumner*, 276; 1 *Black. Com.* 44; *Co. Inst.* 46.

F. Allen argued for the plaintiffs.

Weston was a competent witness. He was not a party, for the corporation is plaintiff. He had no interest, for he had sold out his logs, and was entitled to no dividend of the proceeds, if the plaintiffs recovered, and was under no liabilities which could be changed by a verdict either way.

The defence set up is a gross violation of good faith, in attempting to avoid payment for property purchased of the plaintiffs, and received from them, and appropriated by the defendants to their own use, and no others than the plaintiffs claiming payment, or demanding the property. These facts alone are sufficient to enable us to maintain the action, if both the propositions of the gentleman are determined in his favor.

If a fair construction of the acts require a sale at auction at any time, it is only during the year after they are taken up. During that time they are held in trust for any owners, who may show property. Afterwards they become the property of the plaintiffs, and they may dispose of them as they please. But if the acts do require a sale at auction, the defendants do not show any rights under the original owners, and cannot object to the mode of sale.

It is impossible for any one owner of logs to get them down the river to market, without interfering with the logs of others. The statute merely regulates the mode of doing it for the common good. The argument, which has been advanced, is founded upon an erroneous view of the facts. The property of one man is not transferred to another man, but this description of lost property is kept for one year for the owner, if any such appears; and if no claim is made, is then divided among the owners of logs in the river, in proportion to their ownership. This is for the benefit of the owners, as they receive a portion of the proceeds. If the logs were not secured they would soon become derelict property at sea.

The opinion of the Court was drawn up by

Shepley J. — The defendants purchased of the corporation at private sale "certain logs called prize logs;" and this suit is brought to recover the amount agreed to be paid for them. They have not been molested in the appropriation of them to their use; and they have a right to call upon the corporation on an implied

warranty for any loss arising from a defect of title. They do not attempt to prove the title at the time of sale defective by proving it to have been in some other person or corporation. There is no other claimant. The attempt is to shew how the corporation obtained its title; and that the title so obtained is a defective one. It might be a sufficient answer to such a defence to say, that the defendants are bound to fulfil their contract, and that nothing can excuse them but proof, that they have been deprived of the property by a paramount title, or at least that some one has made a claim upon them for the property or its proceeds.

It is not denied that the corporation had a good title, if the legislature might constitutionally convey one. This is denied on the ground that the logs were the private property of some unknown persons and that the legislature could not transfer that property to the corporation. The argument rests, it is believed, upon a misapprehension of the effect of the legislative provisions respecting what are called prize logs. It alleges, that the legislature deprives some one of his right of property in the logs and transfers it to another; but the acts do not fairly admit of such a construction. And if the construction were doubtful it would be the duty of the court to adopt the one, which would not infringe the right of private property. Under the designation of prize logs does the law include all logs not artificially marked, although the title may be otherwise clearly proved; or only those, to which from the loss of all distinguishing marks or evidences of property no title can be established by any private person? If the latter description only be included, the allegation that the legislature has attempted to interfere with the right of private property is without foundation. In the act of *February* 28, 1807, the legislature of *Massachusetts* described them as "all logs, masts, spars and other timber, the marks of which have been so defaced as not to be known, commonly called prize logs." And the act provided, that "any person or persons *not the owners thereof*, who shall take, carry away, sell, or mark anew, any such prize logs," should be subject to a penalty. It will be perceived, that the owners of any of that description of logs were allowed to take, sell, or mark them anew, if they could in any manner establish their title. In the act of *Feb.* 2, 1816, the description is, logs and other timber, "unmarked, or

on which the marks shall have been so defaced as not to be known, commonly called prize logs;" and any persons "not being owners of such prize logs," were prohibited from taking, selling, or marking them.

The provisions contained in the act of *Feb.* 28, 1807, were re-enacted in this State, *c.* 168, § 8. There was a provision in the act of 1825, *c.* 295, § 2, "that all the prize logs on which no mark can be found whereby to identify the owner or owners shall be considered the property of the log owners generally;" with a proviso that nothing contained in the act should be considered as relating "to any logs having no mark, the ownership of which can be proved by good and sufficient evidence."

The act of 1827, *c.* 355, § 2, relating to the *Kennebec* and *Dead Rivers*, authorized the assessors named in the act to direct the master driver "what mark shall be put on the prize logs having no mark," and directed, that "such master driver shall sell the same together with all such as may be found at any time having no mark." This act does not appear to have recognized directly the right of any one to establish his title to logs found without an artificial mark. It was repealed among others by the act of 1831, *c.* 521, § 8, and there was no provision made in that act respecting prize logs. By the act of 1832, *c.* 8, § 3, provision was made, that mill logs in the *Androscoggin River*, and its tributary streams, "commonly called prize logs, the ownership of which cannot be ascertained by artificial marks *or otherwise* shall be the property," of a certain committee; recognizing the right of any one to establish his private property in them by any competent proof.

The act incorporating this company, *Special Laws*, 1835, *c.* 590, § 4, provides, "that all logs usually denominated prize logs," "and not having thereon some mark for the purpose of designating the owner or owners thereof shall be the property of the company, and the master driver shall from time to time sell the same at public vendue;" "provided, however, any owner or owners of logs sold as aforesaid may within one year from and after the time of such sale, on proof of his or their property therein, recover of said company the proceeds of the sale thereof on paying the expenses of driving and sale." The additional act of 1838, *Spec. Laws*,

c. 496, repeals the fourth section of the former act and provides, that no person shall mark any logs "denominated prize logs" before the same shall have been sold by the company; and that nothing in the act shall be construed so as to impair the exclusive right of the company to control and dispose of "all prize logs in *Kennebec* river." The provision, that owners might prove their property within a year after the sale, was not continued; and a provision is inserted for a distribution of an equal share of the proceeds of all prize logs among all, though not members of the company, who shall have owned and floated logs in the river in proportion to the number owned. This provision was doubtless made upon the presumption, that the prize logs must have been originally the property of those who owned the logs in the river. And it was thought to be just, when they could no longer distinguish what each owned, that the proceeds should be applied to the benefit of each in proportion as he owned in all the logs floated. Taking into consideration all the legislative provisions, which have been made respecting this description of logs, there is little reason to contend, that the legislature has attempted to violate the right of private property. It does not appear to have designed, with the exception perhaps of one act repealed, to do more than interpose its protecting care by enactments similar to those respecting lost goods, rather for the preservation than the destruction of individual property, so far as it could be done after the loss of all the usual evidences of it.

The provision respecting a sale at public vendue was contained in the fourth section of the act of incorporation, and was repealed by the fourth section of the additional act, which however speaks of a sale by the company as if it had been provided for by some existing law. And if the provision may be regarded as still binding upon the company, it is for the legislature or the proper authorities only to punish the corporation for a violation of its provisions.

The officer of the corporation, if he may be regarded as a member of it, does not appear to have had any interest in the amount to be recovered in this suit. Nor did he come within the rule, which excludes the parties to the record. The corporation as such derives no benefit from the sale of the prize logs. A benefit is received by those members only, who are the owners of logs floated to market. The witness was not an owner of logs, and so not en-

titled to any benefit either as a member of the corporation or as an owner. If he were proved to be a member of the corporation, there would be a contingent liability to pay any costs which the defendants might recover "in default of company property to satisfy the execution." There is no other evidence, that he was a member, than the fact that he was one of the board of directors and its president. There is no provision in the act requiring such an officer to be selected from among the members, and the court cannot therefore conclude, that there was even a contingent liability for cost.

Judgment on the verdict.

EBENEZER FRYE *vs.* LEWIS HINKLEY.

Where a misnomer of the defendant is pleaded, and the plaintiff replies, that the defendant is as well known by the one name as the other, the jury may well find the issue for the plaintiff, if they are satisfied that the defendant was as truly known and called by the name given in the writ as by that given in the plea; although the number of persons who knew and called him by the latter name might be greater, than that of those who knew and called him by the former.

Where a misnomer is pleaded, and an issue of fact is joined and tried, the judgment is to be peremptory; and therefore if the issue be found for the plaintiff, the jury should assess the damages.

Where in such case, the District Judge erroneously instructed the jury, that they had nothing to do with the question of damages; and the counsel for the defendant, at the trial, also contended for this; it does not furnish ground of exception on his part.

The omission of the jury to assess damages, on the trial of an issue on a plea of misnomer, does not require that the verdict should be set aside. The damages may either be assessed by the Court, as upon default or where a plea is adjudged bad upon demurrer, or that question may be put to another jury.

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

This was an action of assumpsit, in which the defendant was sued by the name of *Lewis Hinkley*. At the term at which the action was entered, the defendant filed a plea in abatement, that

his name was *Benjamin Lewis Hinkley*. The plaintiff replied, that the defendant was as well known by the name of *Lewis Hinkley*, as by the name of *Benjamin Lewis Hinkley*, and tendered an issue to the country thereon, which was joined.

The matter in issue therefore was, whether the defendant was called and known as well by the name of *Lewis Hinkley* as by that of *Benjamin Lewis Hinkley*. Upon this point, a large number of witnesses were introduced by each party. After the testimony and arguments had been closed, the Judge remarked to the jury, that the time of the court and jury had apparently been occupied in a matter of very trifling importance, the ascertainment of the name of one of the *Hallowell* coasters; that this inquiry seemed to be entirely unnecessary, because the defendant, even though sued by a wrong name, might have pleaded to the action, and thereupon had the merits of the action tried; and that on the other hand, the plaintiff as soon as the error was pointed out by the plea in abatement, might have had leave to amend by inserting the true name in the writ; but that however trifling the issue might seem to be, it was one which the parties had a right to present, — and that it was the duty of the jury to give to the subject the same careful and deliberate consideration, as if the matter in issue were one of more intrinsic importance. To this remark of the Judge the defendant excepted.

The jury were instructed, that if in the community where the defendant was known, he was as truly and really known and called by the name of *Lewis Hinkley* as by the name of *Benjamin Lewis Hinkley*, by persons supposing the former to be not a nickname, or a name drawn from his occupation, but his true and genuine name, they would find for the plaintiff; although the number of persons who knew and called him by the name of *Benjamin Lewis Hinkley*, might be greater than the number of those who called and knew him by the name of *Lewis Hinkley*.

The plaintiff's counsel had remarked to the Court that if the verdict on this issue should be for the plaintiff, he should expect a peremptory judgment against the defendant for damages. The defendant's counsel controverted this position, but in his argument to the jury, urged, that the plaintiff's pretension in this respect should lead them to be cautious in finding a verdict for the plaintiff. The

Judge remarked to the jury, that he did not feel called upon in this stage of the case to instruct them what the effect of the verdict would be; that it was a question on which he had as yet formed no opinion; that the jury in trying this issue, had nothing to do with the question of damages; but had merely to say whether the defendant was called and known as well by the name of *Lewis Hinkley*, as by that of *Benjamin Lewis Hinkley*. The verdict was for the plaintiff, finding that the defendant was known as well by the name of *Lewis Hinkley*, as *Benjamin Lewis Hinkley*.

No evidence was introduced or offered in relation to the amount of damages.

Subsequent to the rendition of the verdict and after the juries were dismissed, the plaintiff moved for judgment in chief against the defendant. The defendant moved that the pleadings might be set aside as a nullity, which was overruled. He then moved that judgment of *respondeas ouster* should be awarded. The Judge ruled, that the plaintiff was entitled to judgment in chief, to be assessed by a jury to be hereafter empannelled. To all which the defendant excepted.

Wells, for the defendant, contended: —

1. The remarks of the Judge had a very improper influence on the minds of the jury in leading them to believe that the issue was of very little consequence to the defendant.

2. The instruction was erroneous, because the jury under it would be authorized to find for the plaintiff, if he was really and truly known by the name of *Lewis Hinkley* by a small number of persons, when he was known to the community generally by the other.

3. The Judge should have told the jury, that the verdict would have some effect, if such was the law; and not leave them to believe it unimportant, and then decide that the judgment should not be *respondeas ouster*.

4. A man cannot have two christian names. *Franklin* v. *Talmadge*, 5 *Johns. R.* 8; *Jackson* v. *Stanley*, 10 *Johns. R.* 133; *Jackson* v. *Hart*, 12 *Johns. R.* 77; 1 *Willes*, 554; 1 *Campb.* 480, *note*; 1 *Ld. Raym.* 562; *Co. Lit.* 3 *(a)*; 3 *Bac. Abr.*

Title Misnomer; Commonwealth v. *Hall,* 3 *Pick.* 262; *Commonwealth* v. *Perkins,* 1 *Pick.* 388.

5. A man should not be punished for pleading what he knows and believes he can prove is his name. The ancient rule was founded on the ground of punishment for pleading a false plea. There should be correct names in all judicial proceedings, and the only punishment under our statutes is the payment of costs. The judgment should have been to answer over.

6. But in this case no damages have been found, and the judgment is a mere nullity, as much as in any other case where the verdict is final. We have here neither law nor practice to justify the finding for a party by one jury, and the assessment of damages by another. The assessment of damages is a part of the verdict. *Howe's Prac.* 262; 3 *Caines,* 80; *Bac. Abr. Title Verdict, M; Co. Lit.* 227 (*b*). If the plaintiff denied the fact, he should by the ancient rule, have prayed judgment for damages. 1 *Ld. Raym.* 594; *ib.* 338.

Vose for the plaintiff, contended that the defendant had no cause to complain of the remarks of the Judge in relation to the trial of this issue, for both parties were treated alike.

Nor is there any cause of complaint as it regards the instruction of the judge upon the number of persons knowing the defendant by one name or the other. It was precisely upon the issue joined. If a wrong one was tendered, the defendant should have demurred.

No case has been cited against the ruling of the Judge, that the judgment was peremptory, and not *respondeas ouster.* The law is perfectly well settled as the Judge decided.

One jury may settle the damages, as well as another. The case *Eichorn* v. *Le'maitre,* 2 *Wilson,* 367, is directly in point, and is very much like the present.

The opinion of the Court was by

Weston C. J. — On the question of misnomer, we perceive no error in the instructions of the Judge. Where an issue of fact is joined and tried, the authorities very clearly establish the doctrine, that the judgment is to be peremptory. The jury therefore should have assessed the damages. *Eichorn* v. *Le'maitre,* 2 *Wilson,* 367. The judge should not have instructed them, that they had

nothing to do with the question of damages; but as the counsel for the defendant also contended for this, it does not furnish ground of exception on his part. This omission does not, in our judgment, require that the verdict should be set aside. The damages may either be assessed by the court, as upon default, or where a plea is adjudged bad upon demurrer, or that question may be put to another jury. The reason why a new trial was granted, and a writ of inquiry refused, in the case cited from *Wilson*, where a similar omission occurred, was that otherwise the defendant would be deprived of his remedy by attaint, if the damages were outrageous. As this is a process not known to our law, there is no reason for sending the question of misnomer, to another jury.

Exceptions overruled.

JAMES B. NORRIS *vs.* REED SPENCER *& al.*

Whether the contract of one who engages to be responsible for another, is to be regarded as an original and joint, or as a collateral one, must depend upon the intention of the parties, to be ascertained from the nature of it and the language used.

Where a written contract is made in form between two, and signed by the parties named, and *at the same time*, a third person adds, *I agree to be security for the promisor in the above contract*, with his signature, the latter is holden as a joint promisor.

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

Assumpsit against *Reed Spencer* and *Charles Ramsdell.* To maintain the issue on his part, the plaintiff produced and proved a paper executed by the defendants and himself, and also proved performance on his part. The paper was not under seal, and commenced thus. "This agreement made and concluded by and between *J. B. Norris* of *Hallowell*, and *Reed Spencer* of *Bangor*, this sixth day of *January*, 1826." The agreement provides, that *Norris* should furnish *Spencer* a six ox team and driver on certain conditions and for an agreed compensation, to be paid by *Spencer* between the first and fifteenth of the then next *October*. It was

signed "*J. B. Norris.*
Reed Spencer."

Then followed on the same page—"I *Charles Ramsdell* of *Bangor*, county of *Penobscot*, agree to be security to the said *Norris* for the said *Spencer*, in the above contract.

"*Charles Ramsdell.*"

The counsel for the defendants objected, that the evidence introduced on the part of the plaintiff was insufficient to maintain the action. The Judge instructed the jury, that the paper, with proof of the performance of the contract on the part of the plaintiff, was sufficient to maintain the action. On the return of a verdict for the plaintiff the defendants filed exceptions.

McCobb, for the defendants, said, the only question presented in this case was, whether *Ramsdell* could be joined in this action as a joint promisor. He contended, that he was not to be considered as a surety, but merely collaterally liable, as a guarantor, and therefore not liable as a joint promisor. He cited *Little* v. *Weston*, 1 *Mass. R.* 156, *and the Editor's note; True* v. *Harding*, 3 *Fairf.* 193; 6 *Bingh.* 201; *Ulen* v. *Kittredge*, 7 *Mass. R.* 233; 2 *Campb.* 215; 1 *Vent.* 293; *Cowper*, 227, 460; *Fell on Guaranty*, 20, 177; 7 *T. R.* 197; 5 *Binney*, 195; 5 *B. & Ald.* 165; *Oxford Bank* v. *Haynes*, 8 *Pick.* 423; 1 *Dev.* 372; 8 *Wend.* 512; 7 *Peters*, 113; *Levy* v. *Merrill*, 4 *Greenl.* 180. To be a surety is to be bound with another. To be security for another, is to be bound for him as a collateral undertaking.

Wells, for the plaintiff, said that the paper was signed by both defendants at the same time, and that as the instrument had been drawn as between the plaintiff and *Spencer*, *Ramsdell* placed the words before his signature, to show that he was merely a surety. Here too it was for the same consideration, as well as made at the same time. To have made it a collateral undertaking, it should have been made at a different time and for a different consideration. The plain meaning of the words show, that *Ramsdell* undertook to be security or surety for *Spencer*. *Hunt* v. *Adams*, 5 *Mass. R.* 358.

The opinion of the Court was drawn up by

SHEPLEY J. — Whether the contract of one, who engages to be responsible for another, is to be regarded as an original and joint, or as a collateral one, must depend upon the intention of the parties, to be ascertained from the nature of it and the language used. This contract, being for labor to be performed, and containing the terms of payment, was signed by the plaintiff and *Spencer*, in whose ability to pay there was not so much confidence as to induce the plaintiff to dispense with his obtaining security. It having been prepared and signed by these parties, a third person, who designed to become jointly responsible, could not make that intention known by simply signing his name without any declaration of the object. This might have been accomplished by signing his name and adding the words surety for *Spencer*. And this, it is admitted, would have made him jointly responsible. Instead of this he describes the place of his residence and says, he "agrees to be security to the said *Norris* for the said *Spencer* in the above contract." The only important words are I agree to be security in the above contract. This contract being without a date and there being no proof to the contrary, is presumed to have been made at the time of the original one; and they become parts of the same transaction. He was to be security in the contract, which is equivalent to becoming a party to it; and without any intimation, that he was to be a favored party. There is nothing indicating, that he was to pay only in case *Spencer* did not. And this appears to have been a consideration of importance in determining whether the contract was collateral in the case of *Jones* v. *Cooper*, *Cowp.* 227. It is said that a surety is one, who is bound with and for another; while the word security only implies, that one is bound for another, and that he enters into a collateral undertaking, it being equivalent to the word guaranty; and that this Court has so declared in the case of *True* v. *Harding*, 3 *Fairf.* 193. The contract in that case being upon the back of it, was "to secure the within note" out of a particular fund, and therefore admitting of no doubt, that it was collateral. The court observe, that "to secure, is a term equally as strong as if he had engaged to guaranty and must be understood to have the same meaning." That is, it must be so understood, as used in that contract, not that it usually has the same meaning. It has

not by usage acquired a legal and technical meaning like the word guaranty. To become security in a contract is to become a party to it in the character of a surety unless there be something indicating a different intention. In the case of *Newbury* v. *Armstrong*, 6 *Bing.* 201, the contract was "to be security" for another and "in case of any default, to make the same good," and there was no contract by the one for whom he became security, and the terms also clearly exhibit its collateral character. This is more like the case of *Hunt* v. *Adams*, where the contract having been made at the time the note was signed, and containing nothing indicating that it was intended to be collateral, it was held to be a joint and several promise.

Exceptions overruled.

EZRA LEADBETTER *vs.* ISAAC BLETHEN.

An officer returned on a writ that he had "attached all the real estate of the within named J. L. (the debtor) to wit, all the right and interest he owns in the grist-mill and stream the said mill stands on in the town of *Wayne*, and his farm with his dwellinghouse and all other buildings thereon in said *Wayne*, in said County." The debtor owned a grist-mill and privilege; another tract of land of fifty acres on which was a house and barn; and another tract of three acres, near to but not adjoining the last tract, on which was a dwellinghouse in which he lived, a barn, and other buildings, all within the town of *Wayne*. The jury found that the three acre lot was not a part of the farm.

It was held, that the general words in the first clause of the return, were restricted and applied to the grist-mill and right of water only, and that the three acre lot was not attached under that description:—

That what tract of land then constituted his farm, there being no boundaries named, could not be ascertained from the return, and that it must necessarily be submitted to a jury to determine that fact:—

That the statement that his dwellinghouse was on the farm, was a circumstance tending to prove that the land on which the dwellinghouse stood should be regarded as a part of the farm, but was not necessarily conclusive, and might be controlled by other circumstances:—

And that the dwellinghouse in which the debtor lived was not attached, unless it was upon the farm.

WRIT OF ENTRY demanding about three acres of land in *Wayne* village. The land was formerly owned by *Jabez Leadbetter*, and

each party claimed under different levies thereon as his property. Judgments were duly rendered in both suits, and executions were taken out and levied on the premises demanded in each case, in *June*, 1834, within thirty days, after judgment; and the question was, which had the prior legal attachment.

The demandant claimed under *Abishai Wing*. The attachment in his suit was made on *July* 13, 1830. The tenant claimed under *David Betts*. The following is a copy of the return of the attachment of real estate on the writ, *David Betts* v. *Jabez Leadbetter*. "*Kennebec, ss. June* 12, 1829, at 11 o'clock A. M. I have attached all the real estate of the within named *Jabez Leadbetter*, to wit, all the right and interest he owns in the grist-mill and stream the said mill stands on in the town of *Wayne*, and his farm with his dwellinghouse and all other buildings thereon in said *Wayne*, in said county." Then followed the return of an attachment of personal property, and the signature of the deputy sheriff. It was in evidence at the trial before WESTON C. J. that on *June* 12, 1829, *Jabez Leadbetter* lived in a large house on the demanded premises, being a three acre lot conveyed to him *Sept.* 2, 1819; that on *March* 20, 1822, *E. Maxim* conveyed to him a farm containing fifty acres with a house and barn thereon. *Jabez Leadbetter* carried on and improved both lots, putting hay and produce in the barns on each lot; that the fifty acre lot was called "the farm, or the *Maxim* farm;" that for sometime a tenant lived in the house on that lot, but that at the time of the attachment of *Betts*, the house was much out of repair and considered of little value, and no person lived in it, but after the large house was burned in 1833, *Jabez Leadbetter* repaired this, and lived in it himself for two years; that the *Maxim* farm and the three acre lot did not adjoin, but the nearest sides were not more than twenty or thirty rods apart; and that the three acre lot, was commonly called "the lot" or "the home lot," and had thereon not only the dwellinghouse, but a barn and other small buildings. There was much evidence introduced on each side upon the question whether the three acre lot was or was not a part of *Jabez Leadbetter's* farm.

The counsel for the tenant contended, that although in the opinion of others, the three acre lot and the dwellinghouse on it, were not a part of the farm, yet if the officer making the attachment in-

tended to embrace them in his return, then they were to be considered as attached; and that if the whole of the three acre lot was not attached, his dwellinghouse on it was.

The Chief Justice instructed the jury, that what was in fact attached would depend on the language of the return, applied to the subject matter; that if the three acre lot was a part of the farm, it was attached with the buildings thereon; that if it was not a part of the farm, neither that lot, nor the buildings thereon, were attached; and that in such case the old house on the farm would satisfy the phrase "his dwellinghouse," in the officer's return, although his actual dwellinghouse at the time was on the three acre lot.

The jury found, that the three acre lot was not a part of his farm, and returned their verdict for the demandant. The verdict was to be set aside, if they were erroneously instructed.

Wells, for the defendant, contended, that the three acre lot was attached on *Betts'* writ. The finding of the jury has not settled the meaning of the words made use of by the officer. The common meaning of *his dwellinghouse* is the house in which that person resides or dwells; and a different expression is used to designate a dwellinghouse belonging to a person who does not occupy it.

His dwellinghouse, the house in which the debtor lived, was attached, whether upon the farm or not. That was attached, and the buildings thereon — on the land where his dwellinghouse was. If the same words were used in a deed, the house in which he lived, with the other buildings, and at least sufficient land for the enjoyment of them would pass.

But the officer attached *all* the real estate of the debtor in the county. *All* means the whole. Out of abundant caution, he specifies particular portions of it, but this does not prevent holding the whole. *Keith* v. *Reynolds*, 3 *Greenl.* 393; *Thorndike* v. *Richards*, 13 *Maine R.* 430. The to wit, applies only to the mill and stream.

May, for the demandant, agreed that it was for the Court not the jury to determine the meaning of the return. If that covers this land, then we fail, and if it does not, we succeed. The general words are limited and controlled by the particular ones follow-

ing. *Lyman* v. *Clark*, 9 *Mass. R.* 235; *Jackson* v. *Stevens*, 16 *Johns. R.* 110; *Allen* v. *Allen*, 14 *Maine R.* 387; *Whiting* v. *Dewey*, 15 *Pick.* 428; *Tyler* v. *Hammond*, 11 *Pick.* 193; *Crosby* v. *Parker*, 4 *Mass. R.* 110; *Jackson* v. *Clark*, 7 *Johns. R.* 217.

The three acre lot was not a part of the farm, and therefore was not attached on *Betts'* writ. The mention of the dwelling-house is of no other importance, than as a part of the description of the farm. There was a house on the farm as well as on the lot, and this was a mere immaterial circumstance. But this was a question for the jury to decide upon the evidence, and their verdict is conclusive of this question. *Waterman* v. *Johnson*, 13 *Pick.* 261; 8 *Johns. R.* 495; 5 *Har. & Johns.* 155.

If the first sentence of the return is not restricted to the property afterwards described, then the latter part is different from the former, and each standing alone would be a sufficient attachment. It would then be impossible to tell which was intended, and both would be void. *Taylor* v. *Mixter*, 11 *Pick.* 341; *Whitaker* v. *Sumner*, 9 *Pick.* 308.

The opinion of the Court was drawn up by

SHEPLEY J. — The rights of the parties depend upon the officer's return on the writ, *David Betts* v. *Jabez Leadbetter et al.* Does he in the first clause intend to say, that he has attached all the real estate of *Leadbetter*, in the town of *Wayne*, or only all his real estate in the grist-mill and stream on which it stands? If he intended to attach all his estate the limitation was unnecessary. It is a rule of construction, that effect is to be given, if possible, to all the language used. This rule would be violated if the limitation were wholly rejected. And effect is given to the words, all his real estate, when they are restrained to all his real estate in the grist-mill and stream. General words in a deed may be restrained by a particular recital, when such recital contains a certain description of what is to be conveyed or performed. *Solly* v. *Forbes*, 2 *Brod. & Bing.* 38. The general words are in the return restrained and applied to the grist-mill and right of water, and these are sufficiently described to create a lien by attachment. That such was the intention in the first clause is also apparent from the sec-

ond clause, which describes other real estate in the same town. The lot demanded cannot therefore be considered as attached under the first clause, or description of real estate. In the second he attaches his farm with his dwellinghouse and all other buildings thereon. What tract of land then constituted his farm, there being no boundaries named, could not be ascertained from the return itself. It was a fact, which must necessarily be submitted to a jury to determine. Their verdict decides, that the lot demanded was not a part of the farm. It is said, that such a decision must be erroneous, because it does not embrace his dwellinghouse. The statement that his dwellinghouse is on the farm is a circumstance tending to prove, that the land on which it stood, should be regarded as a part of the farm. But it was not necessarily conclusive. Other circumstances might be so controlling as to outweigh it, and require a different conclusion. And in such case, it must be considered as a false or mistaken circumstance in the description and be rejected. *Jackson* v. *Clark*, 7 *Johns. R.* 223. It is contended, that his dwellinghouse must be considered as attached whether upon the farm or not. It is however only the farm, which is attached including his dwellinghouse and all other buildings thereon. There is no dwellinghouse attached as a separate portion of the estate; and if there be no dwellinghouse on the farm there can be no attachment of it.

Judgment on the verdict.

JAMES B. NORRIS *vs.* HARTSON HALL.

In a suit by an assignee of a chose in action, in his own name, on an express promise of the debtor to pay the same to him, it is not necessary for the assignee to exhibit proof that the assignment was made for a valuable consideration.

And if such proof had been necessary, the deed of assignment, acknowledging the receipt of a consideration, was sufficient for that purpose.

A judgment against a trustee, although not satisfied, is a protection against a suit by his principal; but such protection cannot extend beyond the amount due upon the judgment.

After the judgment against the debtor and his trustee, if the principal pay to the judgment creditor a part of the amount, and thus relieve the trustee from his liability to that extent, and then bring a suit and obtain a verdict against his debtor, the trustee, for the amount thus paid; although there may be some difficulty in permitting the debtor to make a partial payment, and divide one debt into several parts, and thus bring several suits; yet as the trustee might have avoided such result by payment of the amount due from him, as soon as charged, the Court will not set aside the verdict, if the plaintiff will release any further claim upon the trustee.

Although the debt for which the trustee is charged is one bearing interest, he will not be held accountable for interest after he was summoned as trustee, when there is nothing to rebut the legal presumption that he was ready to pay, and was holding the money unemployed to await the decision; but where the facts rebut such presumption, he is chargeable with interest.

If the trustee lives within the county where the suit is brought, and does not appear in Court and submit himself to an examination, but makes oath to his answer before a justice of the peace out of court, and was not about to leave the State, and did not obtain the written consent of the plaintiff; he is not entitled to costs under the *st.* 1821, *c.* 61, and of 1830, *c.* 469.

Where one summoned as trustee, appears and submits himself to examination at the first term, and is adjudged to be trustee, he cannot deduct his costs from the goods, effects or credits in his hands, under the provisions of the *st.* of 1828, *c.* 382, unless his costs are taxed and allowed in Court.

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

The facts in this case sufficiently appear in the opinion of the Court. After the evidence was fully out, the counsel for the defendant contended, that he was entitled to retain from the goods, effects and credits in his hands the sum of eighteen dollars, as his costs. The Judge ruled, that he was entitled to retain, as costs, only $4,47. The Judge also ruled, that the defendant was en-

titled to retain so much of the two accounts sued as would be sufficient to pay the costs to which he was legally entitled as trustee, and also the amount due from *James B. Norris* on the judgments in which the defendant had been charged as trustee with interest thereon; and that the residue of the amount due on the two accounts might be recovered in this action.

The counsel for the defendant also contended as matter of law, that the plaintiff ought not to be allowed any interest by way of damages on sums claimed and proved to be due from the defendant during the time of the pendency of the trustee processes, or since he was adjudged trustee, and requested the Judge so to instruct the jury. The Judge instructed the jury to compute interest by way of damages on the whole amount proved to be due from the defendant from the time of the demand and promise proved to the present time.

The counsel for the defendant also contended, that inasmuch as there was no proof of any valuable or adequate consideration paid or allowed by said *James B. Norris* to said *Thomas J. Norris* for the alleged assignment, that the plaintiff had shown no title to the demand assigned. The Judge ruled, that the plaintiff could and ought to recover his damages without proof of such consideration, although the assignment aforesaid under seal may perhaps be presumptive evidence of the consideration therein expressed.

The counsel for the defendant also contended, that he was entitled, under the facts proved and stated, to a verdict in his favour, and that the plaintiff in this present action ought not to recover any balance caused by means of the sums paid by him towards the judgment to the judgment creditor. The Judge ruled, that such payments made and proved operated as a discharge *pro tanto* of the goods, effects and credits attached by the trustee processes, and that any balance caused by such payments might be and ought to be recovered of the defendant.

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

Clark, for the defendant, argued in support of the several points made at the trial in the District Court, and cited *Stat.* 1828, *c.* 382; *Stat.* 1821, *c.* 61; *Chapman* v. *Phillips*, 8 *Pick.* 25; *Wells* v. *Banister*, 4 *Mass. R.* 514; *Stat.* 1834, *c.* 95; *Foster*

v. *Jones*, 15 *Mass. R.* 185; *Field* v. *How*, 5 *Mass. R.* 390; *White* v. *Garland*, 7 *Mass. R.* 453; *Thomas* v. *Sever*, 12 *Mass. R.* 379; *Ford* v. *Wright*, 7 *N. H. Rep.* 586; *Perkins* v. *Parker*, 1 *Mass. R.* 117; *Dunning* v. *Sayward*, 1 *Greenl.* 366; *Mills* v. *Wyman*, 3 *Pick.* 207; *Chitty on Pl.* 462; *Winthrop* v. *Carleton*, 8 *Mass. R.* 456; *Wise* v. *Hilton*, 4 *Greenl.* 435; *Matthews* v. *Houghton*, 2 *Fairf.* 377; *Adams* v. *Rowe*, *ib.* 89; *Meriam* v. *Rundlet*, 13 *Pick.* 511; *Stevens* v. *Gaylord*, 11 *Mass. R.* 256.

Wells argued for the plaintiff: —

That the consideration for the promise was good. *Crocker* v. *Whitney*, 10 *Mass. R.* 316; *Mowry* v. *Todd*, 12 *Mass. R.* 281.

If any costs are to be allowed, the Judge allowed the full amount to which the defendant was entitled. But he was not entitled to any costs. The disclosure before the justice was a mere nullity, as he had never appeared in court. *Stat.* 1830, *c.* 182.

If the trustee uses the fund, he ought to pay interest. He was not charged with any interest on the amount for which he was liable. He declined to pay, when he was charged as trustee, and he ought to be held to pay interest. *Prescott* v. *Parker*, 4 *Mass. R.* 170.

The verdict was right, being only for the balance, leaving in his hands enough to pay the full amount for which he was liable. If complaint is to be made, we are the party to make it, as we may be compelled still to pay the rest of the judgment. *St.* 1834, *c.* 95.

The opinion of the Court was drawn up by

Shepley J. — It appears that the defendant was indebted to the plaintiff before the month of *June*, 1835, for goods sold and delivered. And that he was also indebted to *Thomas J. Norris* for goods sold and delivered; and that this claim with others had been assigned by deed to the plaintiff. The defendant in *June*, 1835, promised to pay both these debts to the plaintiff. Having neglected to do so, the plaintiff commenced this suit, on the 20th *July*, 1836, to recover them. The defendant objected to his right to recover the debt originally due to *T. J. Norris*, because he had not exhibited proof, that the assignment of it was made for a val-

uable consideration. The creditors of *T. J. Norris* might have interposed to prevent a recovery by the plaintiff without proof that the assignment was made for a valuable consideration, but it was of no importance to the defendant. It was sufficient for him that the plaintiff was authorized to receive it. The defendant, if he could have availed himself of such an objection, had waived it by his express promise to the plaintiff. And if such proof had been necessary, the deed itself was sufficient.

During the pendency of this suit the defendant had been summoned as the trustee of the plaintiff in three other suits. In two of them he disclosed and was adjudged trustee, and in the other he was discharged by a discontinuance of the suit as to the trustee. Executions issued and a demand was made upon him as trustee for payment and he neglected to pay. The first judgment against him as trustee was satisfied by a joint promisor with the plaintiff. The second remained unsatisfied to the time of this trial, when forty dollars were paid upon it, and it being thus reduced, there would remain a balance due to the plaintiff after the defendant should pay the amount still due upon it.

It was decided in *Matthews* v. *Houghton*, 2 *Fairf.* 377, that a judgment against a trustee was a protection against a suit by his principal although not satisfied. But such protection cannot extend beyond the amount due upon the judgment. And the Judge in this case was obliged to act upon the evidence introduced, and that proved the judgment to be partly satisfied. Whether the holder of that judgment was obliged to receive a partial payment, it is unnecessary here to determine. The judgment was admitted by the court to be a protection for the amount remaining due upon it. There is a difficulty however in allowing the principal to pay a part of his debt, relieve the trustee from his liability as to that part, and then bring a suit for it, and thus continue to divide one debt into several parts and bring several suits. The defendant might in this case have avoided such a result by an immediate payment of the amount due from him, and this it was his duty to have done after he was adjudged trustee. The plaintiff has offered to release any further claim against the defendant, and if that be done the objection to a multiplication of suits will be avoided, and there will be no just cause for setting aside this verdict on that account.

Another objection interposed relates to the amount of interest with which the defendant was charged. When he was summoned as trustee he was legally chargeable with an accruing interest. The conclusion must be, that if he had the money then unemployed he would before that time have satisfied these undisputed demands. And the fact that he did not pay it over, when it was demanded after he had been adjudged trustee, shews, that he could not have procured it and held it unemployed during the pendency of the trustee suits. The party in such cases is not chargeable with interest, when there is nothing to rebut the legal presumption that he is ready to pay and is holding the money unemployed to await the decision of the law. The facts in this case sufficiently rebut such a presumption, and prove the defendant to have been in fault whenever a call for payment was made upon him; and he was properly charged with interest on the amount due.

Another objection is, that he was not allowed to retain his legal costs. The residence of the trustee was in the county where the suit was brought. He might by the provisions of the statute *c.* 61, § 6, appear in court and there submit himself to examination and after having done so he might make oath to the truth of his answers before a judge or justice of the peace out of court. One summoned as a trustee, who is about to leave the state may, by the provisions of the statute, *c.* 469, upon notice given, make his disclosure before a magistrate out of court. And any trustee may do so by the written consent of the plaintiff in the action. There is a reference in the bill of exceptions to the records and dockets, and from them it does not appear, that the trustee ever appeared in court. In his disclosure there is a statement, that he came into court, but it is contained in the formal statement of his coming and submitting himself to examination, and may as well be made in a disclosure before a magistrate as in one taken in court.

There is another difficulty deserving consideration. There were no costs taxed for the trustee. By the provisions of the statute 1828, *c.* 382, one who appears at the first term and discloses, if adjudged trustee, is entitled to costs in the same manner as parties in civil actions, who have an issue joined for trial; and he may deduct the amount of such costs from the effects in his hands. "Costs" to which parties are entitled in civil actions, is a legal

term implying an amount derived from items to be regularly taxed and allowed to be due to the party by the judgment of the court. And it appears from that provision of the statute creating a lien on specific articles in the hands of the trustee for his costs, that the legislature had reference to costs thus legally taxed and adjudged to be due; for it provides that the officer selling the property shall pay his costs according to the certificate of the clerk on the margin of the execution. This case therefore affords no satisfactory evidence that the trustee was legally entitled to costs; for it does not appear that he came into court and there submitted himself to examination at the first term, or if he did, that any costs were allowed and taxed for him by the judgment of the court.

Exceptions overruled upon the plaintiff's filing a release of further claim for the sums sued for.

Benjamin Ellis *vs.* William Beale.

Horse racing, or horse trotting, is a game within the *st.* 1821, *c.* 18, "to prevent gaming for money or other property."

This statute, with respect to the party losing, is not penal but remedial.

Money lost by betting upon the speed of horses in a trotting match, may, under the provisions of that statute, be recovered back.

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

The action was money had and received, and was brought to recover back the sum of fifty dollars lost at gaming. The plaintiff offered to prove, that he and the defendant agreed to trot horses, and laid a wager of fifty dollars on the speed of their respective horses; that the amount of the wager was deposited in the hands of a stakeholder, to be paid to the winner of the wager; that the plaintiff and defendant did trot their horses; and that the stakeholder thereupon paid the fifty dollars deposited in his hands by the plaintiff to the defendant as the winner. The action was commenced within three months from the time of the wager.

The plaintiff contended, that this was a case within the statute

entitled "an act to prevent gaming for money or other property," and insisted on his right to recover back his money under the provisions of that act.

The Judge ruled, that the facts stated, if proved, would not support the action, and excluded the testimony on that ground. The plaintiff filed exceptions.

Wells and *Morrill*, for the plaintiff, said that the suit was brought to recover back money lost by gaming under our *st.* 1821, *c.* 18, § 2. Our statute is the same as the *Mass. stat.* of 1786; and that the *st.* 1786, was the same as that of 9th *Anne*, with the exception of two or three words not touching this question. The latter is found in *Bac. Abr. Gaming, B.* Horse racing, horse trotting, cock-fighting, and card playing for money, are prohibited, and the money may be recovered back. 5 *Dane*, 209; 1 *ib.* 693; 2 *B. & Pul.* 130; 4 *Bl. Com.* 173; 7 *T. R.* 316; 6 *ib.* 499; *Chitty on Con.* 241. All wagers in this State are unlawful. *Lewis* v. *Littlefield*, 15 *Maine Rep.* 233. This is a remedial law. 5 *Dane*, 210. The wrong does not consist in trotting the horses, but in gaming, and in keeping the money won at gaming in that way.

May, for the defendant, said that the exceptions presented the single question, whether the money could be recovered back by the provisions of the statute. Whether it can be or not at common law is not open. Where the act is unlawful, and the parties stand in *pari delicto*, the money received under the unlawful contract cannot be recovered back. 2 *Hall*, 299; 11 *Mass. R.* 368; 3 *Pick.* 446.

The cases referred to in *Black. Com.* cited for the plaintiff, were all under the *stat.* of 16 *Charles* 2*d*, *c.* 7. That statute expressly extends to horse races and foot races. They are omitted in the *statute* of *Anne*, as well as in that of *Massachusetts*, and in our own. They therefore were not intended to be included. The statute is penal, and not remedial, and should be strictly construed. 3 *N. H. Rep.* 52; 7 *Cowen*, 496.

The opinion of the Court was by

WESTON C. J. — The question, upon which this cause must necessarily turn is, whether horse racing is a game, within the *stat.*

of 1821, *c.* 18. If it is, there can be no just distinction taken, between the trotting and racing of horses. And we are of opinion, that horse racing is a game; and so within the statute. Cards and dice are expressly named. "Any other game," embraces a great variety of other devices of chance or skill, by which money may be lost or won. Cock fighting, horse racing and foot racing are called games, by the statute, 16 *Charles* 2*d*, *c.* 7.

Under the *stat.* of 9 *Anne*, *c.* 14, although horse racing is not mentioned, it has been held to be embraced in the act, under the general words, other game or games. *Bluxton* v. *Pye*, 2 *Wilson*, 309. So a foot race has been adjudged to be a game within the same statute. *Brown* v. *Berkeley*, *Cowper*, 281. In *Segel* v. *Jebb*, 3 *Stark. R.* 1, *Abbott C. J.* was of opinion, that the statute applied to all games, whether of skill or chance, and that it was the playing for money, which made them unlawful. The statute with respect to the party losing, is remedial not penal. *Bines* v. *Booth*, 2 *Wm. Bl.* 1226. Horse racing is within all the mischiefs, which render gaming unlawful.

Exceptions sustained.

GRANITE BANK *vs.* NATHANIEL TREAT *& al.*

In an action upon a bond given to procure the release of a debtor arrested on execution, not only can the proceedings of the justices who admitted the debtor to take the oath, be proved by their record, or by a copy thereof, but the certificate of the justices is also competent evidence.

No presumption is to be made in favor of inferior tribunals, and therefore the jurisdiction of the justices must appear upon the face of the proceedings.

Where the certificate of the justices states their own character, the parties to the process, the commitment of the debtor, his desire to take the oath, and that he had caused the creditor to be notified according to law; these facts are sufficient to make out a *prima facie* case of jurisdiction.

The certificate however would not be conclusive on this point, and it would be competent for the plaintiff to prove that they had not jurisdiction.

Where the condition of the bond does not expressly require, that the certificate should be filed with the keeper of the prison, the bond is not forfeited by the omission to file it.

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

Debt on a bond, dated *Feb.* 15, 1838, given by *Shaw*, a debtor in execution, as principal, and by *Treat* as surety, under the acts for the relief of poor debtors. The condition of the bond was in the common form, and contained no stipulation that the debtor should file the certificate of his discharge with the prison keeper. The plaintiffs proved the signatures and execution of the bond, and introduced it in evidence, but offered no other proof.

The only evidence offered by the defendants was a certificate of two justices of the peace and of the quorum, in the form required by the poor debtor acts, stating that *Shaw* did take the oath before them *July* 28, 1838. There was no evidence, that the certificate was ever filed with the prison keeper, or at his office, but was delivered by one of the justices, to the counsel for the defendant at the trial. The certificate showed, that the creditor was duly cited and notified of the time and place of caption. The counsel for the plaintiffs objected to the admission of this certificate, but the Judge overruled the objection, and admitted it in evidence. The plaintiffs then objected, that the same as the case then stood, did not amount to a full answer and defence to the plaintiffs' case.

The Judge ruled, that if the plaintiffs did not present further evidence, the certificate was a full and sufficient answer and defence.

The plaintiffs excepted to the ruling of the Judge.

H. W. Fuller, jr. in his argument for the plaintiffs, with other grounds, contended, that the defendants were bound to show that the magistrates had jurisdiction, before their defence was made out. The jurisdiction of the magistrates depends entirely upon the regularity of the previous proceedings, and they must be shown to have been correct by the defendants, before the certificate of discharge can be evidence. Nothing will be presumed in favor of the jurisdiction of inferior magistrates, and it is the duty of the defendants to prove it affirmatively. *Knight* v. *Norton*, 3 *Shepl.* 337.

It is the duty of the justices to make and keep a record of their proceedings "and enter up judgment in due form as in other cases." *Stat.* 1822, *c.* 209, § 14. The proceedings necessary to give the justices jurisdiction should be upon the record, and their own proceedings and adjudications. These must be proved by the record. It is not enough to say that such things have been done and performed, but they must be proved to have been done by the proper evidence, the record. *Kendrick* v. *Gregory*, 9 *Greenl.* 22; *Murray* v. *Neally*, 2 *Fairf.* 241; *Vose* v. *Howard*, 1 *Shepl.* 268.

The certificate was not properly admitted because it had never been filed with the jailer. It can be of no avail until it has been thus filed. *Stat.* 1835, *c.* 195, § 10; *Knight* v. *Norton*, before cited.

No case has gone so far as to say that the certificate is conclusive evidence of the jurisdiction, but only as to certain facts. In *Slasson* v. *Brown*, 20 *Pick.* 436, the court permitted the plaintiff to go behind the return of the magistrates, and contradict the certificate.

Vose, for the defendants, contended, that the certificate of the justices was, *prima facie*, evidence of the fulfilment of the conditions of the bond. It was decided to be conclusive evidence in *Black* v. *Ballard*, 1 *Shepl.* 239, and in *Agry* v. *Betts*, 3 *Fairf.* 415.

The case cited from 20 *Pick.* merely decides that the certificate

is not conclusive evidence, and it was there held to be, *prima facie*, sufficient. That case does not conflict with the ruling of the District Judge in this case. The plaintiffs had the opportunity to contradict the certificate, if they could.

The condition of the bond does not require that the certificate should be lodged with the jailer, and therefore it becomes unnecessary to inquire how far the omission may influence a case where it does.

The opinion of the Court was by

SHEPLEY J. — It should appear that the magistrates had jurisdiction, to make their record or certificate evidence of the facts therein stated. It is said, that there is not sufficient evidence in this case to prove it, because they are required to keep a record, which is the best and only proper evidence of their proceedings.

The statute, *c.* 195, § 10, provides, that the justices shall make out a certificate and deliver it to the debtor; and it makes it the evidence upon which the prison keeper is required to discharge him, and the evidence of his exemption from imprisonment on that or any other execution to be issued on the same judgment or any other judgment founded thereon. In the cases of *Kendrick* v. *Gregory*, 9 *Greenl.* 22; *Murray* v. *Neally*, 2 *Fairf.* 241; and *Agry* v. *Betts*, 3 *Fairf.* 415, copies of the proceedings, or the originals, appear to have been introduced; and while it is decided that a copy of the record is competent and proper evidence, no one of the cases decides, that the certificate is not also evidence. On the contrary it stated in *Kendrick* v. *Gregory*, that the proceedings of the justices may be proved by their record "as well as by a certificate founded on the record."

The certificate was stated to be evidence also in the case of *Black* v. *Ballard*.

It is true as stated in the argument, that no presumption is to be made in favor of an inferior tribunal. Its jurisdiction must appear on the face of its proceedings. Their certificate in this case states their own character, the parties to the process, the commitment of the debtor, his desire to take the oath, and that he had caused the creditor to be notified according to law; and these facts are sufficient to make out a prima facie case of jurisdiction. The certifi-

cate however would not be conclusive on this point, and it would be competent for the plaintiff to prove that they had not jurisdiction. *Smith* v. *Rice*, 11 *Mass. R.* 507. And the cases, which have decided that the record or certificate was conclusive evidence of the facts therein stated, did not decide it to be so in cases where it appeared that the justices had no jurisdiction.

It was decided in *Kendrick* v. *Gregory*, and in *Murray* v. *Neally*, that a neglect to file the certificate with the prison keeper was no breach of the bond under the statute of 1822, and the statute of 1835 does not materially differ from it on that point. It is said that the creditor may be wholly unable to ascertain whether the debtor has taken the oath, if the certificate be not filed. It may be very desirable that it should be filed, and that the condition of the bond should require it; but the court cannot decide, that the bond is forfeited for an omission to do an act not required by it.

Exceptions overruled.

ORRIN D. CROMMETT *vs.* WILLIAM PEARSON *& al.*

Where the defendant in an action of *trespass quare clausum*, becomes defaulted, he has a right to be heard in damages.

Where in such case the damages are assessed by a jury, in pursuance of a request made by the plaintiff, either party may except to any legal opinion of the presiding Judge, instructing them upon what principles they should be governed.

The records of a town cannot be contradicted by parol evidence, in respect to matters regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of law.

In laying out a road, the selectmen of a town may lawfully perform their duty by a majority of the whole number.

The return of the laying out of a road to the town must be made and signed by a majority of the selectmen, but they may depute to one of their own number, or to any other person, the actual location by running out the road, and marking and setting up monuments.

And where one of their own number is employed, it is immaterial whether it was done in virtue of a previous consultation, or was subsequently approved and ratified.

One of the selectmen may employ the hand of another to affix his signature.

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

Trespass *quare clausum*. The defendants were defaulted, and the plaintiffs filed a written motion that their damages should be assessed by a jury. A jury was thereupon empannelled. It appeared that the defendants had opened a pathway across the land of the plaintiff, and had passed thereon with teams. Measures were taken by which, as the defendants alleged, a town way was established on the same path. The plaintiffs denied, that there was a road legally laid out. The parties agreed, that if the road was laid out legally the damages should be nine dollars, and if not, thirty-four dollars.

At the trial in the District Court, it was admitted by the counsel for the plaintiff, that the records of the town, upon the face of them, exhibited such proceedings, if uncontrolled or unimpaired by their evidence, would constitute the town way a legal one. The records contained a certified copy of a return purporting to be signed by two of the selectmen, being a majority, which defines the boun-

daries of the highway, and states that they, the two selectmen, had laid out the same. The plaintiffs then offered to prove by parol testimony, "that in fact only one of the selectmen was present at the making of the location, or had any knowledge of it at that time; that the selectman, who laid out the road, affixed to the original return the name of another of the selectmen, having obtained his permission so to do after said location." To the admission of this testimony the defendants objected.

The Judge rejected the testimony, and instructed the jury that it was not admissible to control or impair the face of the records, and that their verdict should be but for the nine dollars.

The plaintiffs filed exceptions.

I. Redington argued for the plaintiffs, and cited *Harlow* v. *Pike*, 3 *Greenl.* 438; *Stark. Ev.* 252, 1014; *Cowp.* 640; *Haskell* v. *Haven*, 3 *Pick.* 404; *Slasson* v. *Brown*, 20 *Pick.* 436.

Boutelle argued for the defendants, citing *Stat.* 1824, *c.* 260, § 4; *Taylor* v. *Henry*, 2 *Pick.* 397; *Manning* v. *Fifth Par. in Gloucester*, 6 *Pick.* 16; *Bruce* v. *Holden*, 21 *Pick.* 187; *Jones* v. *Andover*, 9 *Pick.* 146.

The opinion of the Court was drawn up by

Weston C. J. — Although the defendants had been defaulted, and were no longer at liberty to controvert the cause of action set forth in the plaintiffs' declaration, they had a right to be heard in damages. And if settled by a jury, in pursuance of a request made by the plaintiffs, we are of opinion, that either party might except to any legal opinion of the presiding Judge in instructing them, upon what principles, they should be governed.

It would, in our judgment, be of dangerous consequence to suffer the records of a town to be contradicted by parol evidence, in respect to matters, regularly within the jurisdiction of a town or its officers, and which is entered of record in pursuance of law. It has been held, that parol proof is inadmissible to supply an omission in town records. *Taylor* v. *Henry*, 2 *Pick.* 397. In *Manning et al.* v. *The fifth parish in Gloucester*, the same evidence was rejected in regard to parish records. There is a still stronger reason, for the exclusion of such evidence to contradict them. In *Jones* v. *The Inhabitants of Andover*, where the laying out of a

town road was in controversy, the court say, "we are satisfied that a board of selectmen in this, as well as other branches of their duty, may lawfully perform their duty by a major part of the whole number."

But if the testimony were admissible, we are not satisfied, that it would vitiate the proceedings. The selectmen are not obliged to locate the road in person. They may perform this service either personally, or by such person or persons, as they shall appoint. *St.* of 1821, *c.* 118, § 9. By this it must be understood, that although the return of the laying out to the town, must be made and signed by a majority of the selectmen, they may depute to another the actual location, by running out the road, and marking or setting up monuments. If they availed themselves of the agency of one of their number for this purpose, we are aware of no legal objection to such a course, whether this was done in virtue of a previous consultation, or subsequently approved and ratified. If one of the selectmen employed the hand of another to affix his signature, he made it his, as much as if he had done it by his own hand.

Exceptions overruled.

THE STATE *vs.* DAVID SNOW *& als.*

In criminal cases, the jury are the judges of the law as well as the fact.

If persons innocently and lawfully assembled, afterwards confederate to do an unlawful act of violence, suddenly proposed and assented to, and thereupon do an act of violence in pursuance of such purpose, although their whole purpose should not be consummated, *it is a riot.*

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

This was an indictment against *Snow* and three others, for a riot. The respondents with many others, were collected together at a militia training. The facts in the case are found in the opinion of the Court. The counsel for the accused contended, that in criminal cases the jury were the judges of the law as well as of the facts.

The Judge ruled, that the law was otherwise, excepting in cases of libel, and instructed the jury, that they were to receive the law from the Court in this case as in civil cases.

The counsel for the defendants requested the Judge to instruct the jury, that if they were satisfied, that it was the object of the defendants to ride the complainants upon a rail, and that they did not execute that object, they were not guilty of a riot. The Judge declined to give such instruction.

Vose, for the defendants, said that there was no evidence of any previous confederacy to commit a riot, and had only taken some steps towards an act, which might have caused one, if carried into effect. It is not a riot, unless the object is accomplished. 1 *Hawk. P. C.* 293.

The jury in criminal cases, are judges of the law as well as of the fact. *St.* 1821, *c.* 84, § 12; *The People* v. *Croswell*, 3 *Johns. Cas.* 337; 4 *Black. Com.* 361; *Commonwealth* v. *Knapp*, 10 *Pick.* 497.

Emery, Attorney General, remarked, that the case showed, that the four persons actually proceeded to the commission of personal violence. To constitute a riot, it is not necessary that all should be accomplished, which was intended. *Russell on Cr.* 247, *and note; Roscoe on Cr. Ev.* 728.

Our constitution expressly provides, that the jury shall judge of the law as well as the facts in cases of libel, thus implying, that in all other cases the Court and jury should both attend to their own peculiar duties. If the jury are to judge of the law, their construction of it cannot be known, and hence no uniformity in the law, and no mode of revising it in the highest court; and no remedy however flagrantly the decision may defeat public justice, or oppress an individual.

The opinion of the Court was drawn up by

Weston C. J. — The counsel for the defendants waives the exception taken to the mode of proof at the trial.

Blackstone defines a riot to be, where three or more actually do an unlawful act of violence. 4 *Bl. Com.* 146. It seems however, that there must be some degree of premeditation, for the execution of a common purpose. But if persons innocently and law-

fully assembled, afterwards confederate to do an unlawful act of violence, suddenly proposed and assented to, and thereupon do an act of violence, in pursuance of such purpose, this is a riot. 2 *Russell*, 250. If they proceed to this length, it is not necessary, that their whole purpose should be consummated. In this case, the defendants having united to ride the complainant on a rail, seized his person, and were proceeding to the accomplishment of their object, when he was rescued from their hands, by the interference of others. The Judge was right in declining to instruct the jury, that having failed to effect their entire purpose, they were not guilty of a riot.

But the presiding Judge erred, in determining that in criminal cases, the jury are not the judges of the law as well as the fact. Both are involved in the issue, they are called upon to try; and the better opinion very clearly is, that the law and the fact are equally submitted to their determination. It is doubtless their duty to decide according to law; and as discreet men, they must be aware, that the best advice they can get upon this point, is from the Court. But if they believe they can be justified in deciding differently, they have a right to take upon themselves that responsibility. The question is very elaborately discussed and exhausted by *Kent J.* in the *People* v. *Croswell*, 3 *Johns. Cas.* 337. The opinion of the Court was given to the same effect, in the *Commonwealth* v. *Knapp*, 10 *Pick.* 497.

Exceptions sustained.

ALFRED MUDGET *vs.* CHARLES B. KENT.

After final judgment in the District Court, exceptions will not lie to any proceedings in the action prior to the rendition of the judgment.

If the District Court should proceed to render judgment in an action where exceptions were allowed, it would afford just cause for new exceptions.

But a party cannot except to any proceedings of a court, which take place in accordance with his own request, or by his consent.

And if a judgment be rendered in the District Court at the request of a party, the rendition of such judgment will furnish no cause for exception on his part.

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

The action was debt, originally commenced before a justice of the peace, and carried by appeal to the District Court. Under instructions from the District Judge on matters of law, the jury returned a verdict for the defendant. The exceptions state, that upon the rendition of the verdict, the plaintiff's counsel moved for leave to file exceptions, *and requested the judgment to be entered up.* The Judge suggested whether it might not be too late, after judgment, to file exceptions. The plaintiff's counsel however, after taking time, and examining, and citing certain statutes, preferred to have judgment rendered. Thereupon in pursuance of the verdict, the Judge rendered judgment, that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and recover his costs. "To which proceedings and several rulings and instructions of the Judge as aforesaid the plaintiff excepts, and he also excepts to the rendition of the judgment rendered upon the verdict as aforesaid."

Clark, for the plaintiff, contended, that the exceptions were taken at the proper time. But if they were not, then the judgment ought not to have been rendered, and that is a sufficient ground of exception.

Wells, for the defendant, insisted, that exceptions did not lie to an irregular final judgment. The remedy then is by appeal, petition for new trial, or by writ of error. *Stat.* 1839, *c.* 373, § 5; *Stat.* 1822, *c.* 193. Exceptions lie to matters arising during the progress of a cause. *Warren* v. *Litchfield*, 7 *Greenl.* 63.

The opinion of the Court was prepared by

SHEPLEY J. — The act establishing District Courts, *Stat.* 1839, *c.* 373, § 5, provides, that when exceptions shall be allowed and signed "all further proceedings shall be stayed; and the party making such exceptions shall enter such action" in this court, and shall produce all papers as in cases of appeal. And this court is to consider and determine the same, and "render judgment thereon" or grant a new trial as law and justice may require. The intention is clearly exhibited, that the District Court should not in such cases proceed to judgment. The proceedings are to be stayed, not completed, there. And this court is to render the judgment, when it does not find a new trial to be necessary. It would afford just cause for new exceptions, if that court should proceed to render judgment on a case, where exceptions were allowed. But a party cannot except to any proceedings of a court, which take place in accordance with his own request, or by his consent. The judgment in this case having been rendered at the request of the plaintiff is not vacated according to any of the provisions of the statute. For the statute does not in such cases authorize an appeal from a judgment, but introduces the case here, that a proper one may be rendered. The exceptions taken to the prior proceedings were not by the statute designed to vacate a judgment by consent. The plaintiff is precluded from having his exceptions considered here, because he does not present the case to this court in the manner required by law. Not being so presented, this court can take no cognizance of it; and it must be dismissed.

BENJAMIN EMMONS *vs.* LEVERETT LORD.

The *statute* of 1839, *c.* 373, § 4, determines and limits appeals from the District Court, and that section is not varied by the appealing clause in the twelfth section. The will of the legislature, as expressed in the fourth section, operates in effect as a repeal of all prior legislation inconsistent with it.

If no exception is taken in the District Court to the form of the action, none can be taken in this Court, when brought up by exceptions for other causes.

Where, in consideration of the services of a minor son for a stipulated time, a mechanic entered into a written contract with the father to learn the son a trade, to pay a certain sum, and to board him, and where the minor, while on a visit at his father's house during the time, was taken sick there, the master is liable to the father for the board of the son.

If evidence of a usage in the place where the contract was made, that the master under such circumstances was held to pay for the minor's board during his sickness, be admitted at the trial, it being consistent with the contract, the admission of such usage furnishes no cause for a new trial.

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

This was an action of assumpsit, on an account annexed, for boarding and washing for the plaintiff's son, for the term of three months.

The plaintiff offered a writing signed by the defendant, but not sealed. The defendant objected to the introduction of this paper; but the objection was overruled and the paper was read, as follows. "*Hallowell, August* 20, 1836. Then agreed with *Benjamin Emmons* to take his son *Benjamin* until he is twenty-one years of age, and learn him the shoemakers trade, and give him $15 the first year. $25 the second. $35 the third. $45 the fourth year. — board, washing, and three months schooling. — The first year ends the 8th *May*, 1837." The plaintiff then proved, that his son *Benjamin* was one evening on a visit at his house, and was there suddenly taken so severely sick as to render it unsuitable and unsafe for him to be removed for several weeks to the defendant's house. The claim in this action is for board and washing for the son while thus detained at the plaintiff's house. The son had boarded with the defendant up to the time of the sickness, and after the sickness returned to board with the defendant, where he now continues to live and to board. The plaintiff then offered to prove

that there was a general custom among mechanics for masters to pay the expenses of apprentices, while sick, whether at their parents' house or elsewhere, and whether the apprentices were indented or not. The defendant objected to the introduction of this testimony. The objection was overruled, and the plaintiff introduced several witnesses, who testified relative to such custom, and the defendant then called several witnesses who testified on the same subject. It was proved that the boy was at work with the defendant learning the shoemakers trade, at the time when the written contract was made, and has continued to live with him to the present time, excepting while he was at his father's house.

The Judge instructed the jury, that the paper contract did not of itself, unexplained by custom, impose an obligation upon the defendant to bear the expenses sued for, as it was a mere contract of hiring. But that, as every department of business might have its own usages, of which all, pertaining to the trade, are supposed to be conversant, with reference to which their contracts relative to that business are made, and as nothing is mentioned in the contract as to expenses incurred by the parent in a contingency like this; the custom among such mechanics may be considered by the jury, not as being conclusive, but as evidence in ascertaining what was the real intent of the parties. That, as the boy had resided and boarded with the defendant, the jury would judge whether, if defendant was bound to support the boy in sickness, it was his privilege to board and support him at his, the defendant's house. That if so, he could not be required to maintain him elsewhere, except by his own consent, or by act of providence. That there was no evidence of such consent, and therefore, that the defendant cannot be charged unless, and for no longer period than the boy was disabled by the act of providence to return to defendant's house with safety. The jury found a verdict for the plaintiff. The defendant claimed a right to appeal on finding sufficient sureties. But the Judge refused to allow the appeal, believing it to be unauthorized by law. The defendant filed exceptions.

Paine, for the defendant, contended, that this was not a binding under the statute, but a mere contract of hiring. *Day* v. *Everett*, 7 *Mass. R.* 145. The plaintiff should have brought his action on the contract, and not have declared upon an account annexed

to his writ. Unless he declared upon it, he could not support his action by the contract. 6 *Conn. R.* 100; 2 *Pick.* 267; 18 *Johns. R.* 169; 1 *Bibb.* 565. Here was no privity of contract. The law will not imply a promise from a stranger to pay the father for the support of his son.

The evidence of usage was improperly admitted. 2 *Sumner*, 377; 9 *Wheat.* 581; 3 *Wash. C. C. R.* 150; 10 *Mass. R.* 26; 12 *Pick.* 107.

The law allows an appeal in all cases originally commenced in the C. C. Pleas or District Court. The statutes of 1826, *c.* 347; 1829, *c.* 444; *st.* 1835, *c.* 165; 1839, *c.* 373, were commented upon, and the conclusion drawn that the right to appeal in all such cases existed.

Vose, for the plaintiff, said, that if the objection to the form of action had been made in the District Court, it would have been remedied by an amendment. It is now too late to make it.

The usage was a reasonable, proper and humane one, and the proof of it was properly admitted. 3 *Greenl.* 376; 6 *Greenl.* 154.

The statutes referred to, it was contended, did not authorize the conclusion drawn from them.

The opinion of the Court was drawn up by

WESTON C. J. — Upon examining and comparing the several statutes, to which we have been referred, by the counsel for the defendant, we are satisfied, that an appeal does not lie from the District Court to this Court, in all actions originally commenced in the District Court, as contended for by him. The statute of 1839, *c.* 373, § 4, determines and limits appeals from the District Court. And this cannot be deemed to be varied by the repealing clauses in the twelfth section. The will of the legislature, as expressed in the fourth section, operates in effect as a repeal of all prior legislation, inconsistent with it.

No exception was taken, in the trial below, to the form of the action; and it is a point therefore not open to the defendant.

By the terms of the contract, the board and washing of the plaintiff's son was assumed by the defendant. There is nothing which limits the performance of this duty only to the time, when

the son should remain in the enjoyment of health; and we perceive no reason why such a condition should be implied. If it was otherwise understood, from a well settled usage, with reference to which the contract might be presumed to have been made, it might perhaps control its construction. But a usage that the charge for board and washing, which is all that is here claimed, should be borne by the defendant is both reasonable in itself, and consistent with the contract. If this could not, by the providence of God, be supplied at the defendant's house, why should he not furnish it elsewhere? He undertook to do it for the period limited, and nothing has taken place to relieve him from that obligation. It may deserve consideration, whether the plaintiff had any occasion to resort to proof of usage. But if such a usage existed, which the jury have found, it is consistent with the contract, and not in our judgment liable to any legal objection.

Exceptions overruled.

JAMES ABBOTT *vs.* ABNER MITCHELL *& al.*

The payee of a negotiable note, who has indorsed it "*without recourse*," is a competent witness for the indorsee, in an action against the maker, to prove that a material alteration of the note was made by the promiser at the time it was signed, and before its delivery to the payee.

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

Assumpsit on a note given by the defendants to *John Albee*, and by him indorsed to the plaintiff "*without recourse.*" After the note had been read to the jury, the *defendants* called the subscribing witness thereto, who testified, that he put his signature to it at the time it was given, and that the words "with interest," had since been added. The plaintiff thereupon called *Albee*, the indorser, *without recourse*, and having offered him a discharge signed by the attorney of record, offered to prove by the indorser, that the words, *with interest*, were written by *Nathaniel Mitchell*, one of the defendants, with the consent of the other, at the time the

note was signed, and before it was delivered to him. The defendant objected to the witness as incompetent from interest.

The Judge was of opinion, that *Albee* was an incompetent witness, by reason of his interest, and excluded him. The plaintiff filed exceptions.

Bradbury, for the plaintiff, contended, that the witness offered was competent to testify in *England*. 2 *Stark. Ev.* 744; 1 *Ld. Raymond*, 745; *Chitty on Bills*, 415; *Dickinson* v. *Prentice*, 4 *Esp. R.* 32; *Barber* v. *Gingall*, 3 *Esp. R.* 62. And he was clearly competent by the decisions in *Massachusetts*, made too while we were a part of that State. *Rice* v. *Stearns*, 3 *Mass. R.* 225; *Barker* v. *Prentiss*, 6 *Mass. R.* 430; *Parker* v. *Hanson*, 7 *Mass. R.* 470. And in *Connecticut*. *Cowles* v. *Hart*, 3 *Conn. R.* 516.

Vose, for the defendant, contended, that the indorser was not a competent witness, and cited 2 *Stark. Ev.* 745; *Bayley on Bills*, 376; *Herrick* v. *Whitney*, 15 *Johns. R.* 240; *Shaver* v. *Ehle*, 16 *Johns. R.* 201.

The opinion of the Court was drawn up by

Weston C. J. — On an indorsement without recourse the better opinion is, that the indorser is liable upon an implied warranty that the note is genuine. When the question is, whether the note is genuine or a forgery, he has been held incompetent. *Herrick* v. *Whitney*, 15 *Johns. R.* 240; *Shaver* v. *Ehle*, 16 *ib.* 201.

It may admit of question, whether if a jury had found in this case, that the note is unavailable, by reason of an alteration, it would conclude the proposed witness, or be evidence for or against him, if sued by the holder. If the plaintiff prevails, he will be relieved from the hazard of such a suit. But this contingency, it has been said, does not render him incompetent, but is matter of observation to the jury. *Chitty on Bills*, 9*th Amer. Ed.* from the 8*th Eng. Ed.* 654.

But notwithstanding the authorities cited from *New-York*, and the legal ground upon which they appear to rest, we must regard the law to have been decided otherwise in *Massachusetts*, when we were a part of that State, and the decisions there equally binding on us.

In *Rice* v. *Stearns & al.* 3 *Mass. R.* 225, which was an action on a negotiable note, by the indorser against the makers, where two of them denied their signatures, the indorser, at the risk of the indorsee, was received as a competent witness to prove them genuine. And this was so held, although it was contended, that the witness would be liable, if the note was a forgery. So in *Parker* v. *Hanson*, 7 *Mass. R.* 470, the payee of a negotiable note, who had indorsed it "not to be holden," where the question was, whether it had been materially altered, was held to have no interest in the event of the suit. It may however be said, that he was there called to testify against his interest, if he had any. In *Barker* v. *Prentiss*, 6 *Mass. R.* 430, an indorser without recourse, was admitted to testify, that the indorsement was not made to transfer the bill to the plaintiff, but as the agents of the payee, for collection only. There also the witness testified against his interest, if he had any; but *Parsons C. J.* said, that if the plaintiff failed in the action, he would have no recourse to the witness. In *Cowles* v. *Hart & al.*, 3 *Conn. R.* 516, which was an action by the indorsee of a bill against the drawer, the cases from *Massachusetts* are cited with approbation, and an indorser without recourse was received as a witness for the plaintiff.

Upon the whole, we do not feel justified in denying the authority of the case of *Rice* v. *Stearns & al.* upon the authority of which the witness rejected here was admissible.

Exceptions sustained.

Horace Flanders *vs.* Elisha P. Barstow.

By a conveyance of goods in mortgage, the whole legal title passes conditionally to the mortgagee; and if not redeemed at the time stipulated, his title becomes absolute at law; though equity will interfere to compel a redemption.

If a mortgage of goods be made, conditioned to be void on the payment of one note in sixty days and another in ninety days, the title of the mortgagee becomes absolute at law on the failure to pay the notes at the times they respectively become payable; but although the mortgage be under seal, the time of payment may be enlarged by parol, and the condition saved until the expiration of the extended time.

An agreement "to extend the mortgage fifteen or twenty days," gives an extension of the time of payment of each note for the term of twenty days beyond the time they respectively become payable, and no further.

And if the goods be sold by the mortgagee, after the condition had been broken by the neglect of payment of one of the notes for more than twenty days after it became payable, for a sum exceeding the amount of the notes, the balance cannot be recovered of the mortgagee in an action for money had and received.

This action was assumpsit for money had and received. The action was referred to referees, who reported a state of facts, and based their opinion upon the decisions of certain questions of law, specially referred to the Court. From the report and papers referred to, it appeared, that on *April* 19, 1837, the plaintiff mortgaged to the defendant, by an instrument under seal, certain personal property to secure the payment of one note payable in sixty days and another in ninety days from date. The bill of sale was to be void on the payment of those notes when they fell due. It was proved by parol testimony, that "two days before the first note fell due, an agent of the plaintiff called upon the defendant, and requested him to extend the mortgage fifteen or twenty days, and the defendant distinctly agreed to extend the mortgage fifteen or twenty days." Seven days after the last note became payable, the defendant took and sold the mortgaged property and converted the same into money. The property sold for more than the amount of the notes. On *Sept.* 24, 1837, the plaintiff tendered to the defendant the amount of both notes. It was submitted, whether on these facts the action could be maintained. The District Judge ordered judgment to be rendered for the defendant, and the plaintiff excepted.

Bradbury, for the plaintiff, urged, that the true construction of the agreement "to extend the mortgage," was to extend the time of payment on each of the notes for the term of fifteen days after it became payable. As the property was sold but seven days after the last note was payable, the plaintiff is entitled to recover the balance. This is an equitable action, and in equity the plaintiff is entitled only to his debt.

Boutelle, for the defendant, contended, that the extension of time had only reference to the first note. But if it had reference to both, the result would be the same, for the first note was not paid, and the sale was long after the expiration of the fifteen days given on that note. The language must be construed according to the common acceptation of the words. 2 *Kent*, 557; *Story on Bailments*, 197.

The opinion of the Court was drawn up by

WESTON C. J. — The right of the plaintiff to recover in this action, will depend upon the question, whether at the time of the sale by the defendant, of the chattels described in the schedule annexed to the mortgage, his title thereto had become absolute at law. And we are of opinion, that such was the fact.

By a conveyance of goods in mortgage, the whole legal title passes conditionally to the mortgagee; and if not redeemed at the time stipulated, his title becomes absolute at law; though equity will interfere to compel a redemption. *Story on Bailments*, c. 5, § 287; 4 *Kent*, 138.

If the condition had been broken at the time of the sale, the defendant's legal title had become absolute. The plaintiff having failed to pay the first note, at the time stipulated, was a breach of the condition, if the time had not been enlarged. Being enlarged, the condition was saved, until the extended time had run out. The parol agreement, made by the defendant was, that he would extend the mortgage fifteen or twenty days. This would fairly give to the plaintiff an extension for the longer period. To entitle the plaintiff to redeem, by the condition of the mortgage, he was to pay two sums of equal amount, the one in sixty, and the other in ninety days, from the date of the instrument.

It is insisted, by the counsel for the plaintiff, that under the pa-

rol agreement, he might delay payment of both notes, without forfeiting his right to redeem, for fifteen or twenty days, after the second note was payable. This is extending the indulgence granted beyond what it will fairly bear. It may be justly understood to mean, that the plaintiff was to have an extension of fifteen or twenty days, upon each note. Upon the construction, set up by the plaintiff, it would be giving him forty-five or fifty days enlarged time, upon the first note, which we think is not deducible from the language used by the defendant.

Exceptions overruled.

GEORGE KIMBALL *vs.* NATHANIEL MOODY *& al.*

In the *st.* 1839, *c.* 373, establishing district courts, there is no provision like that in some of the former acts for an *appeal* from a judgment on an issue in law or case stated by the parties, unless the damages demanded exceed the sum of two hundred dollars.

In all cases therefore, not falling within the exceptions relating to certain descriptions of actions, where the damages demanded do not exceed that sum, the only provision made for bringing them before this Court is *by bill of exceptions.*

THE action was upon a bond given to procure the release of the principal from an arrest upon an execution, under the poor debtor acts. The action was originally commenced in the Court of Common Pleas, the amount of damages demanded, being less than two hundred dollars. After the act establishing the District Court had gone into operation, the parties agreed upon a statement of facts, each reserving his right to appeal to the Supreme Judicial Court. The District Judge ordered judgment to be rendered for the defendant, and the plaintiff *appealed from this judgment.* On the entry of the action in this Court, the counsel for the defendants moved to dismiss it, because no appeal was allowed in a case like this, the remedy being by exceptions only.

Child, for the defendants, said, that the *st.* 1839, *c.* 373, "to abolish the Court of Common Pleas, and establish District Courts," repealed all other acts regulating appeals to the Supreme Judicial Court. With certain exceptions not applicable to the present case,

that act restricts appeals to cases "in which the debt or damage demanded shall exceed two hundred dollars."

F. Allen, for the plaintiff.

The opinion of the Court was drawn up by

SHEPLEY J. — This case is presented on an appeal, and not stated in a bill of exceptions; and the counsel for the defendant insists, that it is not regularly here for consideration.

By the act establishing a Court of Common Pleas, *c.* 193, § 4, provision was made for an appeal in personal actions wherein any issue was joined and the damage demanded exceeded one hundred dollars. That provision was repealed by the additional act regulating judicial process and proceedings, *c.* 347; and by the fourth section of the latter act provision was made for an appeal in any action originally commenced in the Court of Common Pleas, in which an issue had been joined. This last provision was repealed by the fourth section of the act of the 4th of *March*, 1829, *c.* 444, and the second section authorized an appeal from a judgment upon an issue in law or case stated by the parties, where it was not agreed, that the judgment should be final. The act of 1829 was repealed by the ninth section of the act of *March* 11, 1835, *c.* 165, by the second section of which, provision was again made for appeals from judgments on issues in law and cases stated by the parties. This second section was repealed by the twelfth section of the act to establish District Courts, *c.* 373. And the fourth section of this last act provides for appeals in personal actions wherein any issue is joined and in which the damage demanded shall exceed two hundred dollars; and the fifth section provides for a revision of any opinion, direction or judgment of that Court in any matter of law by exceptions. There is no provision like that in some of the former acts for an appeal from a judgment on an issue in law or case stated by the parties unless the damages demanded exceed the sum of two hundred dollars. In all cases therefore where the damages demanded do not exceed that sum, the only provision made for bringing them before this Court, is by bill of exceptions.

In examining these several statutes, it will be perceived, that no notice has been taken of certain exceptions relating to the action

of trespass and certain other actions, or of the consequences resulting from appeals in certain cases; for they did not affect the question under consideration.

The result is, that there existed no right of appeal from the judgment in this case, and the suit must be dismissed.

Note by the Reporter. By the Revised Statutes, *c.* 97, § 13, "any party, aggrieved at the judgment of any district court, on any demurrer or agreed statement of facts," may *appeal therefrom* to the next Supreme Judicial Court.

JOHN A. PITTS *vs.* HIRAM MOWER *& al.*

Where an agent sells the goods of his principal, and takes a promissory note payable to himself, the principal may interfere before payment, and forbid it to be made to his agent; and a payment to the agent after this will not be good.

And the principal may sue in his own name on the contract of sale, except when, as with us, it is extinguished by taking a negotiable promise, the law regarding the express contract made with the agent as made with the principal, and not extinguished by a note not negotiable.

When the payee of a note not negotiable, given to an agent in his own name, is notified, before payment, or judgment against him as trustee, that the principal was the owner of the property sold, and that he claimed to have the payment made to himself; if the payee disregard such notice, the rights of the principal are not impaired by such payment or judgment.

The disclosure of a trustee and the judgment upon it are to be received in evidence only between those, who were parties to the suit.

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

Assumpsit. The first count in the writ was on an account annexed, charging a "horse power," and the second and third set forth in different modes the facts on which the plaintiff relied to maintain his action. The evidence at the trial is given in the exceptions, from which it appeared that *Hiram A. Pitts* was the agent of the plaintiff in selling articles called horse powers, and sold one to the defendants, taking their note therefor, running to himself, payable in specific articles, but stating to them at the time, that it belonged to the plaintiff. A copy of the judgment, and disclosures

of the defendants as trustees of *Hiram A. Pitts* were read in evidence by the defendants, the plaintiffs objecting thereto. The material facts in the case appear in the opinion of the Court.

Upon the evidence the Judge instructed the jury, that they would first determine whether *Hiram A. Pitts* was the authorized agent of the plaintiff for selling horse powers, and if they should find he was such agent, whether he had authority to take a note running to himself for a horse power; and if he was such agent and had such authority, whether he designedly accepted the note in payment for the horse power sued for in this action; and that if they should find an affirmative answer to the inquiries, the plaintiff was not entitled to recover.

The plaintiff requested the Judge to instruct the jury, that if they found, that the defendants, or either of them, promised *Hiram A. Pitts*, as the agent of the plaintiff, to pay the note to the plaintiff, in the same manner as if written running to the plaintiff, then this action could be maintained. The Judge declined to give the requested instruction, there being, as the exceptions state, no evidence, in the opinion of the Court, that if one of the defendants made such promise, the other had authorized him so to do. The plaintiff excepted to the ruling and instructions given, and to the refusal to give the instruction requested.

Wells and *May*, for the plaintiff, contended, that the answers of the defendants, as trustees of *Hiram A. Pitts*, were improperly admitted. *Wise* v. *Hilton*, 4 *Greenl.* 435; *Edmond* v. *Caldwell*, 15 *Maine R.* 340.

A promise to pay the note to the plaintiff made by the defendants or either of them would sustain the action, and therefore the instructions requested should have been given. *Crocker* v. *Whitney*, 10 *Mass. R.* 316; *Coolidge* v. *Ruggles*, 15 *Mass. R.* 387; *Boardman* v. *Gore*, *ib.* 331; *Smith* v. *Jones*, 3 *Fairf.* 332; *Lang* v. *Fiske*, 2 *Fairf.* 385; *Munroe* v. *Conner*, 15 *Maine R.* 178.

The instructions given were manifestly erroneous. *Kelly* v. *Munson*, 7 *Mass. R.* 319; *Titcomb* v. *Seaver*, 4 *Greenl.* 542; *Edmond* v. *Caldwell*, 15 *Maine R.* 340; *West Boylston Man'g Co.* v. *Searle*, 15 *Pick.* 225.

H. A. Smith argued for the defendants.

The plaintiff cannot recover upon an implied promise, because

the law will never imply a promise, where an express one has been made. *Whiting* v. *Sullivan*, 7 *Mass. R.* 107.

Joint owners of a particular piece of property are not bound like general partners, by the acts of each other. Even if the benefit of this note enured to the plaintiff, the legal interest remains in the payee, in whose name only can payment be enforced in law. *W. B. Man. Co.* v. *Searle*, 15 *Pick.* 230.

This note, being payable on time and in specific articles, did amount to payment. A judgment in this action would be no bar to an action on the note by the payee. *Wise* v. *Hilton*, 4 *Greenl.* 435.

The plaintiff can have his remedy against his agent, but the defendants are without remedy. 3 *Mass. R.* 403.

The agent was authorized to take payment, and it is immaterial whether it was in a note to himself or in cash. The same rule of law is necessary to protect the rights of purchasers in one case as in the other. 4 *Greenl.* 340; 5 *Mass. R.* 53; 15 *Pick.* 184.

There was sufficient evidence to support the verdict without the judgment and disclosures of the trustees, and the verdict will not be set aside for the admission of immaterial evidence. 1 *Greenl.* 17. But the judgment against the defendants as trustees of the payee of the note is equivalent to a payment to him, and therefore admissible. 6 *Greenl.* 226.

The opinion of the Court was by

SHEPLEY J. — It has been decided, that the disclosure of a trustee and the judgment upon it are to be received in evidence only between those, who are parties to the suit. *Wise* v. *Hilton*, 4 *Greenl.* 435.

In this case the plaintiff was not a party to the suit in which the disclosure was made, and he is not bound by that judgment.

When an agent sells the goods of his principal and takes a promissory note payable to himself, the principal may interpose before payment, and forbid it to be made to his agent; and a payment to the agent after this will not be good. And the principal may sue in his own name on the contract of sale, except when, as with us, it is extinguished by taking a negotiable promise. It is

said in argument for the defendants, that the law will not imply a promise where there is an express one; and that there being an express one in the note to *Hiram A. Pitts* one cannot be implied to the plaintiff. The law regards the express contract made with the agent in the purchase as made with the principal and as remaining unextinguished by the note not negotiable. These rights of the principal are well established, and were recognized in the cases of *Titcomb* v. *Seaver*, 4 *Greenl.* 542, and *Edmond* v. *Caldwell*, 15 *Maine R.* 340. In this case the defendants were notified before payment or judgment against them as trustees, that the plaintiff was the owner of the property sold, and that he claimed to have the payment made to himself. If they thought proper to disregard that notice, the rights of the plaintiff cannot thereby be impaired.

Exceptions sustained and new trial granted.

Horace Gould *vs.* William C. Fuller.

As a general rule, whatever payment one surety may receive from the principal shall enure to the benefit of all; but where payment of the debt for which all were liable, has been made by one surety, and the claim against each of the others to contribute has become fixed, each may look to his principal for a reimbursement of the share paid by him, on his separate account.

If one of two sureties has actually paid the debt for which both were liable, he may recover of the other surety half the amount thereof, although after such payment he may have been repaid by the principal the other half expressly for his separate indemnity.

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

Assumpsit for money paid, laid out and expended, the suit having been commenced *July* 22, 1839. The plaintiff and defendant had been sureties for *Asa H. Hankerson* in a note to *G. W. Stanley*. *Fuller* received certain property of *Hankerson* to be appropriated to the payment of the note, and it was disposed of, and the proceeds paid over to *Stanley* at different times, the last payment having been made *March* 12, 1834. In *October*, 1838,

the plaintiff paid to *Stanley* the balance then due on the note, amounting to $83,05.

The defendant proved, that on *March* 6, 1839, the plaintiff settled with *Hankerson* for one half the amount he had paid on his account, and gave him a receipt as follows. "*March* 6, 1839. This day received of *Asa H. Hankerson* forty-five dollars in full for my half of a note signed by myself and *William C. Fuller*, and *Asa H. Hankerson* as principal, dated *Sept.* 1832. The property I received for this was for my special benefit. *Horace Gould.*" And at the same time *Hankerson* gave *Gould* a writing of this tenor. "This may certify that the money I paid *Horace Gould* is for his separate benefit, and not for *William C. Fuller's* and his together. *March* 6, 1839. *Asa H. Hankerson.*"

The plaintiff requested the Judge to instruct the jury, that the plaintiff was entitled to recover of the defendant the other half of the amount which had been paid by him with interest from the time it was paid. The Judge declined to give this instruction, and among other things did instruct them, that if all of the indorsements upon the back of said note were paid from the funds of *Hankerson*, and if defendant had paid on the note no more than he had received from said funds, then the plaintiff would be entitled to recover of the defendant only one half of such sum as should remain, after deducting from the amount paid by him all the moneys which he had received in payment for his part of the note on *March* 6, 1839, with interest on the same from the date of the writ, this being one half the actual loss which the plaintiff had sustained. The jury found a verdict for the plaintiff, assessing the damages at $12,72.

The plaintiff filed exceptions to the instructions, and to the refusal to instruct.

May, for the plaintiff, contended, that the instruction was wrong in saying that the defendant was entitled to the benefit of one half the amount received by the plaintiff of the principal, *March* 6, 1839. This was not the case of one surety receiving indemnity from the principal, which enures for the benefit of all. The payment was made after this relation had been extinguished by a payment of the note by the plaintiff as a surety. The defendant became the debtor to the plaintiff for one half and was to look to the

principal for it. The only remedy for the plaintiff for the other half was on the principal, and it was paid specially as such. On a fair settlement with the defendant by the principal, nothing might be due. A release takes effect only according to the intention of the parties. *Holland* v. *Weld*, 4 *Greenl.* 255.

The surety is entitled to interest on any advances he is compelled to make, as such. 1 *Pick.* 118; 5 *Cowen*, 596; 9 *Pick.* 368; 14 *Mass. R.* 455; 17 *Mass. R.* 169.

E. Fuller, for the defendant, submitted the case without argument on his part.

The opinion of the Court was by

WESTON C. J. — Where one of several co-sureties, receives security or moneys from the principal, the whole enures to the benefit of all the sureties. It has the same effect, as if so much had been paid by the principal himself to the creditor. Until an adjustment is made, whatever indemnity or payment one receives, he must account for with his co-sureties. So the law was laid down by *Jackson J.* in *Bachelder* v. *Fiske et al.* 17 *Mass. R.* 464. To the same effect are the cases of *Messer* v. *Swan*, 4 *N. H. R.* 481, and of *Low* v. *Smart*, 5 *N. H. R.* 353. In *Messer* v. *Swan* it was held that in general, whatever payment one surety may receive from the principal, shall enure to the benefit of all. It was however there intimated, that where payment has been made, and the matter of contribution has been adjusted, each may look to the principal for a reimbursement of his share, on his separate account.

In the case before us, the plaintiff, in *Oct.* 1838, paid the balance of the whole debt, for which the defendant stood equally bound. This gave him a right to call upon the defendant for the one half of this sum, and for the other his remedy was against the principal. And it ought not to be impaired, by the neglect of the co-surety to pay his just proportion. When the whole of the obligation, for which both were liable, was discharged, the plaintiff's claim for reimbursement against his co-surety and the principal, each for one half, became fixed.

This should give to him all the rights which would result from an actual adjustment between the parties. It is in fact an adjustment, which the law makes, arising from the equity of the case.

The claim for contribution, depends upon a doctrine purely equitable. Hence it is not enforced in favor of one surety against another, who became such at his request. *Turner* v. *Davies*, 2 *Esp. R.* 478. So if one surety actually pays, we do not feel the force of the equity, which would suspend his right to receive for his several benefit a reimbursement of one half from his principal, until it might suit the convenience of his co-surety to make contribution, or until he might be compelled to do so by an action at law. It would be withholding from a vigilant surety, in favor of a negligent one, an advantage to which he is well entitled.

If the paying surety subsequently receive a sum of money from the principal, not claimed or specifically paid for his several reimbursement, it might enure to the joint benefit of himself and his co-surety. But if payment is paid and received, as it was here, to restore to him what the principal alone, and not the co-surety was bound to refund, it is only carrying out an adjustment, which the law imposes, and we perceive no good reason why the liability of the negligent surety should be thereby diminished. In our opinion the instructions requested of the presiding Judge should have been given.

Exceptions sustained.

The State *vs.* Isaac Shurtliff.

The party whose name is alleged to have been forged, is a competent witness upon the trial, under an indictment for forgery.

On such trial, it is competent to prove by the party attempted to be defrauded, without notice to produce papers, that the defendant had previously brought to him the draft of an instrument which he saw and read, but never executed, and which was different from the deed afterwards brought to him as the same, and as such executed by him.

Where the grantee agreed with the grantor to purchase an acre of his farm, and procured the draft of a deed correctly describing the land agreed to be conveyed, and exhibited it to the grantor, who examined it, and found it right, but the execution of it was delayed, and the draft was retained by the grantee; and the grantee afterwards fraudulently procured the draft of another deed, describing the grantor's whole farm, and presented it to the grantor for his signature as the deed before examined, and it was executed and delivered; *this was held to be forgery.*

This was an indictment for the forgery of a deed, conveying certain land to *Shurtliff*. At the trial before Weston C. J., *Thomas Buker*, whose deed was alleged to have been forged, was offered as a witness by the government. He was objected to as incompetent by the counsel for the defendant, but the objection was overruled. The Attorney General proposed to prove by the witness, that the defendant had prepared and brought to *Buker* a deed other than that which was alleged to have been forged, and which after having been read by him went back to the hands of *Shurtliff*. It was objected by his counsel, that it was not competent for the government to prove, that there was such a deed, and that it was other than the one alleged to have been forged, without first notifying the defendant to produce the first deed, but this objection was overruled. It appeared, that *Buker* had agreed to sell to the defendant, who was the owner of land adjoining his, a small piece of land of about one acre, being a part of his, *Buker's* farm, for ten dollars; that in pursuance of this agreement, the defendant, prepared a deed, which *Buker* read, and with which he was satisfied; that they thereupon agreed to meet at the house of a justice of the peace for the purpose of executing it; that the defendant without the consent, privity or knowledge of *Buker*, prepared the deed set forth in the indictment, and which purported to convey *Buker's* whole farm; that when they met at the house of the justice, who

lived about three miles from their residence, the defendant took from his hat and laid upon the table, partly folded, the last mentioned deed; that *Buker*, supposing it to have been the deed, which he had seen and read, executed and delivered it, without having read it, although he might have done so, if he had unfolded it. The counsel for the defendant contended, that these facts did not constitute the crime of forgery. The Chief Justice ruled, that the facts stated did constitute the crime of forgery. The jury returned a verdict of guilty, which was to be set aside, if the Court should be of opinion that the testimony objected to was improperly admitted, or that the crime of forgery had not been proved.

Bradbury argued for *Shurtliff*: —

1. That *Buker*, whose deed was alleged to have been forged, was not a competent witness. The decisions, it was said, were not uniform, in some states a witness thus circumstanced being admitted, and in others rejected.

2. Parol evidence of the contents of the deed was improperly admitted, no notice having been given to produce the original.

3. The offence proved was not forgery. Had he been indicted for cheating by false pretences, the evidence might have justified the verdict. No alteration was made in the instrument. It was the making of a different paper, to be signed, from that previously shown. Our statute against cheating by false pretences is sufficiently broad to include this case. But neither our statute against forgery, nor the definition of the offence in the books embrace it. The question was raised in a case similar in principle to this in *Massachusetts*, and it was there held to be cheating by false pretences, and not forgery. *Putnam* v. *Sullivan*, 4 *Mass. R.* 45.

Emery, Attorney General, for the State.

Formerly in *England*, for reasons not applicable here, it was held that the person whose name was forged, was not a competent witness. But even there the rule is now altered. 2 *Stark. Ev.* 583. But here he has always been considered competent. *Comm'th.* v. *Snell*, 3 *Mass. R.* 82; *Comm'th.* v. *Hutchinson*, 1 *Mass. R.* 7.

It was not necessary to give notice to produce this writing, it never having been a valid paper. 2 *Russel on Cr.* 670; 5 *English Com. L. Rep.* 377.

The third objection was admitted to present a question not entirely free from difficulty. A mere nonfeasance is not forgery. But here there was a paper actually made and examined by the grantor, and another, fraudulently substituted therefor by *Shurtliff*, actually signed. It has been held, that fraudulently inserting a legacy in a will before it was signed was forgery. The essence of the offence is the intention to defraud. So too it is a forgery to write one's own name to a paper, pretending to be a different person of the same name. In its consequences, it is the worst kind of forgery. 2 *Russell on Cr.* 317, 320; *East's P. C. c.* 19, § 1; 18 *Johns. R.* 164; 3 *Peere Wms.* 419; 1 *Russell & R. Cr. Cas.* 446; 1 *Harr. Dig.* 793; 10 *Mass. R.* 187; 2 *Stark. Ev.* 571; 6 *Cowen*, 72.

The opinion of the Court was drawn up by

WESTON C. J. — It was the law of *Massachusetts*, prior to the separation of *Maine*, and has continued to be the law of both states since, that the party, whose name is alleged to have been forged, is a competent witness upon the trial, under an indictment for the forgery. *Commonwealth* v. *Snell*, 3 *Mass. R.* 82.

The party attempted to be defrauded, was permitted to testify that the defendant, at a prior period, brought to him the draft of a deed, which he, the witness, read, and that it was not the deed set forth in the indictment, which he afterwards signed. This was not proving, by parol, the contents of a deed, not produced. It was competent for the witness to testify, that he never saw the deed he signed, before it received his signature; and that the defendant had previously brought to him the draft of an instrument, which he saw and read. The first is a simple negation, the second is testimony of the acts both of the defendant and the witness. The draft seen and read by him was not an executed paper, which is the best evidence of the contract made or agreed, the contents of which can be proved only by its production. 2 *Russell*, 670. But whether its contents could be proved or not, we are satisfied that the testimony, as far as it was received, was legally admissible.

Forgery has been defined to be a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit. 2 *Russell*, 317, and the authorities there cited. The evi-

dence fully justifies the conclusion, that the defendant falsely made and prepared the instrument, set forth in the indictment, with the evil design of defrauding the party, whose deed it purports to be. It is not necessary, that the act should be done, in whole or in part, by the hand of the party charged. It is sufficient, if he cause or procure it to be done. The instrument was false. It purported to be the solemn and voluntary act of the grantor, in making a conveyance, to which he had never assented. The whole was done by the hand, or by the procurement of the defendant. It does not lessen the turpitude of the offence, that the party whom he sought to defraud was made in part his involuntary agent, in effecting his purpose. If he had employed any other hand, he would have been responsible for the act. In truth the signature to that false instrument, in a moral and legal point of view, is as much imputable to him, as if he had done it with his own hand. The art and management used, has no tendency to mitigate the charge. And the opinon of the Court is, that the crime of forgery has been committed. When the false making, with an evil design is proved, artful subterfuges in defence have been disregarded, of which many of the cases, cited for the government, are illustrations.

ANGELINE LOW *vs.* BENJAMIN MITCHELL.

The rule that a witness is not obliged to criminate himself, is well established. But this is a privilege which may be waived; and if the witness consents to testify to one matter tending to criminate himself, he must testify in all respects relating to that matter, so far as material to the issue.

If he waives the privilege, he does so fully in relation to that act; but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue.

The complainant in a bastardy process, is not obliged to answer whether she had an illicit connexion with another man about the same time with her connexion with the man charged with being the father of her child.

The complainant in such process, although under the age of twenty-one years, need not act by guardian or *prochein ami*, nor can her guardian control or dismiss the proceedings.

The respondent cannot give in evidence, that he had always sustained a good character in every respect.

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

The proceedings in this case, which were under the bastardy act, were in the complainant's own name, and not by guardian or *prochein ami.* The complaint and examination bore date of *July* 18, 1839, and alleged that the child was begotten on or about the 10th of *Nov.* 1838. The child was born *Aug.* 10, 1839. On the examination of the complainant at the trial, after she had stated that the respondent was the father of the child, his counsel inquired of her whether she had had intercourse with any man, other than the respondent, by whom the child might have been begotten about the same tenth of *November.* Her counsel objected to her answering it, contending, that she was not bound so to do. The Judge ruled that she was not bound to answer the question, but might if she would. The question was not answered.

The complainant was under the age of twenty-one, when the complaint was made, but became twenty-one on *Jan.* 14, 1840, before the trial in the District Court. One *Pressey* had been her guardian, and agreed to pay the expense of the prosecution at its commencement, but he declined prosecuting further at his expense, before she became twenty-one, and said at the trial, "that he

should stand neutral, and that said complaint was not now prosecuted by his consent, nor against it." The counsel for the respondent contended, that the process could not be further prosecuted. The Judge ruled, that the prosecution of the complaint could not be stopped by *Pressey*, even if he now desired it; and that the facts constituted no bar to the further prosecution of the complaint.

The respondent offered to prove, that from his infancy, up to the time of the trial, he had sustained a perfectly good character in every respect. The Judge rejected the evidence.

The verdict having been against the respondent, he filed exceptions.

Wells, for the respondent, contended, that the complainant was bound to answer the question proposed. The only ground of objection is, that she is not bound to criminate herself. Here she had already criminated herself, and had voluntarily waived any objection, if it existed. She is bound to answer, on cross examination, to every circumstance connected with that statement, to show the degree of credit attached to it. The whole truth should be told or nothing said about it. The principles settled in decided cases, analogous to this, support us in requiring an answer to the question. 3 *Stark. Ev.* 1740; 5 *Mass. R.* 320; 4 *N. H. Rep.* 562.

The complainant, being only a minor, could not prosecute herself, and when her guardian withdrew from prosecuting, the complaint should have been dismissed. *Knapp.* v. *Crosby*, 1 *Mass. R.* 479; *Comm'th* v. *Moore*, 3 *Pick.* 194.

The good character of the respondent was calculated to have an influence and he was entitled to give it in evidence. This is more a criminal, than civil process. The commencement is by complaint and warrant, and the consequences of conviction are much more grievous, than on conviction for fornication. 2 *Mass. R.* 317; 2 *Stark. Ev.* 356, 368.

Emmons, for the complainant, considered the first point settled by the case *Tillson* v. *Bowley*, 8 *Greenl.* 164. The same doctrine is recognized in 3 *Pick.* 194.

If there had been any necessity to have had the complaint made by guardian, the objection should have been taken by plea in

abatement. *Blood* v. *Harrington*, 8 *Pick.* 555. But it should not have been by guardian. 1 *Pick.* 275; 9 *Mass. R.* 106; 7 *Conn. R.* 286. The guardian has no power to stay or control a process of this description. It is no part of his duty to interfere, and the instruction was correct.

The Judge was clearly right in rejecting the evidence as to character. 2 *Stark. Ev.* 366; 2 *Phill. Ev. (Cowen's Ed.)* 336, *note.*

The opinion of the Court was drawn up by

SHEPLEY J. — The rule, that a witness is not obliged to criminate himself is well established. It is contended however, that if the witness waives that privilege when testifying to one fact in the cause, he cannot claim it while testifying to any other fact material to the issue. If he consents to testify to one matter tending to criminate himself, he must testify fully in all respects relative to that matter so far as material to the issue. If he waives the privilege, he does so fully in relation to that act. But he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act, of which he has spoken, even though they may be material to the issue. His consent to speak of one criminal act cannot deprive him of that protection, which the law affords him so far as respects other criminal acts not connected with it. That the prosecutrix was not obliged to answer, whether she had an illicit connexion with another man, was decided in *Tillson* v. *Bowley*, 8 *Greenl.* 163.

The statute respecting the maintenance of children born out of wedlock was designed to relieve the towns from burthen as well as to aid the mother in their support. And there is no reason to believe it to have been the intention of the legislature to limit it to those cases, where the woman was of full age. It is competent for the legislature to authorize minors to prosecute, and to enable them to do all acts necessary for that purpose. If the objection had been good, it was available only in abatement.

The prosecution was not designed to punish the accused for a crime, but to make him, if found guilty, contribute to the support of the child. In *Wilbur* v. *Crane*, 13 *Pick.* 284, it is said to be in substance and effect a civil suit. Evidence of the character of

a party is not admissible generally in civil suits, unless the proceedings put the general character in issue; and that is not regarded as put in issue by an allegation of one particular unlawful or fraudulent act. *Attorney General* v. *Bowman*, 2 *B. & P.* 532, *note a*; *Nash* v. *Gilkeran*, 5 *S. & R.* 352. There was nothing in the proceedings in this case, which authorized its admission.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN, JUNE TERM, 1841.

INHABITANTS OF FARMINGTON *vs.* INHABITANTS OF JAY.

Posthumous children have a derivative settlement from their father, if he had any; and in this respect are in the same condition, with such as are born in his lifetime.

By the *Massachusetts statute* of 1793, *c.* 59, and also by the *statute* of this State of 1821, *c.* 122, legitimate children are to follow and have the settlement of their father, if he had any within the State, *until they gain a settlement of their own;* but if he shall have none, they shall follow and have the settlement of their mother, if she shall have any.

A legitimate child, therefore, whose father had a settlement within the State, and died subsequent to the *statute* of 1793 and prior to that of 1821, does not follow a new settlement, acquired by his mother under the latter statute, but retains the settlement of his father, until he acquires one in his own right.

It has become a principle of law in the construction of statutes for the relief of the poor, that minor children, until emancipated, are incapable of gaining a settlement in their own right.

THIS was an action for supplies furnished to *Mary D. West*, a pauper under the age of twenty-one, whose settlement was alleged to be in the town of *Jay*. From the statement of facts agreed by the parties, it appeared that the pauper is the legitimate child of *Sydney West*, who died on the 19th of *August*, 1819, within the limits of the town of *Jay*, in which town he then had his legal settlement. The wife of *West*, at the time of his death, was preg-

nant with the pauper. *West* and his family were supported as paupers by *Jay*, and immediately after his death, the selectmen of that town provided places for his children, and agreed with one *Hatch*, the father of *Mrs. West*, that he should have the property left by *West*, in value about seventy dollars, if he would take *Mrs. West*, and take care of her and of the child with which she was then pregnant, without any trouble and expense to said town of *Jay*. *Hatch* gave an obligation to the town of *Jay* to that effect. In pursuance of this agreement, on the day after the funeral of her late husband, she went with her father to the town of *Wilton*, where the pauper was born *Nov.* 12, 1819. The pauper and her mother continued to live in *Wilton* for the ten or twelve next succeeding years, and of course were residing there on *March* 21, 1821. No supplies were furnished to the pauper, or to her mother after her removal to *Wilton*, until the supplies for which this action was brought were furnished to the pauper in *Farmington*, commencing *October* 1, 1838. If the settlement of the pauper was in *Jay*, the defendants were to be defaulted.

J. L. Cutler, for the plaintiffs, said that the *Massachusetts statute* of 1793, *c.* 59, under which the pauper gained a settlement derivatively from her father, was, as it respects the present case, precisely the same as our statute of *March* 21, 1821.

A posthumous child gains a settlement in the same way, as if born before the death of the father, and is to be considered in all respects as the other children. 3 *William's Abr.* 17; 1 *Bl. Com.* 94, and *notes*; 3 *Bac. Abr.* 124.

A legitimate child can gain no settlement in his own right, while a minor, unless emancipated. *Somerset* v. *Dighton*, 12 *Mass. R.* 383; *Hallowell* v. *Gardiner*, 1 *Greenl.* 93; *Fayette* v. *Leeds*, 1 *Fairf.* 409; *Milo* v. *Kilmarnock*, 2 *Fairf.* 455. Emancipation is never to be presumed. *Sumner* v. *Sebec*, 3 *Greenl.* 223.

Legitimate children, deriving a settlement from their father, at the time of his death, will not follow the settlement of their mother, if she should gain a new one. *Fairfield* v. *Canaan*, 7 *Greenl.* 90; *Biddeford* v. *Saco*, *ib.* 270.

The mother of the pauper was carried to *Wilton* as a pauper, and so remained on *March* 21, 1821, and at the incorporation of *Wilton*, and for that cause could gain no setttement in *Wilton*.

The selectmen had power to contract for their support as a pauper of *Jay* in another town. *Davenport* v. *Hallowell*, 1 *Fairf.* 317.

H. Belcher and *May*, for the defendants.

The mother of the pauper was not herself a pauper after her removal to *Wilton*. She gained a settlement by residing in *Wilton* on *March* 21, 1821. *Standish* v. *Windham*, 1 *Fairf.* 97; *Wiscassett* v. *Waldoborough*, 3 *Greenl.* 388.

The pauper does not take her settlement from her father, but from her mother; and if so, acquires any new settlement which the mother may acquire. *Parsonsfield* v. *Kennebunkport*, 4 *Greenl.* 47. This child, under our statute can take no settlement until its birth. Every provision in the statute has relation to the time of the birth in fixing the settlement. Our statute being on this subject like that of *Massachusetts*, the decisions there apply. *Plymouth* v. *Freetown*, 1 *Pick.* 197; *Scituate* v. *Hanover*, 7 *Pick.* 140; 2 *Dane*, 410, and cases cited.

It is a consideration of great weight in favour of the construction for which we contend, that unless we are correct, the mother and child will be separated, and belong to different towns. *Dedham* v. *Natick*, 16 *Mass. R.* 135; 20 *Johns. R.* 1.

R. Goodenow replied for the plaintiffs.

The opinion of the Court was drawn up by

Weston C. J. — The pauper was born prior to the separation of this State. Her settlement therefore, at the time of her birth, must depend upon the law of *Massachusetts*. By the statute of that state of 1793, *c.* 59, which was the law existing at the birth of the pauper, legitimate children were to follow and have the settlement of their father, if he shall have any within the commonwealth, until they gain a settlement of their own; but if he shall have none, they shall in like manner follow and have the settlement of their mother, if she shall have any. The same provision has been reenacted in this state. Statute of 1821, *c.* 122, § 2. In all the cases, in which a child has been held to follow the settlement of the mother, under this mode, the father never had any settlement in the state. We are satisfied, that posthumous children have a derivative settlement from their father, if he had any; and that in this respect they are in the same condition, with such as are

born in his lifetime. Every legitimate child in *ventre de sa mere*, is considered as born for all beneficial purposes. *Coke Lit.* 36; 1 *P. Wms.* 329.

It has become a principle of law, in the construction of the statutes for the relief of the poor, that minor children, until emancipated, are incapable of gaining a settlement in their own right. The reason for the establishment of this rule was, that they might not be separated from their parents. It has been applied however generally; and sometimes where its application has had the effect, to separate the settlement of the minor from that of the surviving parent. *Biddeford* v. *Saco*, 7 *Greenl.* 271, is a case of this character. There two minor children with their mother, their surviving parent, dwelt and had their home in *Saco*, on the twenty-first of *March*, 1821; yet they were held incapable of acquiring a settlement in their own right; although a different decision would have given them the same settlement with their parent, and that which actually obtained, separated their settlements. *Milo* v. *Kilmarnock*, 2 *Fairf.* 455, was a decision to the same effect. These were cases of illegitimate children, who although they take the settlement of their mother, at the time of their birth, do not follow one, which she may subsequently acquire. Nor in this case did the pauper follow the settlement of her mother, the law giving her the settlement of her father, which was in *Jay*, until she acquired one in her own right. And although she resided and had her home in *Wilton*, on the twenty-first of *March*, 1821, yet being a minor, and not emancipated, she thereby gained no settlement in that town.

In *Dedham* v. *Natick*, 16 *Mass. R.* 135, cited for the defendants, where a legitimate daughter was held to follow the settlement of her mother, who was her surviving parent, the decision depended upon the law in force prior to the act of 1793, *c.* 59, which was changed by that statute.

Defendants defaulted.

Henry H. Foster *vs.* Inhabitants of Dixfield.

Where evidence has been introduced *tending to prove* all the points required by law to be proved, in order to maintain the action, although circumstantial in its character, and by way of inference from facts proved, a nonsuit ought not to be ordered, but the case should be submitted to the determination of the jury.

In an action against a town for an injury alleged to have been sustained by reason of a defect in a bridge, if the party injured *be bound to prove affirmatively* due care on his part which may well be doubted, yet direct and positive proof is not essential, but it may be inferred by the jury from facts in evidence.

Exceptions from the Western District Court, Whitman J. presiding.

The action was case, for an injury alleged to have been sustained by the plaintiff to his person, horse and gig, through a defect in a highway and bridge in *Dixfield.* The bridge was over a brook under which the water was in depth about three feet. The planked part of the bridge was about twenty-four feet in length, and eighteen feet in width, and four and an half feet above the water. There was no railing or guards upon the bridge, nor had there been any. The whole testimony is given in the exception, and from it, it appears, that the plaintiff was found at the bridge, a little before sunset, and appeared to have been thrown into the brook, and that the gig went off the bridge. The tracks made by the wheels, and the appearances were particularly stated by the witnesses, but no one was with the plaintiff at the time, and it did not appear that any person saw him until after the injury. There was, therefore, no other evidence of careful conduct on the part of the plaintiff, than what might be inferred from the facts proved. The horse was proved to have been kind, well broken, and easily managed.

After the plaintiff had closed his testimony, the Judge ordered a nonsuit, and the plaintiff filed exceptions.

Tenney and *H. Belcher*, for the plaintiff, contended, that the nonsuit was erroneously ordered, being founded merely on a supposition that the evidence was not sufficient to warrant a jury in finding a verdict for the plaintiff, and not on account of any legal objections to the maintenance of the action. It was a mere ques-

tion as to the weight of evidence, of which the jury were the exclusive judges. The plaintiff must satisfy them that he made use of proper care, but this may be inferred from other facts. It is not the province of the Judge, but of the jury, to draw inferences from facts. By ordering a nonsuit, the plaintiff was deprived of his right of appeal. They cited *Wilkinson* v. *Scott*, 17 *Mass. R.* 249; *Sanford* v. *Emery*, 2 *Greenl.* 5; *Perley* v. *Little*, 3 *Greenl.* 97; *Leighton* v. *Manson*, 2 *Shepl.* 213.

Wells, for the defendants, contended, that the Judge has the right to order a nonsuit in all cases where the plaintiff, from his own showing, has not made out a case to entitle him to a verdict. *Perley* v. *Little*, 3 *Greenl.* 97; *Smith* v. *Frye*, 14 *Maine R.* 457.

But here was an entire absence of all proof, that the plaintiff had made use of proper care on his part. This the plaintiff is bound to prove, and where he fails to do it, it is for the court to say that he has not supported his action, and to direct a nonsuit. If the town was in fault in neglecting to place a railing on the bridge, still they are not liable, if the accident happened through the negligence of the plaintiff, or the viciousness of his horse. The burthen of proof is on the plaintiff, to show due care. *Adams* v. *Carlisle*, 21 *Pick.* 146; *Howard* v. *North Bridgwater*, 16 *Pick.* 189; *Lane* v. *Cromwell*, 12 *Pick.* 177; *Farnum* v. *Concord*, 2 *N. H. Rep.* 392; *Wood* v. *Waterville*, 4 *Mass. R.* 422; *Mayhew* v. *Boyce*, 1 *Stark. Cas.* 423.

The opinion of the Court was drawn up by

Weston C. J. — We are of opinion, that the presiding Judge should not have ordered a nonsuit in this case; but that it should have been submitted to the jury. The evidence, arising from the wheel tracks, indicate that the horse had become unmanageable. It is against all experience, that a man in his senses should have had any voluntary agency in the business.

It is contended, that the plaintiff is bound affirmatively, to prove due care on his part. It may well be doubted, whether this should be required in all cases. If direct and positive proof to this effect is essential, a party who sustains an injury, by reason of a defect

in the highway, when alone, or when the transaction was witnessed by no other eye, would be without remedy.

It is in proof, that the horse was usually kind. The condition of the road and the bridge was fully presented to the eye of the traveler. The want of railing on the bridge could not fail to admonish the plaintiff, that care was necessary for his own safety. In the absence of all opposing proof, it may not be too much to infer care from common experience, when essential to personal security. The erratic and dangerous movement of the carriage, it may be presumed the plaintiff would have prevented, if he could. It would be most unreasonable to suppose, that he voluntarily encountered the hazard, for the sake of a remedy against the town, in which he cannot by law recover any thing beyond the actual damage. It is a question proper for the consideration of a jury, upon the evidence reported.

Exceptions sustained.

Charles Ripley *vs.* Nathan Dolbier.

If one legally in the possession of the personal property of another, misuse that property, it is a conversion thereof, and the owner may immediately maintain trover therefor.

The debtor can impart to another no rights to such property superior to his own.

Where a horse was conveyed to the plaintiff as security for a debt, to be paid in one year, and where there was an understanding between the parties, although not expressed in the bill of sale, that the debtor should retain the possession during the year; *it was held*, that any such management with the horse during the year as would unnecessarily injure his value, would be a violation of the agreement for his use, and would put an end to any right of the debtor to his possession.

Exceptions from the Western District Court, Whitman J. presiding.

Trover for a horse. The exceptions state, that the plaintiff introduced a paper of which the following is a copy:

"This certifies that I have this day sold and delivered to *Chas.*

Ripley one stud horse, of a bright bay color, with a white star in the forehead; the same is imported *French* and *Indian* horse — that I deliver the same to *Charles Ripley* free and clear from all incumbrance — now providing that I, *Orrin Dyer*, pay to *Charles Ripley* the sum of seventy-five dollars in one year from date the horse is mine.

"*Orrin Dyer.*"

Evidence was introduced on both sides showing that the plaintiff exchanged the horse in question with *Dyer* for a mare, and for the greater value of the horse took the paper to secure him for the difference, which was to be paid in one year from date; that the horse was recommended by the plaintiff as valuable for stock; and that *Dyer* would obtain the sum due plaintiff in the use of the horse; he also recommended him as suitable for labor, for which purpose he had been much used; that it was the understanding, that *Dyer* should have the possession and use of the horse for one year; and that after the exchange, *Dyer* permitted the defendant to have the horse in question for labor, but there was no sale. There was no evidence that defendant knew of the lien of the plaintiff on the horse. *Dyer* testified that he permitted the defendant to castrate the horse, if he chose. Defendant caused him to be castrated in *June*, 1838. Evidence was adduced that the plaintiff was informed of the alteration, and after that, obtained the writ in this action, and went and demanded the horse of the defendant, but showed no evidence of a claim and declined so to do, unless the defendant would show him the horse when called on by the plaintiff, but the defendant told him that the horse was in his pasture, and he might take him, but if he had any claim on account of a bargain between him and *Dyer*, to go to *Dyer*. Before this conversation, and on the same day, the plaintiff had been into the pasture of defendant, and said he could not find the horse, and gave this as a reason for not searching further for the horse in the pasture, and without any further examination or delay left. Evidence was introduced by the defendant tending to show that the horse was more valuable as a gelding than a stud, and by the plaintiff that the alteration lessened his value.

Under this evidence the Judge instructed the jury, that if the defendant, though ignorant of the plaintiff's claim, used the horse

for any purpose different from that contemplated by plaintiff and *Dyer* in the trade, or if he caused any alteration diminishing the worth of the horse, which impaired the security of the plaintiff, though within one year, it would be a conversion, and the defendant would be liable in this action, after a demand by the plaintiff, and a refusal by the defendant. The jury returned a verdict for the plaintiff. To which instructions of the Judge the defendant excepted.

Tenney and *H. Belcher* argued for the defendant.

R. Goodenow, for the plaintiff, in his argument, cited *Lunt* v. *Whitaker*, 1 *Fairf.* 310; *Tibbetts* v. *Towle*, 3 *Fairf.* 341.

The opinion of the Court was by

SHEPLEY J. — The contract does not in terms secure to *Dyer* the use of the horse until payment was made. It is silent on that subject. Admitting however, that it was the intention of the parties to it that he should have the use of him for the year, he would not thereby be authorized so to conduct as to injure unnecessarily his value. The design of the contract was to secure the plaintiff, and they could not have intended to allow one party to defeat it. Such conduct would be a violation of any implied agreement for the use of the horse, and would put an end to his right of possession. If one legally in possession of the property of another, misuse that property, it is a conversion of it. *Mulgrave* v. *Ogden*, *Cro. Eliz.* 219; *Richardson* v. *Atkinson*, 1 *Stra.* 576; *Syeds* v. *Hay*, 4 *T. R.* 260. The defendant could have no rights superior to those of *Dyer*.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1841.

FREDERIC RAYMOND *vs.* ABRAHAM WYMAN *& al.*

Where it appears from the Probate records, that a majority of the selectmen of a town made a representation and complaint to the Judge of Probate for the county, that a certain inhabitant of that town was a spendthrift and wasting his estate; and that thereupon notice issued to the alleged spendthrift, to show cause why he should not be put under guardianship; it is sufficient to show that the Judge of Probate had jurisdiction under the *Stat.* 1821, *c.* 51, § 53.

Although no record of a decree for the appointment of a guardian is to be found in the Probate office, except in the registry of the letter of guardianship, yet as the jurisdiction of the Judge regularly attached by a proper representation and complaint, and he notified the party to be affected, the letter of guardianship is evidence, that the guardian was duly appointed.

And if the letter of guardianship misrecites, that this had been done upon an inquest of the selectmen, this does not vitiate the authority of the guardian, and a debtor of the spendthrift is protected in a payment to such guardian.

Where there are two guardians of a spendthrift, it is competent for one to receive payment of a debt due to the ward, of which payment his receipt is *prima facie* evidence.

ASSUMPSIT upon a note given to *Benjamin Wyman* and by him indorsed to the plaintiff, after it had been payable for some months. The defence relied upon was a payment to *Levi Emery* and *Joseph Cushing*, as guardians of *Benjamin Wyman*, the payee. The facts in relation to their appointment are stated in the opinion of the Court. To prove payment to the guardians, a receipt signed

by one of them was offered in evidence. This was objected to by the plaintiff as inadmissible for that purpose. It was admitted by WESTON C. J. presiding at the trial, as evidence merely to show a payment by the defendants to the person who signed it, in his character of guardian. A verdict was returned for the defendants, which was to be set aside, if the guardians were not authorized to receive the money, or if the receipt was erroneously admitted in evidence, unless the objections could be removed by an amendment of the probate records.

Boutelle & Kidder argued for the plaintiff, and cited *Stat.* 1821, *c.* 51, § 49, 53; 15 *Maine Rep.* 215; 9 *Pick.* 167.

Tenney argued for the defendants, and cited 4 *Mass. R.* 147; 12 *Pick.* 152; 14 *Pick.* 280; 21 *Pick.* 36; 10 *Mass. R.* 251; 11 *Mass. R.* 477; 3 *Greenl.* 29; 6 *Greenl.* 48, 162, 307; 2 *Fairf.* 177.

The opinion of the Court was drawn up by

WESTON C. J. — It appears from the Probate records, that on the 13th day of *March*, 1833, a majority of the selectmen of *Bloomfield* made a representation and complaint to the Judge of Probate, that *Benjamin Wyman*, the payee of the note in question, who was an inhabitant of that town, was a spendthrift and wasting his estate; and that thereupon notice issued to the said *Benjamin*, to show cause why he should not be put under guardianship. This proceeding gave jurisdiction to the Judge, under the *Statute* of 1821, *c.* 51, § 53. No record of a decree for the appointment of a guardian is to be found in the Probate office, except the registry of the letter of guardianship. It is very manifest, that this instrument was drawn upon a blank, which was intended to apply to the forty-ninth section of the same statute, which provides for the appointment of guardians for idiots and persons *non compos* or lunatic. But as the jurisdiction of the Judge regularly attached, by a proper representation and complaint, and he notified the party to be affected, we regard the letter of guardianship as evidence, that the guardians were duly appointed. It does not appear to us, that the misrecital, that this had been done upon an inquest by the selectmen, vitiates their authority, derived as it was from a lawful source, and upon proceedings regularly instituted. In a case thus

duly brought within the jurisdiction of the Judge, we are of opinion, that the debtors of the ward ought to be protected in their payments, notwithstanding the want of form in proceedings, with which they had no privity, and over which they had no control.

And we are further of opinion, that it was competent for one of the guardians to receive payment of a debt due to their ward; and that there is no legal objection to the evidence, by which this was proved.

Judgment on the verdict.

JAMES MILLAY *& al. vs.* ISRAEL MILLAY *& al.*

Where one in possession of lands not his own, submitted to the title of the true owner and consented that a conveyance thereof might be made to a third person, from whom, after the conveyance was completed, he received a bond for a deed on the performance of certain conditions; it *was held*, that his occupation after that time could be only that of a tenant at will under the grantee; and that the latter could convey the land and pass the title to another, notwithstanding that the obligee at the time of this conveyance produced his bond and gave notice that he claimed the land.

One may make a peaceable entry upon his own land; and having so entered, he is entitled to protect himself from being turned off by one, who has no title therein.

An instruction to the jury, that if they believed that one of the parties had attempted to deceive them in an important particular relative to the issue, they might take it into consideration in connexion with the other conflicting testimony, is not legally objectionable.

TRESPASS *vi et armis*, for an assault and battery committed upon the plaintiff by the defendants. The defendants, by brief statement, pleaded, that "*Israel Millay* made an entry into a tract of land called the *Preble* lot, the possession and fee of which he claimed and owned, and that said *James* undertook to remove him, the said *Israel*, from said land; that said *Israel* and the other defendants, as his servants, were plowing said land; and that said *Israel* resisted the attacks of the plaintiff, and the defendants did nothing more than what was necessary for self defence, and to continue plowing the land."

On the trial before WESTON C. J. it appeared that the field where the transaction took place was near to the residence of the plaintiff, and had been many years in his possession and occupancy; that the defendant, *I. Millay*, had made an entry into the field peaceably, in the absence of the plaintiff, and with the other defendants was there plowing. It became a question of importance at the trial, whether the entry of *Israel Millay* into the land was lawful, and whether he had the right to exercise the acts of ownership over it he assumed to do. It appeared, that *John Millay*, the father of *Israel*, who died in 1822, was seized of the land at the time of his death, and had been so for several years before, but that the paramount title was in *Mrs. Preble;* that the widow of *John Millay* took out administration upon his estate, and employed the plaintiff to assist her in the administration and in the management of the estate. The plaintiff introduced a quit-claim deed of the lot from the widow of *John Millay* to himself, dated *March* 22, 1826, and proved that he had been in the occupancy since, until the time of the affray. There was evidence tending to show that the plaintiff entered and occupied for the benefit of the heirs of *John*, and also that he occupied, claiming it as his own. There was evidence also tending to show that the plaintiff had attempted to purchase the land of *Mrs. Preble*, and that she declined to convey to him, but expressed a willingness to convey for the benefit of the heirs of *John Millay;* and there was also testimony tending to show, that the purchase was to be made of *Mrs. Preble* for the benefit of the plaintiff. All the witnesses concurred in stating, that the deed of the land from *Mrs. Preble* to *Savage*, dated *Jan.* 23, 1829, was made with the consent and at the request of the plaintiff. Some money appeared to have been paid towards the land by the plaintiff, and the amount was tendered to him by *Israel Millay*. *Savage*, on *Feb.* 19, 1833, conveyed the land to *Israel Millay*, and a witness stated, that the plaintiff was then present, and objected to the conveyance, and insisted that it should rightfully be conveyed to him, and produced a bond for a conveyance from *Savage* on certain conditions.

The counsel for the plaintiff requested the Chief Justice to instruct the jury, that if they were satisfied, that the plaintiff had previous possession of the land, claiming it on his own account,

and the defendants were notified by the plaintiff, that he intended to prevent their occupying the land, they had no right to use violence against the plaintiff in obtaining or retaining possession of the land. The instruction given was, that the land being conveyed to *Savage* by the consent and procurement of the plaintiff, the seizin was in *Savage*, and the subsequent possession of the plaintiff was in subordination to *Savage's* legal title; that if however the plaintiff had acted in good faith, and was fairly entitled to the land under a bond from *Savage*, the deed subsequently taken from *Savage* was fraudulent and void as against the plaintiff, and that the defendants in that case had no right to repel by force the force used by the plaintiff. But if the plaintiff acted in trust for the heirs of *John*, and procured the conveyance to be made to *Savage* in furtherance of the same trust, the legal title was in *Israel*, and that having entered peaceably, he had the rights of an owner, and as such might use such force as was necessary to repel the forcible attempt of the plaintiff to turn off his team. No other instruction was given on the points on which instruction was requested.

It was in evidence, that in the conflict, the plaintiff had received blows upon the hand and wrist, and when this testimony was offered, the plaintiff showed to the jury a bunch on his wrist, and a thickening of the integuments on the back of his hand. Several witnesses testified, that there was the same bunch on the wrist of the plaintiff, and the same appearance upon the back of his hand many years before the conflict; and there was evidence tending to show, that at a trial in the Common Pleas, between the same parties, in an action brought by the plaintiff for a beating subsequent to the one now in controversy, the plaintiff exhibited to the jury the same wrist and hand with the same marks. The counsel for the plaintiff requested, that the jury should be instructed, that if the plaintiff exhibited his injured hand and wrist in the trial of another action, such evidence was improperly admitted in that action, and that in this action that fact should have no effect, it being for another and distinct trespass. The jury were instructed, that a recovery of damages in that action for an injury received at the time now in controversy, that action being for a subsequent affray, would be no bar to a recovery for the injury now charged; but that if the plaintiff had attempted to deceive them by passing off

the appearances on his wrist and hand, as having been occasioned by the blows received in the field, when in truth they were of much longer standing, they would consider this attempt in connexion with the other testimony in the case, which in relation to the conflict itself, was upon many points conflicting. The jury returned their verdict for the defendants, which was to be set aside, if the instructions requested and withheld should have been given, or if such as were given were erroneous.

Tenney argued for the plaintiff: — and to the point, that there was no legal evidence on which a trust estate could be based, cited *Northampton Bank* v. *Whiting*, 12 *Mass. R.* 104; *Jenney* v. *Alden*, *ib.* 375; *Flint* v. *Sheldon*, 13 *Mass. R.* 443; *Stackpole* v. *Arnold*, 11 *Mass. R.* 27; *Goodwin* v. *Hubbard*, 15 *Mass. R.* 210; *Runey* v. *Edmands*, *ib.* 294; *Chadwick* v. *Perkins*, 3 *Greenl.* 399; *Given* v. *Simpson*, 5 *Greenl.* 303.

Wells and *Bronson* argued for the defendants; and to show, that as the plaintiff entered under the heirs of *John Millay*, he could not elect to consider himself a disseizor, and could become such only by their election, cited *Porter* v. *Hammond*, 3 *Greenl.* 188; *Peters* v. *Foss*, 5 *Greenl.* 182; *Brimmer* v. *Proprietors Long Wharf*, 5 *Pick.* 131.

The opinion of the Court was drawn up by

Shepley J. — Whatever of interest the plaintiff might have in the land by virtue of his occupation and the deed from the widow of *John Millay*, he was precluded from questioning the title of *Savage*, by consenting, that the title should be conveyed to him, and by receiving a bond from him for a conveyance of it. After that time his occupation could be only that of a tenant at will under *Savage*. The title passed to *Israel Millay* by the conveyance from *Savage*, and the plaintiff was in a position no more favorable than before that conveyance. *Israel* might make a peaceable entry upon his own estate; and having so entered he would be entitled to protect himself against one, who had no title. Any notice of the intentions of the plaintiff given to *Israel* would not change the rights of the parties. The instructions requested on this point were properly refused; and those, which were given,

were very favorable to the plaintiff. Whether more so, than the testimony authorized, it is unnecessary to consider.

The hand of the plaintiff appears to have been exhibited to the jury in connection with the testimony tending to prove that it had been thus injured in this affray without objection. Testimony was afterward introduced by the defendants to prove, that the injury exhibited, had existed years before this conflict. The instruction to the jury, that if they believed, that the plaintiff attempted to deceive them in this particular, they might take it into consideration in connexion with the other conflicting testimony in the case, does not declare any legal rule controling the judgment of the jury. They were left free to allow it to have such an influence as they should think reasonable and just. It is rather a commentary on the testimony called forth by the position in which the plaintiff had chosen to place himself, than a statement of any rule or presumption of law. It was much less severe than the rule, which the law applies to the testimony of a witness thus situated; and it does not appear to be liable to any just objection.

Judgment on the verdict.

JOHN G. NEAL *vs.* LEMUEL WILLIAMS.

An innocent purchaser of goods for a valuable consideration from a fraudulent vendee, in possession thereof, obtains a good title against the creditors of the fraudulent vendor.

THE action was replevin for a pair of oxen, attached by the defendant as an officer on a writ in favor of one *Dore* against *J. Westcott*, as his property. The action was referred to a referee, to be decided upon legal principles. The referee, in his report stated, that the plaintiff claimed the property as having been sold to him by *J. Witham*, and it was proved, that the plaintiff purchased the oxen *bona fide* of *Witham*, and while they were actually in his possession, and without any knowledge on the part of the plaintiff of any defect or fraud in *Witham's* title, he having a bill of sale of the oxen signed by *Westcott*. The defendant proved,

that the debt sued in the action in which the oxen were attached, was to the amount of their value, and was justly due before the sale of the oxen by *Westcott* to *Witham;* and also that the sale from *Westcott* to *Witham* was made for the purpose of delaying and defrauding creditors; that *Witham* at the time of the sale was solvent, and so continued until after the attachments.

On these facts, the referee decided, that the property of the oxen was in the plaintiff, and that he was entitled to recover his costs; unless in the opinion of the Court, the decision of the referee is wrong in matter of law, in which event he decided, that the property of the oxen was not in the plaintiff, and that the defendant should recover costs.

Tenney and *Hutchinson*, for the defendant, contended, that the Court ought to reverse the decision of the referee, and cited *Woodman* v. *Trafton*, 7 *Greenl.* 178; *Seaver* v. *Dingley*, 4 *Greenl.* 306; *Damon* v. *Bryant*, 2 *Pick.* 411; 2 *Stark. Ev.* 116; *Buffington* v. *Gerrish*, 15 *Mass. R.* 156.

Leavitt, for the plaintiff, insisted, that the plaintiff by his purchase had acquired a perfect title to the property replevied, and cited *Rowley* v. *Bigelow*, 12 *Pick.* 307; *Somes* v. *Brewer*, 2 *Pick.* 184; *Bridge* v. *Eggleston*, 14 *Mass. R.* 245; *Mowry* v. *Walsh*, 8 *Cowen*, 238; *Seaver* v. *Dingley*, 4 *Greenl.* 306.

The opinion of the Court was drawn up by

Shepley J. — It was decided in *Preston* v. *Crofit*, 1 *Conn. R.* 527, *note*, that an innocent purchaser for a valuable consideration from the fraudulent grantee did not obtain a good title against the creditors of the fraudulent grantor. This case was approved and strengthened by the decision of chancellor *Kent*, in *Roberts* v. *Anderson*, 3 *Johns. Ch. R.* 372. But this last decision was reversed in the court of errors, and the contrary doctrine established. *Anderson* v. *Roberts*, 18 *Johns. R.* 515. And *Kent* states, that such is now the settled doctrine. 4 *Com.* 464. The question was very elaborately examined in the case of *Somes* v. *Brewer*, 2 *Pick.* 184, and the Court came to the like conclusion. It was decided in *Rowley* v. *Bigelow*, 12 *Pick.* 307, that the same rule prevails in the sale and purchase of personal property.

Judgment for plaintiff.

EBENEZER HUTCHINSON *vs.* GEORGE B. MOODY *& al.*

Where the presumption, that a blank indorsement of a note, was made on the day of its date, has been rebutted by proof, that it remained the property of the payee until after it became payable, the acts of ownership and declarations of the payee are admissible, in an action by an indorser, until evidence of a transfer to or possession by him has been introduced by the plaintiff.

After a written agreement by the payee with the principal to delay the payment of a note, has been proved by the sureties, a note of the same date, given by the principal to the payee, is admissible in evidence to show a consideration for the agreement for delay.

A verdict will not be set aside, because evidence was permitted to be introduced at the trial, to prove as fact, what the law would presume.

A collateral agreement for a sufficient consideration, made by the holder of a note with the principal, giving day of payment, operates as a discharge of the sureties.

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

Assumpsit by the plaintiff, as indorsee of a note, dated *April* 3, 1835, for $1060, payable in one year with interest, to *John Ware*, or order, and signed by *Moody*, as principal, and by the other two defendants, *French* and *Roberts*, as sureties. The principal was defaulted, and the sureties defended the action. Evidence was introduced tending to show, that on *May* 24, 1836, a writ was sued out against the defendants, in favor of *Ware*, by the plaintiff in the present action as the attorney of *Ware*, and was put into the hands of an officer for service, but the service was not made. The defendants offered in evidence an agreement signed by *Ware*, of which a copy follows. "*Oct.* 3, 1836. For a valuable consideration, I agree, that the note signed by *George B. Moody*, *Ebenezer French* and *Amos M. Roberts* to me, dated *April* 3, 1835, for one thousand and sixty dollars, payable in one year from that date, shall remain six months from this date, and that the time of payment shall be extended till *April* 3, 1837. *John Ware.*" Also, another agreement on the same paper below the other of the following tenor. "*April* 3, 1837. I agree with *Mr. Moody* to extend the time of payment of said note four months more. *John Ware.*" The plaintiff objected to the admission of these agreements. The Judge ruled, that if said note

was not negotiated until said 24th of *May* — unless the plaintiff should prove that said note was negotiated by the said third of *October* and third of *April* — the said agreements of the two last mentioned dates were admissible in evidence; and the plaintiff not offering any evidence except the note and the indorsement thereof, the agreements were admitted. One of the answers of the deponent in the deposition of *E. L. Le Breton*, introduced by the defendants, to a question proposed by them, inquiring, whether *Moody* had not in *April*, 1836, a large sum of money appropriated to the payment of this note, was this. "In the early part of the year 1836, *Mr. Moody* had in his hands a large sum of money, the amount of the money I do not now recollect, but I have no doubt that it was more than sufficient to pay this note." The plaintiff objected to the admission of this part of the deposition, but the objection was overruled. The deposition of *W. H. Mills* was introduced by the defendants, giving a conversation between *Ware* and *Roberts*, tending to show, that the note was in the hands of *Ware* long after it was due, and that *Roberts* and *French* had supposed that the note had been paid when it fell due. This was objected to, but admitted. The defendants also offered in evidence a note dated *April* 3, 1837, for $269,44, signed by *Moody* and payable to *Ware* in four months with interest. The admission of this was opposed, but it was received.

Roberts and *French* contended, that the time of payment had been extended by *Ware* for his own benefit without their assent, and that they were thereby discharged.

The Judge instructed the jury, that the agreement of the third of *October* on its face and in its terms implied that it was made by all the defendants, and if so, it would be no defence to the action, and that there was no evidence to show otherwise than the deposition of *Mills*, and that the jury were at liberty to infer from that deposition, that the agreement of *October* 3d, was made with said *Moody* alone without the knowledge of *French* or *Roberts*; and that if they should find that the agreement of *October* 3d, was made with said *Moody* without the knowledge or consent of the sureties, their verdict would be for *French* and *Roberts*. The Judge further instructed the jury, that said agreement of *April* 3d, would have no effect without a consideration; but if they found

there was a consideration for it, it would defeat this action, and their verdict would be for *French* and *Roberts*.

The plaintiff requested the Judge to instruct the jury, that if they found no change of circumstances on the part of *Moody* between the maturity of the note and the 3d of *Oct.* and 3d of *April*, those agreements would not defeat the action. The Judge declined to give such instruction. The jury returned a verdict for *French* and *Roberts*, and being inquired of by the Judge, whether they found there was any consideration for the agreement of *April* 3d, they answered, that no consideration was given by the jury to the agreement of *April* third.

The plaintiff filed exceptions.

Wells and *Hutchinson* argued for the plaintiff in support of the positions taken at the trial. They also said that the jury had thrown the agreement of *April* 3d out of the case, and the defence rested wholly on the paper of *Oct.* 3d. That paper is a mere collateral agreement not to bring a suit on the note for a stipulated time. This does not prevent the maintenance of a suit upon the note. The only remedy would be by an action on the agreement. No collateral agreement can operate as a bar to a suit on the note against either principal or surety, and therefore cannot discharge either. They cited on this point the following authorities, and commented upon several of them. *Walker* v. *McCullock*, 4 *Greenl.* 421; *Perkins* v. *Gilman*, 8 *Pick.* 229; *Dow* v. *Tuttle*, 4 *Mass. R.* 414; *Central Bank* v. *Willard*, 17 *Pick.* 150; *Hunt* v. *Bridgham*, 2 *Pick.* 581; *Oxford Bank* v. *Lewis*, 8 *Pick.* 458; *Blackstone Bank* v. *Hill*, 10 *Pick.* 129; 3 *Mason*, 446; 2 *Johns. Ch. R.* 554; 12 *Wheat.* 554; *Page* v. *Webster*, 15 *Maine Rep.* 249; 6 *Peters*, 250.

Tenney argued in opposition to the various grounds for setting aside the verdict urged for the plaintiff. To show that the declarations of the indorser of a dishonored note were admissible, he cited *Shirley* v. *Todd*, 9 *Greenl.* 83; *Peabody* v. *Peters*, 5 *Pick.* 1; *Sargent* v. *Southgate*, *ib.* 312.

To show that an agreement with the principal for a sufficient consideration to give him time of payment, discharges the sureties, whether such agreement be, or be not, a bar to an action on the note, he cited *Gibson* v. *Gibson*, 15 *Mass. R.* 106; 10 *Johns.*

R. 587; 17 *Johns. R.* 384; 9 *Cowen*, 194; 16 *Johns. R.* 70; 1 *Gall.* 32; 3 *Mason*, 446; 5 *Wheat.* 554; *Bayley on Bills*, 121, 223; *Chitty on Bills*, 441; *Kennebec Bank* v. *Tuckerman*, 5 *Greenl.* 130; *Bank of United States* v. *Hatch*, 6 *Peters*, 250; *Page* v. *Webster*, 3 *Shepl.* 249; *Leavitt* v. *Savage*, 4 *Shepl.* 72.

The opinion of the Court was drawn up by

SHEPLEY J.—The presumption of law, that the indorsement was made on the day of the date of the note, was rebutted by proof, that it remained the property of the payee after it became payable. His acts of ownership would be the best evidence of a continued property in it, until some further evidence of a transfer or of a possession by the plaintiff was offered. And the agreements and declarations of the payee respecting it were therefore properly admitted.

The note for $269,44, appearing upon inspection to bear date on the 3d of *April*, 1837, when one of the agreements for delay of payment was made, was properly admitted as tending to prove a valuable consideration for it. That part of the deposition of *Le Breton* objected to had a tendency to prove, that the principal could have paid the note at maturity, and that delay was injurious to the sureties. Such evidence was not however necessary, for the law presumes an injury from a change of the contract and a prolongation of the risk assumed.

The deposition of *Mills* was properly submitted to the jury to infer, if they thought proper to do so, that the contract of the 3d of *October*, 1836, was not made with the assent of the sureties; for the conversation between one of them and the payee was apparently inconsistent with such a state of facts.

One of the points decided in *Leavitt* v. *Savage*, 16 *Maine R.* 72, was, that a collateral agreement with the principal, giving day of payment, would, for the reasons there stated, operate as a discharge of the sureties.

Exceptions overruled.

BENJAMIN HILTON *vs.* NATHAN HANSON.

When the debtor is sole seized of real estate which can be divided without injury to or spoiling the whole, a levy upon it must be made by metes and bounds, agreeably to the provisions of the *st.* of 1821, *c.* 60, § 27.

It is not every estate, the value of which may in some measure be diminished by a levy by metes and bounds, that falls within the provisions of the twenty-ninth section. The words, "other real estate, which cannot be divided without prejudice to or spoiling the whole," in that section, have reference to such other estate as would be injured in like manner, as a mill, mill privilege, or factory, would be by such levy, and not to real estate liable to some, but not to such kind of injury, by separating it by metes and bounds.

The Court cannot declare a levy void, merely because it appears to have been injudiciously made, as the determination of that question is entrusted by the statute to the appraisers, whose decision is conclusive on this point, unless they act fraudulently.

Nor can the Court presume that the appraisers have lent themselves as instruments to aid the creditor to perpetrate a fraud upon the rights of the debtor, however revolting to one's sense of justice the levy may appear; but such case, if it shall occur, must be presented to a jury for decision.

WRIT of entry in which a tract of land with part of a building in *Anson* was demanded. The demandant was the former owner of this tract and other land adjoining, and still claimed it as his. The tenant claimed the land under the levy of an execution thereon in his favor against the demandant. At the time of the levy there was on the land a building of two stories, having one room below used as a store with a door therein towards the street, the remainder of the house being occupied as a dwellinghouse. There was a door in front opening into the entry and a staircase in that entry. The levy was on four feet of land at the store end of the house, about four feet in front of the store, and running so as to include a foot of the front door of the house, and extending back so as to include about three fourths of the store room and of the chamber over it, and a part of the entry near to the stairs, but not including them. There was a passage way levied upon from the store door to the street of four feet in width. No passage way was reserved to either party. The facts were agreed by the counsel, and the Court was authorized to render such judgment as the facts would warrant.

Tenney and *Bronson*, for the demandant, contended, that the levy was void, because it was made by metes and bounds, when it should have been upon the rents and profits. The course adopted in making the levy necessarily injured the whole estate, and thus shows this was not the legal mode.

It was void also, because there was no cause for making the levy in this manner, so as necessarily to injure the debtor. The creditor could have taken this course only from bad motives and to injure the other party, and it must show fraud upon its face, which avoids all levies. *St.* 1821, *c.* 60, § 28, 29.

Boutelle, for the tenant, said, that the language of the statute was imperative to set off by metes and bounds, when it can be done. There is nothing in the case to show, that there was fraud or oppression intended, or even that the creditor knew what portion of the property was assigned to him, until the return of the appraisers was made. The parties respectively had a way from necessity to their estate. *Taylor* v. *Townsend*, 8 *Mass. R.* 411. Levies made in quite as inconvenient manner as the present, have repeatedly been held good. *Hodge* v. *Drew*, 12 *Pick.* 141; *Buck* v. *Hardy*, 6 *Greenl.* 162; *Sturdivant* v. *Frothingham*, 1 *Fairf.* 100; *Allen* v. *Kincaid*, 2 *Fairf.* 155. The demandant was a man of large estate, and could at any time have redeemed the land, had he chosen.

The opinion of the Court was by

Shepley J. — When the debtor is sole seized of real estate, which can be divided without injury to or spoiling the whole, it must be levied upon by metes and bounds agreeably to the provisions of the *stat. c.* 60, § 27. Nor is it every estate, the value of which may in some measure be diminished by such a levy, that falls within the provisions of the twenty-ninth section. The words "other real estate which cannot be divided without prejudice to or spoiling the whole" in that section have reference to such other estate, as would be injured in like manner as a mill, mill privilege, or factory, would be by such a levy. And not to real estate liable to some, but not to such kind of injury by separating a portion of it by metes and bounds. If this be not the true construction every debtor owning real estate would be liable to suffer

all the inconveniences and losses attendant upon an estate in common, whenever those making a levy should judge that his remaining estate would be prejudiced by levying on a part of it by metes and bounds. And it is not difficult to perceive, that this might very frequently happen.

The estates referred to in the twenty-eighth section were probably such as the debtor might be entitled to enjoy the rents and profits of only; or such as the value consisted principally in the privileges and income annexed to them, as for instance acqueducts, works for lighting by gas, bridges, turnpikes, and canals when owned by an individual. It was however decided in the case of *Barber* v. *Root*, 10 *Mass. R.* 260, that the interest of the husband in the lands of the wife might be taken by a levy on the rents and profits. And that construction was admitted here in the case of *Sturdivant* v. *Frothingham*, 1 *Fairf.* 100.

Whatever may be the true construction of these provisions, there is nothing in this agreed statement to prove, that the estate levied on could not be divided and a portion set out by metes and bounds without prejudice to or spoiling the whole estate. It therefore only proves, that the levy was injudiciously, not illegally made. It appears to have been made in a manner very inconvenient for both parties, and probably in a manner prejudicial to the interests of both. It does not however appear to have been intended by the statute, that the question whether the levy would be prejudicial or not to the remaining estate should be taken from those appointed by law to make it, and who could examine the estate and decide that question, before they completed the levy; and be transferred to a court having no such power conferred or opportunity afforded it for its proper exercise. The decision of those appointed to make the levy must be conclusive on this point unless they act fraudulently.

A case may perhaps be found so revolting to one's sense of justice as to afford strong evidence, that the appraisers lent themselves as instruments to aid the creditor to perpetrate a fraud upon the rights of the debtor. But the court can never presume that they have done so. Such a case, if one should ever arise, must be presented to a jury for decision.

Plaintiff nonsuit.

JOHN HUGHES *vs.* AURIN Z. LITTLEFIELD *& al.*

If two of three joint promisors of a note are sued, without assigning any cause for the omission of the third, the objection can be taken only in abatement.

If an alteration in a note be made by one of the promisors, he cannot allege that it was fraudulent.

It furnishes no defence to a surety, that he voluntarily became such, without the assent or knowledge of the principal.

If a note be made and signed by one, and another for the same consideration afterwards signs the note, and adds after his name the word surety, he is a joint promisor.

The consideration of the contract between the principal parties, is a good consideration for the promise of a surety.

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

This action was assumpsit on a note of hand, dated *July* 8, 1836, for $55,00, payable to the plaintiff or order, and signed by *James Hayden* as principal, and by the defendants, *A. Z. Littlefield*, and *J. Kerswell*, thus, "*Littlefield & Kerswell*, sureties." It was admitted, that the signature of the defendants was in the handwriting of *Kerswell*. The defendants were then partners, trading under the firm of *Littlefield & Kerswell*. *Hayden*, the principal in the note, being called by the defendants, testified, "that on a settlement made between him and the plaintiff, on the day of the date of the note, he was found indebted to *Hughes* in the sum of $55; that he proposed to give his note for that sum; that *Hughes* desired him to get the defendants to sign the note as sureties, but he declined to do so, insisting that the plaintiff should take his own note without sureties, which was finally consented to; that the note was thereupon written, signed by himself alone, and delivered to the plaintiff, who accepted it; that the names of the sureties were not signed to the note in his presence, or with his knowledge, or at his request; and when, or why they were signed he did not know."

Testimony was introduced by the plaintiff tending to prove *Littlefield's* assent to the act of his copartner in signing the name of the firm to the note in question. No other testimony was introduced.

It was now contended for the defendants, that this action could not be maintained against them for the following reasons, viz.

1. That the note being joint and several, two of the signers were sued without joining the third, and without assigning any cause for the non-joinder.

2. The note not being given for any consideration, wherein the defendants were interested as partners or otherwise, the *onus probandi* is on the plaintiff to show, that *Littlefield* assented to the act of his partner in signing said note.

3. That the signature of the defendants as sureties having been put to the note after its execution and completion, without the assent of all the parties thereto, and especially without the assent or knowledge of the principal, constituted such a material alteration of the note as to render it void.

4. That the action is wrongly brought; — the defendants being chargeable, if at all, as guarantors, and not as original promisors.

5. That inasmuch as the signature of the defendants was not affixed to the note at the time of its execution, but afterwards; they are not parties to the note itself, but must be held, if at all, on a distinct contract; and that the burthen is on the plaintiff to prove such a contract, and to show a valuable consideration to support it.

The Judge overruled these objections, and instructed the jury, that none of the above grounds taken in defence of this action could prevail, or be sustained. The jury returned a verdict for the plaintiff for the amount of the note; and also found that *Kerswell* was authorized by *Littlefield* to sign the note with the partnership name. To the ruling and instructions of the Judge the defendants except.

E. Allen argued in support of the grounds of defence taken by him in the District Court, and cited *Moies* v. *Bird*, 11 *Mass. R.* 436; 4 *Petersd. Abr.* 348, *note;* 19 *Johns. R.* 391; 7 *Serg. & R.* 505; 3 *Yeates*, 391; 3 *Har. & J.* 159; 5 *Monroe*, 31; 1 *Nutt & McC.* 102; 11 *Mass. R.* 309; 3 *Nev. & Per.* 248; *Holt*, 474; 1 *Salk.* 292; 3 *Stark. Ev.* 1074; 1 *Cowen*, 192; 3 *Wend.* 417; 16 *Johns. R.* 38; 4 *Johns. R.* 251, 262; 2 *Johns. R.* 300; 19 *Johns. R.* 154; 2 *Cowen*, 246; 2 *Peters*, 197; 1 *East*, 48; 13 *East*, 175; 3 *Camp.* 478; 2 *Esp. R.* 524, 731;

Peake's R. 61; 2 *Stark. R.* 307; 14 *Mass. R.* 279; 8 *Johns. R.* 29; 11 *Johns. R.* 221; 13 *Johns. R.* 175.

Kidder, for the plaintiff.

The opinion of the Court was drawn up by

SHEPLEY J. — The defendants could avail themselves of the first objection in abatement only. The jury having found, that the name of the partnership was used by one of the partners with the consent of the other, the second objection becomes unimportant. And they could not have so found in consequence of any ruling respecting the burden of proof, for it is admitted in argument, that the defendants did not introduce any testimony on that point.

The only alteration in the note appears to have been voluntarily made by the defendants, and they cannot allege it to be a fraudulent one. If they became sureties contrary to the wishes of the principal his relations will not be altered thereby; nor will any new responsibilities attach to him in consequence of it.

It has been decided, that by signing in this manner they became joint and several promisors.

The consideration of the contract between the principal parties is a good consideration for the promise of a surety.

Exceptions overruled.

ELBRIDGE G. MORRISON *& al. vs.* NATHAN FOWLER.

The vendor of goods may be a witness as well to defeat, as to sustain the sale, his interest being a balanced one in either case.

In a suit by the vendee against the vendor of goods on his implied warranty of the title, it would not be a good defence to prove, that the plaintiff had obtained a release from a subsequent purchaser from him; and therefore such release would not affect the competency of the vendor as a witness.

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

Trespass for the taking of an ox, alleged to be the property of

the plaintiffs, by one *Kimball*, a deputy of the defendant, formerly sheriff of the county, on a writ in favor of *Strickland* against *Marsh*, as the property of the latter. The taking of the ox from the possession of the plaintiffs by *Kimball* on a lawful precept against *Marsh* was admitted, and that *Kimball* was a deputy of the defendant.

To prove their title, the plaintiffs called *A. Z. Littlefield*, who was objected to by the defendant, as interested. To prove the interest, *Kimball* having been released by the defendant, was called and testified that at the time of the attachment, one of the plaintiffs told him that they had purchased the ox of *Littlefield & Kerswell*, who must make good the ox to them. *Littlefield* and *Kerswell* were released by the plaintiffs, and then admitted to testify. They stated that they originally signed a note for oxen, of which that in controversy was one, with *Marsh* to *McClure;* that afterwards *Marsh* agreed with them to pay the note and take the oxen, and that the note was paid by them, and the oxen taken into their possession ; and that they sold this to the plaintiffs. The defendant introduced evidence tending to contradict *Littlefield & Kerswell*, and offered *Marsh* as a witness. He was objected to as interested, and excluded by the Judge. The verdict was for the plaintiffs, and the defendant filed exceptions.

Tenney, for the defendant, contended, that *Marsh* was a competent witness, and should not have been excluded. It is but the common case of a balanced interest, being liable to *Strickland*, the attaching creditor, or to *Littlefield & Kerswell*, the purchasers of him. 2 *Mass. R.* 106 ; *ib.* 520 ; 13 *Mass. R.* 199 ; 17 *Mass. R.* 197 ; 4 *Johns. R.* 126 ; 3 *Wend.* 386 ; 2 *East*, 458 ; 7 *T. R.* 480 ; 13 *East*, 177 ; 2 *Caines*, 77 ; 3 *Fairf.* 371 ; 21 *Pick.* 70.

The release of the plaintiffs to *Littlefield & Kerswell* could make no difference. *Marsh* would be equally liable to them, whether they were obliged to pay to the plaintiffs, or could keep the amount themselves.

Leavitt, for the plaintiffs, contended, that *Marsh* was directly interested. If the defendants prevail, so much of the debt of *Marsh* to the creditor will be paid, and the plaintiffs can have no

claim on him. The release to *Littlefield & Kerswell* destroys the right of action of the plaintiffs against them and against *Marsh*. *Rice* v. *Austin*, 17 *Mass. R.* 197; *Lothrop* v. *Muzzy*, 5 *Greenl.* 450.

The opinion of the Court was drawn up by

SHEPLEY J. — If *Marsh* testified so as to defeat the title of *Littlefield & Kerswell*, who derived their title from him, he would be liable to them for the value. *Nichols* v. *Patten*, *ante p.* 231. And if his testimony supported it, his debt to *Strickland* would remain unpaid. His interest was balanced, and he should have been admitted, unless the release from the plaintiffs to *Littlefield & Kerswell* relieved him from his responsibility to them. When a covenant runs with the land a release from the owner to his grantor may operate a discharge to those preceding him. But in contracts for the sale of goods, each seller being responsible only to his purchaser, the relations between them are not affected by any contracts between subsequent parties. In a suit by *Littlefield & Kerswell* v. *Marsh*, on his implied warranty of the title, it would not be a good defence to prove, that they had obtained a release from a subsequent purchaser from them.

Exceptions sustained and new trial granted.

THOMAS DARLING *vs.* SAMUEL ROLLINS *& al.*

In the levy of an execution, the appraisement, and the special designation of the estate, must necessarily precede the delivery of possession and seizin thereof, by the officer to the creditor; and any attempt to deliver seizin before the appraisement, can be of no validity.

When an officer has been directed to levy an execution upon real estate, and an appraisement thereof has been made, it is his duty to deliver seizin and possession of the land to the creditor; and if the creditor declines to accept it, the officer should return that with the other facts upon the execution, and that the same is in no part satisfied.

The creditor is not obliged to accept seizin of the land appraised, and upon return of the officer of his refusal, is entitled to have an alias execution; but the original execution cannot be superseded.

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

Darling presented his petition setting forth, that, on *Jan.* 6, 1840, he delivered an execution in his favor against the defendants to an officer, and that the same was on that day levied upon land of *Rollins*, by appraisement, but that the creditor had not received seizin thereof, and did not wish to receive the land in satisfaction of his execution; and prayed that "the said levy be annulled, and that a new execution be issued on said judgment," for several reasons set forth. The officer concluded his return on the execution as follows. "And as to further proceedings, the attorney of record to the said creditor entered upon the said real estate, to show the same to the appraisers and myself, to be levied and set off as aforesaid; and while upon the land, and before the appraisers had appraised the same, I stated to the said attorney, that he might consider the seizin to be delivered to him in order to prevent the necessity of going with him upon the land again, to receive seizin thereof, after the appraisement thereof had been completed, to which the attorney assented and agreed. And the appraisers having afterwards completed appraising the same, as certified in their above certificate, I did not afterwards deliver seizin to him. Wherefore if the levy be completed by the above named proceedings, I return this execution satisfied." The return was signed by the officer.

The District Judge ordered that the execution upon which the

return was made, be superseded and annulled, and that a new execution be issued. To this the respondents excepted.

Johnson, for the respondents, insisted, that the execution was satisfied by a levy upon the land. But this is not the proper mode of trying the question. The creditor should have brought debt on the judgment, or *scire facias* to have a new execution. The Judge cannot in this manner set aside an officer's return, and determine whether a title to real estate was acquired by the levy. *Gorham* v. *Blazo*, 2 *Greenl.* 232; *Atkins* v. *Bean*, 14 *Mass. R.* 404; 7 *Cranch*, 278.

Leavitt, for the petitioner, said, that the creditor was not obliged to accept seizin of the land appraised, in satisfaction of his execution, and was entitled to a reasonable time to make his election. *Stat.* 1821, *c.* 60, § 27; *Gorham* v. *Blazo*, 2 *Greenl.* 232. The remark of the attorney to the officer, that he would consider seizin delivered, was of no validity, as seizin cannot be delivered until after the appraisement.

The opinion of the Court was drawn up by

WESTON C. J. — The course of proceeding, to be pursued in levying an execution upon real estate, is pointed out by the statute of 1821, *c.* 60, § 27. Appraisers are to be appointed, whose duty it is to appraise the estate, and to set out the same by metes and bounds. And the officer is to deliver possession and seizin thereof, that is, of the estate thus set out, to the creditor or creditors, his or their attorney. It is manifest then, that the appraisement, and the special designation of the estate, must necessarily precede the delivery of possession and seizin thereof by the officer to the creditor. It could not be done previously; and an attempt to do so, could be of no validity. It does not appear therefore, that the estate levied upon has vested in the creditor, and the execution thereupon satisfied. The levy was incomplete. The officer has not performed the duty, which the law imposed upon him, which is to deliver seizin to the creditor, after the appraisement, if he will accept it, and if he declines to do so, the officer should certify that fact, and that thereupon he returned the execution in no part satisfied. The judgment debtor or debtors, and others interested in the state of the title, might thereupon have access to record evidence that the levy

had failed, and for what reason. And upon such a return, the creditor, who is not obliged to accept seizin of the land levied on, may have an alias execution.

But we perceive no reason why the original execution should be superseded. It issued regularly; and the officer, at the instance of the attorney for the creditor, performed important official acts, in obedience to its precept. That precept requires, that he make due return of his proceedings, in the performance of which both debtor and creditor have an interest. In our judgment, the order to supersede that execution, is not warranted by law.

Exceptions sustained.

Levi J. Merrick *vs.* Joseph Parkman.

In an action by an indorsee on a note transferred when over due, the declarations of the indorser while he held the note, may be given in evidence by the maker.

But if the maker of the note elects to call the indorser as a witness, he thereby waives his right to give his declarations in evidence.

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

The plaintiff brought his action as indorsee of a note, dated *July* 7, 1837, made by the defendant to *Gridley T. Parkman*, payable on demand, and by him indorsed to the plaintiff, *Oct.* 4, 1837. The defendant called *Gridley T. Parkman*, the payee, and examined him as a witness, and his testimony tended to show, that the note was given to him under such circumstances, that it could not be recovered. The plaintiff then called witnesses who testified to facts calculated to control the effect of *G. T. Parkman's* testimony. The exceptions state, that "the defendant, without pretending that his witness had made any mistake, or had stated any thing untruly, to prove admissions made by said *Gridley* relating to the consideration of the note and the circumstances under which it was given, not contradicting said *Gridley's* evidence in the case, and made while said *Gridley* held the note previous to

its transfer to the plaintiff." This evidence was objected to and the Judge ruled that it should not be admitted. To this ruling the defendant excepted.

The case was submitted without argument: —

H. Warren, for the defendant, merely citing *Hatch* v. *Dennis*, 1 *Fairf.* 244.

Tenney, for the plaintiff.

The opinion of the Court was by

SHEPLEY J. — In the case of *Hatch* v. *Dennis*, 1 *Fairf.* 244, it was decided, that the declarations of the holder of a negotiable promissory note over due might be given in evidence by the maker. And the defendant's counsel claim the benefit of that rule in this case, although he had been introduced and examined as a witness. The defendant was not obliged to introduce him and make him his witness, but having done so, the whole truth is presumed to have been extracted from him under oath. The general rule then applies, that his testimony under oath is better evidence than his declarations not under oath. The reason for the exception to the rule ceases. And the maker is no longer entitled to the benefit of it. The declarations of such a holder are allowed to be given in evidence, only, because he is supposed to be interested against the maker and to be making them against his own interest. The law therefore does not require the maker to call him, but if he elect to do so, he waives the benefit of the exception, and places himself under the operation of the general rule.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PISCATAQUIS, JUNE TERM, 1841.

Mem. WESTON C. J. was not present at this Term.

ABRAHAM D. YOUNG *vs.* INHABITANTS OF GARLAND.

The declarations of a witness that he is interested in the event of the cause, cannot be given in evidence to exclude him from testifying. The objection goes to his credit, but not to his competency.

The proceedings of a town in laying out a road, not authorized by any statute, although in accordance with a long usage of the town, are inadmissible to show the location or limits of a road.

A county road, or common highway, may be proved by usage, without first showing that there is no location of such way on record.

In an action against a town for an injury alleged to have been sustained by reason of a defect in a county road within the town, the writ may be amended by substituting *common highway* for *county road.*

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

This was an action on the case in which the plaintiff claimed damages for an injury done to his horse by reason of a defect or incumbrance, alleged in the writ to have been upon a county road in *Garland,* which the defendants were bound to maintain. Under the general leave to amend, the plaintiff filed a count, describing the road as a common highway; to which amendment the defendants objected, but the objection was overruled. The plaintiff introduced witnesses to prove the existence of a road within the ter-

mini described in the writ by usage. The defendants' counsel insisted, that the road being described in the writ as a county road, the plaintiff was bound to show a location by the county commissioners, or some other court having authority to locate what are usually termed county roads. He also insisted that parol evidence of the existence, course and limits of a road, could not be introduced until a foundation for its introduction had been laid, by showing that a search had been made for record evidence of its location, course and limits, and that no such evidence could be found; and he objected to the introduction of parol evidence for the reasons aforesaid. The objections were overruled by the Judge, and the evidence was permitted to go to the jury. A witness was called by the plaintiff and was objected to by the defendants on the ground of his interest in the action, and it was proposed to show his interest by proving his declarations. The evidence being objected to, was ruled to be inadmissible, and was excluded, and the witness was sworn and examined. To show the actual limits and boundaries of the roads, the defendants offered to prove by the records of the town, the proceedings of the town in opening the rangeway between ranges eight and nine, which was the road in question, and to prove by witnesses, that in the original location of lots in the town by the proprietors, rangeways were reserved for roads between the ranges of lots in locations, where it was supposed roads would be wanted by the inhabitants, and that when the lots were sold, they were bounded on these rangeways; and that it had always been the custom in that town, when the inhabitants wished for a road upon any of the rangeways, to pass a vote at a town meeting to open the rangeway, and that the range so opened was considered by the town as a road, and that this was the only mode adopted by the town of making roads upon the rangeways. They also offered to prove that the obstruction in question was several feet beyond the limits of the rangeway before described. But it being objected that the doings of the proprietors could be shown only by their records, and it being admitted that the proceedings of the town in opening the road were not pursuant to the provisions of any statute of the State; the objection was sustained and the evidence was excluded. The defendants introduced witnesses who testified, that between the log and the fence on the other side of the

road, the road was in such condition as to repair and width, that two loaded ox teams could safely and conveniently pass each other. The verdict was for the plaintiff, and the defendants filed exceptions.

J. Appleton, for the defendants, objected, that the testimony offered to show the declarations of the witness that he was interested were improperly excluded. 18 *Johns. R.* 98; *Coxe's R.* 47; 1 *Har. & J.* 105; 2 *Hayw.* 340; 2 *Munf.* 149.

The plaintiff should not have been permitted to give evidence of a way by usage, until it had been shown that search had been made for a record thereof, and that it was not found. Secondary evidence is not admissible, until it be proved that the primary cannot be had. *Avery* v. *Butters*, 1 *Fairf.* 405.

A town way can be proved only by the record. *Com.* v. *Low*, 3 *Pick.* 408; *Com.* v. *Newbury*, 2 *Pick.* 51.

The testimony offered by the defendants was important and material, and was improperly excluded. It was admissible to show the side lines of the way, which had been proved only by parol, and to show that there was ample room to pass without difficulty. 6 *Cowen*, 190.

Blake, for the plaintiff, said the allowing of the amendment was a mere act of discretion, to the exercise of which, exceptions do not lie. *Clapp* v. *Balch*, 3 *Greenl.* 216. No amendment however was necessary. County road and highway mean the same. *Com.* v. *Wilkinson*, 16 *Pick.* 175; *Stedman* v. *Southbridge*, 17 *Pick.* 165.

A highway, or county road, may be proved by usage, without showing that all the records of the courts had been searched. 17 *Pick.* 165; *Todd* v. *Rome*, 2 *Greenl.* 65. If it be true that all roads are originally by record, the result is the same; for after twenty years usage, both the location of the road and the record of it will be presumed. *Rowell* v. *Montville*, 4 *Greenl.* 273.

It cannot be right to admit in evidence the proceedings of the town, which are admitted to be illegal. All the proof offered to show where the actual traveled road was, went to the jury. *Sprague* v. *Waite*, 17 *Pick.* 309.

Proof that a witness has admitted that he was interested, does

not exclude him. It goes to his credit, but not to his competency. *Commonwealth* v. *Waite*, 5 *Mass. R.* 261; *Peirce* v. *Chase*, 8 *Mass. R.* 487.

The opinion of the Court was drawn up by

EMERY J. —One matter of exception against the decision of the Court of Common Pleas is the exclusion of evidence as to the declarations of a proposed witness as to his interest. If a witness is sought to be excluded by proof of his declarations the attempt will be unavailing. It will go only to his credibility. Were it otherwise any one might deprive a party of the benefit of his testimony by a simple declaration that he was intereste d.

In *North Carolina*, it has been ruled that a witness conceiving himself interested, when in fact he is not, will not render him incompetent. *Harrison* v. *Harrison*, 2 *Hayward*, 355.

As to proof of admissions of declarations of witnesses respecting matters of religious opinion, in order for the Court to determine whether the expected witness be an atheist, it is adopted from the necessity of the case, as a man's mind can only be known from his declarations in conversation or writing. Yet it is considered as an entirely different affair in regard to the declaration by a proposed witness as to his pecuniary interest.

The defendants consider that their proposal to prove the opening of the road between the ranges 8 and 9, and the location of that as bearing on the question of usage and side lines, ought to have been received; and that the accident happened without the range lines; and that there was ample room for travelers to pass between the log and the fence on the other side of the road, was sufficient to sustain the defence.

It appearing on the exceptions that it was admitted that the proceedings of the town in opening the road were not pursuant to the provisions of any statute of the State, we are satisfied that the decision excluding the proof of custom of the town must be sustained.

It has been decided in *Massachusetts*, that a private way cannot be proved by usage. *Com'th* v. *Newbury*, 2 *Pick.* 5; *Com'th* v. *Low*, 3 *Pick.* 408.

A remark of *Shaw, C. J.* in *Stedman* v. *Southbridge*, 17 *Pick.* 162, was, that the allegation of injury on a town way could not

prove but that it was such a highway as the town was to repair, and that road or common road is used synonimously with highway. *Ancient Charters*, 267, 494, 308, 506, 612, that the word *road* is *generic* embracing every species of public way. We apprehend that the proof of the road by usage was altogether proper. It was a question of fact whether the accident happened within the limits of the road, which the jury have settled, and the defendants had the benefit of the testimony before them on this whole subject.

We have expressed our views on this subject independently of the amendment. But that amendment we see no reason to disapprove. The exceptions must be overruled.

JOSEPH P. HILL *vs.* FOREST TURNER.

In an action for neglect to perform militia duty, if the time when the neglect occurred be erroneously stated in the writ, the error may be corrected by amendment.

The *record* of the roll is sufficient evidence of the enrollment.

If it be shown by the company roll, or by the record thereof, that the soldier had once been seasonably enrolled in the company, and that his name had been subsequently continued on the roll without date, it is sufficient.

Where the certificate of the surgeon respecting the bodily infirmity of a soldier, is given after the neglect charged, it can have no effect upon the case.

Whether the soldier charged with neglect of duty was an able bodied man and liable to be enrolled, is a question of fact to be decided by the magistrate; and his decision is conclusive, and cannot be revised in this court by writ of error.

THIS was a writ of error, brought to reverse a judgment of a justice of the peace, imposing a fine on *Hill*, the plaintiff in error, for neglecting to attend a militia training. In the declaration the day of the alleged neglect of duty was so illegibly written, that the justice found it difficult to determine, whether *eighth* or *eighteenth* was intended. He permitted an amendment to be made by writing eighteenth in the place of the word. To prove the enrollment, at the trial before the justice, the original plaintiff, *Turner*, offered the record of a company roll, upon which, under date of 1st *Tues-*

day of *May*, 1836, was found the name of *Hill*, and against it a mark usually placed there when the person was present at the time. This was the only evidence to prove that *Hill* was enrolled prior to the training when the neglect is alleged in this suit. This was objected to as insufficient, but the justice decided that the enrollment was duly proved. There was no date against subsequent enrollments of *Hill* in the same company. The other facts sufficiently appear in the opinion of the Court.

Besides the general error, there were assigned as errors:—

1. That *Hill* was never enrolled, the captain of the company having no roll to produce, and that neither he, nor any other commanding officer of the company, had ever enrolled the plaintiff in error.

2. That the original plaintiff had charged the neglect to have been on the eighth of *September*, when the proof of neglect, if any, was on the eighteenth, and the justice erroneously permitted an amendment of the declaration by making the writ read eighteenth, and thereby in effect making a new writ.

3. That the original defendant had a permanent lameness, and was not liable to perform military duty.

J. S. Holmes, for the plaintiff in error, argued in support of the errors assigned, and cited *Statute* 1834, *c.* 121; *Com.* v. *Hall*, 3 *Pick.* 262; *Sawtelle* v. *Davis*, 5 *Greenl.* 438; *Hill* v. *Fuller*, 14 *Maine R.* 121; *Howe* v. *Gregory*, 1 *Mass. R.* 81; *Com.* v. *Fitz*, 11 *Mass. R.* 540; *Pitts* v. *Weston*, 2 *Greenl.* 349; *Com.* v. *Bliss*, 9 *Mass. R.* 322; *Com.* v. *Smith*, 14 *Mass. R.* 374.

C. A. Everett argued for the plaintiff, and cited *Cutter* v. *Towle*, 3 *Greenl.* 38; *Hill* v. *Fuller*, 14 *Maine R.* 121.

The opinion of the Court was by

SHEPLEY J. — There was but one cause of action stated in the writ. The time when the neglect of duty occurred was erroneously alleged, and this error was allowed to be corrected. That did not introduce a new cause of action. It only reformed the statement of the one in suit. And the amendment was properly allowed.

It was decided in the case of *Potter* v. *Smith*, 2 *Fairf.* 31, that the record of the roll was evidence of the enrollment.

When the enrollment is made a sufficient time before a soldier is called upon to do his duty, it is not necessary, that the date of his first enrollment should be stated upon every correction of the roll. When additional enrollments are made after the first *Tuesday* in *May* the time should be stated. The plaintiff in error having been enrolled in 1836 was a member of the company, and the date of his enrollment need not be proved. *Carter* v. *Carter*, 3 *Fairf.* 285.

The certificate of the surgeon respecting his bodily infirmities was given after the neglect charged, and it could have no effect upon the case. Whether he was an able bodied man and liable to be enrolled was a question of fact to be decided by the magistrate, and his decision was conclusive. It is not brought before this court for revision by a writ of error.

Judgment affirmed with costs.

Inhabitants of MILO *vs. Inhabitants of* HARMONY.

A minor who was emancipated, might gain a settlement in his own right by dwelling and having his home in a town at the time of the passing of the act of *March* 21, 1821.

A minor who was bound to service by the overseers of the poor, could, while so bound, gain a settlement under the provisions of that act.

And therefore a minor emancipated by the death of both his parents, whether under or over the age of fourteen years on *March* 21, 1821, and whether then bound to service or not, might gain a settlement in his own right by residence in a town at that time.

One who was a pauper when bound to service, cannot be considered as continuing to receive supplies as a pauper by reason of such binding.

ASSUMPSIT to recover the expenses of supporting *Josiah Lander*, alleged to have had his settlement in *Harmony*, and to have been found in distress and standing in need of immediate relief, in the town of *Milo*. The facts were agreed, from which it appeared, that the question between the parties was, whether *Lander*, the pauper, had gained a settlement in *Harmony*.

Lander, when between seven and eight years of age, his father and mother both being dead, and being then a pauper, having a legal settlement in *Greene*, in the county of *Kennebec*, was in *September*, 1814, bound by the overseers of the poor of that town by indentures to one *Chadbourne*, to live with him until he should become fourteen years of age. *Lander* lived with *Chadbourne* in *Greene* until 1816, when he removed with *Chadbourne* to *Harmony*, and lived with him in the latter town until *September*, 1821. *Lander* then went to live until he should become twenty-one with one *Littlefield* in the same town, under a verbal agreement. *Lander* left *Littlefield* in 1826, when about twenty, and did not again reside in *Harmony*. It did not appear that he had gained a settlement in any other town. The parties expressly agreed, "that *Lander* resided constantly in *Harmony*, from 1816 to 1826." If the Court should be of opinion that the pauper had gained a settlement in *Harmony*, the defendants were to be defaulted; and if not, the plaintiffs were to become nonsuit.

C. A. Everett, for the plaintiffs, contended, that the pauper was emancipated by the death of both his parents long before the act of *March* 21, 1821; and therefore gained a settlement in *Harmony*, by dwelling and having his home in that town at the time the act was passed. It is immaterial whether the pauper was over or under fourteen years of age on *March* 21, 1821. *Leeds* v. *Freeport*, 1 *Fairf.* 356; *Lubec* v. *Eastport*, 3 *Greenl.* 220; *Sidney* v. *Winthrop*, 5 *Greenl.* 123; *Fairfield* v. *Canaan*, 7 *Greenl.* 90; *Knox* v. *Waldoborough*, 3 *Greenl.* 455; *Bowes* v. *Tibbets*, 7 *Greenl.* 457; *Sumner* v. *Sebec*, 3 *Greenl.* 223; *Holyoke* v. *Haskins*, 5 *Pick.* 20; *Boothbay* v. *Wiscasset*, 3 *Greenl.* 354.

Hutchinson, for the defendants, argued, that the pauper was never emancipated until after 1821, as he was placed under guardianship, and was as much under the restraint and control of others, as if his father had lived. He therefore could gain no settlement in *Harmony* by being there in 1821. He commented upon several cases cited for the plaintiffs, and cited *Hallowell* v. *Gardiner*, 1 *Greenl.* 93; *Hampden* v. *Fairfield*, 3 *Greenl.* 436.

The opinion of the Court was drawn up by

SHEPLEY J. — It was decided in *Lubec* v. *Eastport*, 3 *Greenl.* 220, that a minor, who was emancipated, might gain a settlement in his own right by dwelling and having his home in a town at the time of the passage of the act of *March* 21, 1821. And it was decided in *Leeds* v. *Freeport*, 1 *Fairf.* 356, that a minor, who was bound to service by the overseers of the poor, could, while so bound, gain a settlement under that provision of the act.

The pauper was in this case, emancipated by the death of both his parents. And whether under or over the age of fourteen years in *March*, 1821, and whether then bound to service or not, he might according to these decisions gain such a settlement in his own right.

It was also decided in *Leeds* v. *Freeport*, that one, who was a pauper when so bound to service, could not be considered as continuing to receive supplies as a pauper by reason of such binding. It is admitted in the agreed statement, that the pauper resided in *Harmony* from 1816 to 1826, and there can be no doubt, that his residence was of such a character, that he must be considered as dwelling and having his home there during that time. And he thereby gained a settlement in that town.

The defendants are to be defaulted, and judgment is to be rendered for the plaintiffs according to the agreement.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT, JUNE TERM, 1841.

WILLIAM IRVING *vs.* WILLIAM J. THOMAS.

When a case comes from the District Court by exceptions, although all the evidence at the trial appears on the face of them, it is not in condition to be examined, as it would be on a petition or motion for a new trial. The only subjects of consideration here are those legal questions apparent on the exceptions, *and which were decided by the presiding Judge.*

The rule, *caveat emptor*, does not apply where one party to the contract entered into it by reason of the false and fraudulent representations of the other.

The Court cannot infer that a party to a lease made in consequence of the false representations of the other in relation to the income of the premises leased, waived his right to set up this in defence, from the mere fact that he had seen and been upon the premises before the lease was executed.

A false representation relating to the income or value of an estate, the knowledge of which is usually confined to the owner and those standing in a confidential relation to him, does not come within the rule, that the party making it is not responsible to one deceived by it, by reason of its being a matter which is or should be equally well known to both parties.

Although a party may not be able to rescind a contract partly executed, and recover back what he has paid under it, yet where the contract was made in consequence of the false and fraudulent representations of the plaintiff, this furnishes a good defence to an action to compel a further execution of such contract, unless after a full knowledge of all the facts the defendant has come to a new agreement, or has voluntarily waived all objections to it.

A party cannot justly be regarded as voluntarily confirming a contract believed to be fraudulent, because he did not repudiate it upon a violent presumption of fraud, instead of waiting until the time when it would be clearly shown whether there was fraud or not.

Where premises are leased for three years "at a rent of eight hundred dollars yearly," and where the lessee agrees to pay the rent semi-annually, it is not a semi-annual, but an annual rent; and the payment of four hundred dollars at the expiration of the first six months is to be considered as a part of the yearly rent, and not a payment for any specified number of months.

An objection made to the admission of testimony of a particular description or class, as to parol testimony to prove a contract to be fraudulent, does not extend to or imply an objection to any question, or to any answer of a witness, during the examination.

Testimony appropriate to one count in the declaration, although not to all, is admissible.

A judge may properly refuse to comply with a request of counsel to give a particular instruction to the jury, if the request assume as facts proved on which to predicate the instruction, what had not been proved, or was proper only for the decision of the jury upon the evidence.

If the effect of a compliance with the request of counsel to a judge to give a specified instruction, would be to mislead instead of to enlighten the jury, the request may well be denied.

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

Assumpsit on a lease in writing not under seal, with a count for the use and occupation of a tavern house, being the same described in the lease. The plaintiff read the lease, dated *Dec.* 9, 1835, by the terms of which the defendant was to occupy the buildings for three years from the first of *March*, 1836, at a yearly rent of $800, to be paid in two equal semi-annual payments. At the end of the first six months the defendant paid four hundred dollars. This action was brought after the expiration of the first year. The plaintiff proved that the defendant entered into the premises in the spring of 1836, and occupied the same for about the term of one year, and then removed; and that the defendant had been at the house, and boarded with the plaintiff there, in the fall of 1835, and some part of the winter of 1836, before removing there to take possession of the house.

It was contended in defence, that the lease was obtained by false and fraudulent representations as to the value and amount of the income of the premises, and the defendant offered evidence *tending to prove* what representations were made to him, to induce him to take the lease, and agree to pay the rent stipulated in it; that the same were false and fraudulent; and that he was thereby deceived

and induced to accept the lease and agree to pay as rent four times the value. The plaintiff's counsel objected to the introduction of this evidence, as incompetent and irrelevant. The objection was overruled by the Judge, and the testimony admitted. The defendant offered evidence tending to show that the use of the premises was not worth more than two hundred dollars per year; to the introduction of which the plaintiff's counsel objected as irrelevant. The objection was overruled, and the evidence went to the jury. The whole evidence is set forth in the exceptions at the request of the counsel for the plaintiff, but no further objections appear to have been made to the admission of any part thereof. In committing the cause to the jury, the Judge stated to them, that if they found the lease declared on to have been fairly obtained, they would find for the plaintiff, and give him in damages what appeared to be due on the lease, for it was not a question whether the defendant had made a good bargain or a hard one. The defence relied upon is fraud, and they would inquire whether the evidence proved that the lease declared upon had been obtained by means of representations falsely and fraudulently made by the plaintiff, and that the defendant had thereby been deceived and induced to enter into a contract to which he would not have consented, had the truth been stated, and if so, such representations would render the lease void; that the law would not uphold a contract based upon fraud and deception; and that if they found the lease offered in this case to be of that character, no action could be sustained upon it; that if it had been proved that the defendant actually occupied the premises, and should they find the lease to have been void, he would still be liable under the count for use and occupation for as much as the same would reasonably be worth during the time he had actually enjoyed the premises; that if the four hundred dollars received of the defendant by the plaintiff should appear to be as much as the premises were worth, they would find for the defendant; but if they found the use of the premises was worth more than the plaintiff had received, they would return a verdict for him, and give him in damages what they should find to be due.

The counsel for the plaintiff requested the Judge to charge the jury,

1. That *Thomas* having occupied the premises more than a year,

and made the first semi-annual payment without objection, it is now too late to object that *Irving* misrepresented the amount of hay cut on the premises, or the business of the house.

2. That the acts of *Thomas* amounted to a waiver of all objections to the lease on the ground that false representations were made to him by the plaintiff before the lease was entered into; that by entering into the premises and there remaining more than a year, and paying rent at the end of six months, he thereby ratified and affirmed the original contract, and cannot now resist the payment of rent on the ground of such representations.

3. That the plaintiff is at all events entitled to recover under the count for use and occupation as much as the premises were reasonably worth for the last six months.

4. That having paid four hundred dollars after the defendant had been in possession of the premises for six months, is evidence that the defendant did not then consider that *Irving* had deceived him.

The Judge declined giving the instructions as requested, and directed the jury, that if they found by the evidence, that at the end of six months, when the defendant paid four hundred dollars, it was in settlement of the rent then due, or for a given time, he would be bound by such settlement, and the plaintiff would be entitled to recover what the premises were reasonably worth for the remaining time he occupied the premises. But if they found there was no settlement for a given portion of the time, and the four hundred dollars were paid towards the whole time he had occupied, they would inquire if he had paid enough.

The jury returned a verdict for the defendant, and found that the lease was fraudulently obtained by the plaintiff, and that there had been no settlement of the rent for any portion of the time.

To the admission of the evidence objected to, to the rulings of the Judge, and to his not giving the instructions requested, the plaintiff excepted.

The arguments were in writing.

J. Appleton and *Washburn*, for the plaintiff, argued in support of the four following propositions, making several subdivisions, some of which are noticed in the opinion of the Court.

1. The defendant is within the rule of *caveat emptor*, having had an opportunity to judge for himself, before he made the contract.

1 *Story's Eq.* § 197, 199; 3 *Meriv.* 704; 2 *Kent's Com.* 484; 1 *Fonb. Eq.* 371; *Yelv.* 21; *Rol. Ab.* 101; 2 *Saund. Pl. & Ev.* 441; *Sugd. V. & P.* 195; *Cro. Jac.* 4; 5 *Ves.* 508; 10 *Ves.* 505; 1 *Chitty's Pr.* 841; *Chit. Con.* 223; 4 *Taunt.* 479; 3 *T. R.* 54; 3 *Fairf.* 262; 1 *Dana*, 273.

2. If there were fraudulent representations, still the defendant so conducted with the property after the fraud must have been discovered, that he lost the right to set up that in defence. A party may waive his right to set aside a contract into which he was led by fraud. He may, after the fraud is discovered, by going on, using and enjoying the property, receiving the benefit of it, and holding the other party out, renew, ratify and confirm the contract. 1 *Chit. Pr.* 838; 1 *Bro. P. C.* 289; *Sug. V. & P.* 192; 10 *Ves.* 508; 6 *Ves.* 670; 3 *Carr. & P.* 407; 3 *Wend.* 236; 2 *Stark. Ev.* 641; 4 *Esp. R.* 95; 1 *Campb.* 190; 1 *Stark. Cas.* 257; 7 *East*, 480; 1 *Moore*, 106; *Long on Sales*, 139; 2 *Carr. & P.* 514; 3 *B. & Ald.* 456; *Cowp.* 818; *Dougl.* 23; 1 *T. R.* 133; 3 *Esp. R.* 82; 4 *Mass. R.* 502; 15 *Mass. R.* 319; 3 *Greenl.* 30; 2 *Shepl.* 364; 7 *Greenl.* 70; 12 *Conn. R.* 234; 8 *Verm. Rep.* 214; *Newl. on Con.* 496; 1 *Atk.* 354; *Ball. & B.* 357; 3 *Johns. Ch. R.* 23, 400; 6 *Paige*, 254.

3. The Judge should have instructed the jury, that we were at all events entitled to recover the reasonable value of the premises for the last six months occupied by the defendant. 1 *Fairf.* 467. When the facts are admitted, it is the duty of the Court to declare the law. 2 *Greenl.* 5; 7 *Greenl.* 122; 7 *Wend.* 160; 11 *Johns. R.* 187; 1 *Wend.* 376; 4 *Wend.* 639.

4. Testimony was improperly admitted. Thinking one way or another, is no evidence on which a jury may safely rely. Suspicions, opinions, thoughts, and surmises should never be permitted to go before a jury. 15 *Pick.* 90, 320; 6 *N. H. Rep.* 464; 17 *Wend.* 161; 6 *Conn. R.* 169.

Wilson, for the defendant, considered, that the verdict of the jury, that the lease was fraudulently obtained by the plaintiff, and that the rent was not paid by the defendant for any particular portion of the time, was conclusive of the whole matter.

The evidence to show fraud was rightly admitted. Questions of fraud are for the determination of the jury. *Sherwood* v. *Mar-*

wick, 5 *Greenl.* 295. Parol evidence of the consideration, and of the representations of the plaintiff, was properly admitted. *Folsom* v. *Mussey*, 8 *Greenl.* 400; *Barker* v. *Prentiss*, 6 *Mass. R.* 430; *Tyler* v. *Carleton*, 7 *Greenl.* 175.

The instructions actually given by the Judge covered the whole ground in controversy; they were in strict accordance with law; most liberal to the plaintiff; and such as no honest man would fear, or find fault with. *Bean* v. *Herrick*, 3 *Fairf.* 262.

The opinion of the Court was drawn up by

SHEPLEY J. — Whether the jury came to a right conclusion upon the facts before them cannot be the proper subject of inquiry here upon a bill of exceptions. The case is not in a position to be examined as it would be on a petition or motion for a new trial. The only subjects for consideration here, are those legal questions apparent in the bill of exceptions, and which were decided by the presiding Judge. The first is, whether evidence to prove, that the defendant was induced to accept the lease by the false and fraudulent representations of the plaintiff was, under the circumstances, legally admissible. The circumstances relied on to show, that such testimony was incompetent or irrelative are, that the defendant had seen the premises before taking a lease of them; had boarded with the plaintiff, then the occupant, part of the winter before the term commenced; had entered under the lease and occupied the premises for one year or more; and had paid the first instalment due for rent. The argument is, that under such circumstances he could not, or ought not to have been deceived; and that if deceived he must be regarded as having waived the right to make such a defence. The case does not shew any other knowledge acquired by the defendant before making the contract, than what must be inferred from the fact, that he "had been at the premises the fall before he moved there." How long he remained there before the ninth of *December*, when the lease was executed, or what opportunity he had to examine, or to make inquiries does not appear. From such a fact alone the Court could not have properly decided that the defendant was by law precluded from proving that he was deceived by the false representations of the plaintiff. It is said, that the rule *caveat emptor* should have been applied. That rule is not

applicable to a case like this, but to cases in which there is no proof of false representations, or of warranty.

One is not bound by a false representation or warranty so clearly and obviously differing from the fact, that every person having the use of the common organs of sensation must know it to be erroneous; for reliance is to be placed upon the knowledge which these afford rather than upon the statements of any one. This, however, is not a case of that description. It has been decided also, that the seller is not bound by representations respecting the value of the property sold, because it is a matter which may be equally known to both parties. A representation relating to the income or rent of an estate does not come within this rule for the reason, that the knowledge of it may be, and usually is, confined to one party; and the other can be presumed to ascertain it accurately only from him, or from those standing in a confidential relation to him. Hence one making such a false representation is bound by it. *Leakins* v. *Clissel*, 1 *Lev.* 102; *Lysney* v. *Selby*, 2*d Ld. Ray.* 1118; *Bowring* v. *Stevens*, 2 *C. & P.* 337; *Cross* v. *Peters*, 1 *Greenl.* 389.

It is true, as alleged in the argument for the plaintiff, that the defendant could not then rescind this contract. But the defence was not placed upon the ground that he had rescinded it, and was to recover back what he had paid. It rested upon the position that the plaintiff could not compel the defendant further to execute a contract which originated in his own false and fraudulent representations. And the cases cited shew, that he may make such a defence, unless after a full knowledge of all the facts, he has come to a new agreement, or has voluntarily waived all objections to it. In this case there is no proof of any new agreement; and nothing from which a waiver can be inferred, except the facts before stated, and certain remarks which he afterward made to the witnesses respecting the contract. He could not come to a full and certain knowledge of what would be the amount of business or of profits yearly, until the end of a year; although it would be true that each month or shorter period would afford him an accumulation of knowledge strongly tending to satisfy the mind that the representations must have been false. But he cannot be justly regarded as voluntarily confirming a contract believed to be fraudulent, because he did not

repudiate it at an earlier period upon a violent presumption of fraud, instead of waiting for the close of the year, when it would become so certain that it could be clearly proved. Nor does the fact that he continued to perform on his own part by paying the first instalment, and the remarks made to the witnesses, and his residence in the plaintiff's family during the previous winter, all taken in connexion with the remarks made to the plaintiff at the time of making the payment, authorize any such inference. Much less do all these matters authorize a court to come to such a conclusion and state it as matter of law. And this it must have done before the testimony could have been excluded.

The cases of *Percival* v. *Blake*, and *Cash* v. *Giles*, cited by plaintiff's counsel, do not decide that mere delay to give information of defects, precludes the party from availing himself of them in defence in cases where the contract was entered into through false representations. So far from it, Ch. J. *Abbott*, in the former case says to the jury, "if you think that any deceit was practiced, then you will find your verdict for the defendant."

Objections are now made in argument to particular statements made by the witnesses, and to the expression of their opinions and belief. No such objections appear to have been made to the testimony at the time of the trial. An objection to the admission of testimony of a particular description or class, as in this case to parol testimony, to prove the contract to be fraudulent, do not extend to, or imply any objection to any question, or to any answer of the witnesses during the examination. When the court in this case decided that testimony to prove that the contract was procured by fraud was admissible, it cannot be understood to have decided that any loose remarks which witnesses introduced for that purpose might offer, unless checked, were legal testimony. That the objections were only to testimony of whatever description it might prove to be for the purpose proposed, is quite clear, for they appear from the case to have been made only before the introduction of any such testimony, and on the occasion of its being proposed. There are doubtless remarks made by the witnesses which were not legal testimony, but there being no indication of any other than such general objection, they must be regarded as having been received without objection. Nor is there any thing in the case from

which this Court can conclude with certainty that they were not called out by the plaintiff.

These observations are equally applicable to the objections relating to the testimony introduced to prove, that the premises were "not worth more than two hundred dollars for a year." Such testimony being necessary to prove that some of the plaintiff's representations were false, "and it being appropriate to the count for use and occupation," it was properly admitted.

The Judge properly refused to comply with the first request, for the reason among others, that it erroneously assumed as a fact, that the payment of rent was made without objection. And with the second, because it assumed as proved, matters proper for the jury only to decide, and for the reasons which have been already stated while speaking of the admissibility of the testimony.

The third request and the arguments to sustain it, appear to have arisen out of an impression that the rent was a semi-annual and not an annual rent; and that the payment of the first instalment was an extinguishment or payment of it for a period of six months. But the case states, that it was a yearly rent, the lease being for three years, and at a rent of $800 yearly. The fact that one half of it was to be paid semi-annually would no more constitute it a half yearly rent, than a provision would, that one half should be paid in advance, or in thirty or sixty days after the entry upon the premises. If repairs chargeable to the landlord had been made by the tenant, or the landlord had omitted the performance of a stipulation of importance to the tenant during the first six months, could it be contended that because the first instalment of the rent had been paid without bringing these matters into account, the tenant had forfeited all claim to have them allowed on an adjustment at the end of the year? The balance claimed in this suit arose no more out of one period of the occupation than another. It was only a balance of a yearly rent; and the payment made by the defendant would legally be regarded only as so much paid towards one integral sum of $800 as a yearly rent, and no more applicable to one portion than to another of the occupation of that year. It was part of the yearly rent, and not the rent for any specified number of months that was paid. If the Judge erred, it was in submitting this as a matter to be decided by the jury, instead of re-

garding it as a question of law arising out of the contract to be decided by himself.

The counsel's construction of the fourth request appears to be, that it required the Judge simply to inform the jury, that the payment of the first instalment of the rent was a fact among others, from all of which they might infer, that the defendant did not then consider, that the plaintiff had deceived him. The language used would not present to the minds of a jury any intimation, that they were at liberty to draw such an inference or not, as they should think proper, from that fact taken in connexion with the other facts in the case. The word "evidence," if not inaccurately used for the word "proof," would, as there used, have been likely to have conveyed the same idea to their minds, and to have left upon them the impression, that from that single fact they were bound to infer, that the defendant did not then consider, that the plaintiff had deceived him, although at the same time he informed him that he did consider, that he had been guilty of misrepresentation. It is a sufficient objection to this request, that the effect of a compliance would have been to mislead instead of enlighten the minds of the jury.

Exceptions overruled.

Allen Gilman *vs.* Amasa Stetson.

A judgment for the recovery of land in a real action, is usually conclusive upon the question of title; and may well authorize the peaceable entry of the party, in whose favor it is rendered, without process of law.

But under the *st.* 1821, *c.* 47, § 1, where the other party has by the verdict of a jury established an interest in the same land in virtue of the buildings and improvements made thereon by him or those under whom he claims, if the demandant does not within one year from the rendition of judgment, unless he elects on the record to abandon the demanded premises to the tenant, pay into the clerk's office, or to such other person as the court may appoint, the sum with the interest thereof which the jury shall have assessed for such buildings and improvements, he can have no writ of seizin or possession on his judgment, nor can he maintain any action for the recovery of the same premises, unless he shall first have paid to the tenant all such costs as would have been taxed for him, had he prevailed in the first suit.

If therefore the demandant, in such case, does not make payment within the year, the judgment ceases to have any validity whatever, and will not authorize an entry into the land under it.

A recovery of an undivided portion of a tract of land against one who had been for many years in possession under a recorded deed of the whole, and an entry under the judgment, gives the demandant a rightful seizin of such share in his own right, but does not enure to the benefit of one having a similar claim to the remainder of the tract, or prevent its being barred by the statute of limitations.

Gilman filed a petition for partition at *Oct. Term*, 1835, wherein he alleged that he was seized in fee as tenant in common of one undivided fourth part of a piece of land, with the buildings thereon, on *Exchange Street*, in *Bangor*, and prayed to have partition thereof made. *Stetson* appeared, and pleaded that he was sole seized of the land. The petitioner claimed under a deed from *N. Harlow*, dated *Sept.* 24, 1802, acknowledged and recorded within the same month, purporting to convey the whole lot. *Gilman* entered under that deed and continued in possession until *March*, 1825. The respondent read in evidence a judgment in his favor against the petitioner in 1826 for one moiety of the lot. Also a judgment in favor of *French* against the petitioner in 1827 for one fourth of the lot, and showed that *French's* title was in him. The respondent also read in evidence the record of a judgment recovered at the *June* Term of this Court for this county, 1827, for one undivided fourth part of the same lot in favor of *Robert Lapish*,

against the petitioner, and showed that the title of *Lapish* was in him. In this last case, the then tenant and present petitioner, preferred a claim for betterments under the statute, which was found in his favor by the jury, and estimated at $37,50. It did not appear that this sum, or the costs to which the tenant would have been entitled, had been paid or tendered to the petitioner, or to the clerk of the Court, or to any other person authorized to receive the same, or that the costs had ever been taxed, or that any writ of possession had issued. It appeared that Mr. *Abbott* occupied the building at one time, and in *December*, 1829, took a lease of one fourth part of it from *Gilman*.

There was testimony on the part of the respondent tending to show, that *Gilman* had waived his interest in the betterments, or had agreed to set-off the same against the costs; and also opposing testimony on the part of the petitioner.

At the trial before EMERY J. the parties agreed, that this action should be put to the jury, on the whole evidence, on the question, whether the petitioner had waived or abandoned his interest in the betterments, with instructions that if upon the evidence they were satisfied, that he had waived or abandoned his interest in the betterments, they should return a verdict for the respondent; and if not, then for the petitioner. The verdict was for the petitioner, and was taken subject to be amended or altered according to the opinion of the Court upon the case reported by the Judge.

F. Allen argued for the respondent, citing in support of the position, that if *Gilman* ever acquired any seizin by his entry under the deed from *Harlow*, it was destroyed by the judgments; *Vaughan* v. *Bacon*, 3 *Shepl.* 455, and cases there cited; *Farrar* v. *Eastman*, 1 *Fairf.* 191. That one tenant in common cannot be disseized by a stranger, unless all are disseized, is settled by the cases cited, and by *Ricard* v. *Williams*, 7 *Wheat.* 59. The respondent had the seizin, and was in the actual possession of the land since 1827, and it is not necessary that any writ of possession should issue upon *Lapish's* judgment. It justified the entry made under it. But were it otherwise, the judgments in favor of the other tenants in common and the entries under them were for the benefit of all the owners, and purged any disseizin committed by *Gilman*. *Colton* v. *Smith*, 11 *Pick.* 311; *Liscomb* v. *Root*, 8

Pick. 376. The better opinion is, that where there is an adverse possession, partition will not lie, until after a judgment establishing the right.

Rogers, for the petitioner, said that the petitioner had acquired a title by his entry and occupation under his deed from *Harlow*, unless defeated by the judgments. He does not claim but one fourth, and to that he is entitled. *Lapish* never paid the betterments; and unless payment therefor was made within the time limited in the statute, the judgment cannot give any rights to the demandant whatever, and is as if it had not existed, save that no new action can be maintained to try his former claim, until payment is made. The old suit does not aid the respondent, and the statute of limitation has barred any new one. The entry under the judgments made *French* and *Stetson* tenants in common with *Gilman*, but not with *Lapish*. A petition for partition may be maintained, where there has been a disseizin, if the petitioner has a right of entry. *Baylies* v. *Bussey*, 5 *Greenl.* 153.

The opinion of the Court was drawn up by

Weston C. J. — The principal question presented in this case is, whether the judgment in favor of *Robert Lapish* against the petitioner for the land in controversy, with which the respondent has connected himself, gave a right of entry to the respondent, whereby he became sole seized, or whether that judgment is evidence of title in him. And we are of opinion, that that judgment did not authorize an entry into the land for which it was rendered, and that it does not remain in force, as subsisting evidence of title. A judgment for the recovery of land in a real action is usually conclusive upon the question of title; and may well authorize the peaceable entry of the party in whose favor it is rendered, without process of law.

But the rights of such party have been essentially changed by the statute of 1821, *c.* 47, § 1, where the other party has, by the verdict of a jury, established an interest in the same land, in virtue of the buildings and improvements made thereon by him, or those under whom he claims. In such case, if the demandant does not elect, on the record, to abandon the demanded premises to the tenant, if he does not, within one year from the rendition of judgment,

pay into the clerk's office, or to such other person as the court may appoint, the sum with the interest thereof, which the jury shall have assessed for such buildings and improvements, he can have no writ of seizin or possession on his judgment. Nor can the demandant maintain a new action, for the recovery of the same premises, unless the demandant shall first have paid to the tenant all such costs as would have been taxed for him, had he prevailed in the first suit.

To permit a demandant who had not paid within the time limited, to enter, without process of law, in a case where such process is expressly forbidden, would defeat the manifest intention of the statute, which withholds from him the fruits of his judgment, if he does not extinguish, by payment within the year, the interest of the tenant. And it must be understood, upon a fair construction of the statute, that if he neglects to pay, the judgment ceases to have any validity whatever. He may bring a new action for the premises, upon payment of costs to the tenant, as if he had been the prevailing party, and not otherwise. If the first judgment was to remain as conclusive evidence of title, the prosecution of a new action would be a useless waste of time and expense. The same end would have been much more readily accomplished by providing that the demandant might, after the year, have his writ of possession by paying for the improvements with interest, and also the tenant's costs. This might have been effected by positive enactment, although generally no writ of execution upon a judgment can issue, unless sued out within a year. But we are satisfied that it was the intention of the legislature, that if the demandant did not perfect his judgment, by payment within the time limited, he should be subjected to the necessity of beginning *de novo*, as if no judgment had been rendered.

The judgment under consideration having lost its validity, the question remains, whether the verdict for the petitioner is justified by the other evidence in the case. It appears that the entire piece of land, of part of which he now claims to be seized as tenant in common, was conveyed to him by *Nathaniel Harlow*, in *September*, 1802, by a deed duly executed, acknowledged and recorded. That the petitioner thereupon went into possession, and continued to enjoy it exclusively until *October*, 1826, when a judgment for a

moiety of the whole, which was afterwards executed, was rendered in favor of the respondent. And in the following year, *Zadoc French* recovered judgment for a fourth part, which was perfected. The petitioner therefore neither does or can set up any title to the three fourths, thus recovered against him.

And it is insisted, that an entry under these judgments, not only gave them a rightful seizin in their own right, but enured also to the benefit of *Lapish*, as a seizin by one tenant in common is available to the other cotenant. But when they entered, *Gilman* was the other tenant in common. He entered, not as disseizor, but under a deed, and had then been in possession twenty-five years. *Lapish* might have the better title, unless barred by the statute of limitations, but the actual seizin was in the petitioner, and nothing has yet taken place to divest him of it. The judgment in favor of *Lapish* has lost its validity, and is no longer evidence of title. Whether *Lapish* could now prevail at law, we have no occasion to decide. He can have no action, until he first pays the petitioner his costs, which has not been done. And if *Lapish* cannot controvert the title of the petitioner directly as demandant, in a suit at law, the respondent, who has no right to the part in question, except under *Lapish*, cannot be permitted to set up that title. Otherwise the provisions of the statute, before cited, might be evaded and defeated. With respect to the occupation of the land in the rear of the building, or of the building itself, under the respondent, that would not divest the seizin of the petitioner, he being tenant in common with the respondent. The occupancy by tenants, under the respondent, is justified by his undisputed title to three fourths, without assuming that the petitioner was disseized. He entered upon the premises and asserted his right in 1829, which was recognized by the tenant, *Abbot*.

Judgment on the verdict.

Sargent French *vs.* Charles Camp *& al.*

All have a lawful right to travel on a public river upon the ice; and if any one cuts holes through the ice upon or near the place where there has been a winter way for twenty years, he is liable to the payment of all damages sustained thereby by those travelling upon such way without carelessness or fault on their part.

This was a special action on the case, alleging, that by means of a hole cut in the ice in *Penobscot River* by the defendants, the plaintiff lost his horse, he being then lawfully traveling on the ice, and the horse having fallen in and having been drowned.

There was proof in the case tending to show, that there had been a road in the winter on the ice, near the place where the defendants cut the hole, for more than twenty years.

Shepley J., at the trial, instructed the jury, that the citizens had a lawful right to travel on the river upon the ice; and that if they believed there had been a traveled path as testified, and that the defendants cut the ice so near as to render it dangerous to travel there; and that the plaintiff met with the loss of his horse in the manner stated in the testimony, and without any carelessness or fault on his own part, but by reason of the cutting of the ice by the defendants; they would find for the plaintiff the value of the horse so lost.

The jury found for the plaintiff, and the defendants filed exceptions.

J. Appleton, for the defendants, contended, that the instruction was erroneous. Public roads or highways are either by statute provisions, or by prescription, which supposes there was a statute laying out, which has been lost by lapse of time. There can be no statute laying out of a road upon a river; and being in its nature temporary, there can be no road by prescription. 2 *Mass. R.* 171; 6 *Mass. R.* 691. Nor can the statute regulating ferry ways aid the plaintiff. *St.* 1821, *c.* 292; 3 *N. H. Rep.* 335; 2 *Conn. R.* 610. When a road is once established by prescription, all the statute incidentals to a highway, such as keeping in repair, attach. 17 *Pick.* 163; 5 *Greenl.* 368; 2 *Greenl.* 65; 4 *McCord*, 400; 5 *N. H. Rep.* 558; 1 *Greenl.* 111; 3 *Taunt.* 100; 4 *N. H. Rep.* 381; 1 *Bailey*, 58; 4 *Greenl.* 272; 3 *Pick.* 413; 4 *Pick.* 466; 2 *Pick.* 60; 7 *Pick.* 68.

If there was no road, then the lawful right to travel upon the river, which is founded alone upon such supposed road, ceases. That ceasing, the plaintiff was traveling without right. 3 *Pick.* 412; 8 *T. R.* 186; 1 *Campb.* 346; 1 *Cowen*, 78; *Cro. Jac.* 158.

The instruction, that if the hole was cut near the road the defendants were liable, was erroneous. A road must have defined limits. A vague and indefinite right of way is not the subject of prescription. 5 *Pick.* 485; 5 *Conn. R.* 305.

M' Crillis, for the plaintiff, contended, that as the plaintiff had sustained an injury by the act of the defendants, he was entitled to recover, unless they could show a justification of their doings. An easement upon the water may be acquired by the public, or by individuals by prescription, as well as upon the land. There was nothing for the jury to decide, as there was no conflicting testimony, and no opposing claims or rights set up. There is no distinction in principle or authority between prescriptive rights on water in the summer and in the winter. No persons can cause dangerous pits to be made upon or near a way, without subjecting themselves to the payment of damages. *Hazard* v. *Robinson*, 3 *Mason*, 274; *Shaw* v. *Crawford*, 10 *Johns. R.* 236; 3 *Kent*, 451; *Chitty's Pr.* 453, 604; 4 *Bing.* 628; 3 *B. & Ald.* 304; 7 *B. & Cr.* 39.

The opinion of the Court was drawn up by

Weston C. J. — The waters of the *Penobscot* are, of common right, a public highway, for the use of all the citizens. This right is generally exercised, when they are in a fluid state; but when congealed, the citizens have still a right to traverse their surface at pleasure. Travelers have occasion to cross that, and other public rivers or streams, upon the ice, at points where public ferries have been established. And certain duties are by law imposed upon ferrymen, to aid the public in the enjoyment of this right. *Stat.* 1825, *c.* 292. And it is matter of general notoriety, that in all the settled parts of the State, public rivers and streams, not broken by falls or rapids, are traversed up and down upon the ice, in such well marked and beaten ways, as are most convenient for the public. They are not proper subjects for the application of the statute

laws, provided for the location of public roads or highways; nor are they susceptible of being governed by the rules and principles, by which easements of this kind may be otherwise acquired on land. Yet we do not hesitate to regard them as public rights, so far under legal protection, as to entitle a party to a civil remedy, who is wantonly and unnecessarily disturbed by others, while attempting to participate in their enjoyment.

It is contended, that the defendants had an equal right to cut a hole in the ice, to water their horses or other cattle, or for other purposes. Assuming that the defendants have as good a right to the use of the water, as the plaintiff, or the public generally, had to the right of passage, the use of a common privilege should be such, as may be most beneficial and least injurious to all, who have occasion to avail themselves of it. To cut a hole in the centre of a road upon the ice, or so near it, as to entrap a traveler, is a wanton and unnecessary disturbance of the right of passage. It is making an improper use of a part of the river, lawfully appropriated, for the time being, to a different purpose. It is a direct violation of that great principle of social duty, by which each one is required so to use his own rights, as not to injure the rights of others. With the common bounty of Providence, accessible to them at all points below the surface of the ice, the act of the defendants, in subjecting the plaintiff to loss, to whom no fault can be imputed, and who was in the lawful exercise of his rights, cannot be justified; and in our opinion, they must be held answerable for the damage they have occasioned.

Judgment on the verdict.

JOSEPH HASTINGS *& al. vs.* BANGOR HOUSE PROPRIETORS.

Where goods are purchased by one assuming without authority to be the agent of another, if the latter knowingly receives the goods so purchased as his own property, this will amount to a ratification of the agency.

But if he denies the authority of the pretended agent to act for him, on having knowledge of his acts, and afterwards, in pursuance of a prior engagement to receive goods of that description, does receive them as the property of the assumed agent, in payment of a debt due from him, it will not amount to a ratification.

Although it may be regarded as unfair, or perhaps fraudulent, voluntarily to purchase of such assumed agent goods thus obtained, still the remedy would not be by an action against the last purchaser, as the original purchaser of the goods.

If an instruction be given to the jury which leaves them to draw an incorrect inference from facts, material to the issue, the verdict will be set aside.

ASSUMPSIT on an account annexed to the writ, to recover the value of articles of furniture.

The plaintiffs introduced evidence tending to show, that they sold the goods charged in the account to the defendants, and delivered the same to the order of *Martin S. Wood*, as their agent; that *Wood* was their agent; that the property was put into the *Bangor House;* that a portion of it remained there at the time of the trial, having been leased to the tenant of the house by the proprietors; that the defendants were informed by the plaintiffs, that they had made the sale of the goods to *Wood* as their agent, and that the same were charged to the defendants; and that *Wood* was authorized by the defendants as their agent to purchase of the plaintiffs a part of the articles charged to them in the account. There was much conflicting and opposing testimony upon all these points. It was said at the argument of the questions of law, that the true case was not fully presented in the report.

Upon the evidence the plaintiffs claimed to recover, upon the ground — 1. That *Wood* was the agent of the defendants, and that his contract, made with the plaintiffs was binding on the defendants. 2. That *Wood* was held out by the defendants as their agent, and that his contract was binding upon them. 3. That the defendants having received, claimed and used the property sold by

the plaintiffs to *Wood* as their agent, with a knowledge that the same was so sold to *Wood* and charged to the defendants, was a ratification of his agency, and that claiming and appropriating the same with a knowledge of the manner in which it had been obtained, bound the defendants to pay therefor.

The counsel for the defendants requested the Court to instruct the jury, that if the crockery and glass ware, included in the schedule of the articles, was delivered over to the *Bangor House Proprietors* in part payment of *Wood's* note, and was received by them under the lease, that such reception was not a ratification of the purchase of *Wood* of such crockery and glass ware.

EMERY, J. who presided at the trial, instructed the jury, that the mere fact that the *Bangor House Proprietary* received the goods and chattels in question from *Martin S. Wood* in part payment of his note to them, by direction of the referees in the reference between them, would not be sufficient of itself to charge the defendants, had they been ignorant of the purchase thereof of the plaintiffs by *Wood*, claiming to act as the agent of the defendants.

That the jury would consider all the matters previously in evidence as to former acts of *Wood*, as the defendants' agent in selecting crockery ware from the plaintiffs' store by direction of Mr. *Dwinal*, the defendants' agent, *Wood's* application to *Dwinal* and *Emerson* for permission to purchase silver ware, and the evidence of *Dwinal* and *Emerson*, denying that they gave *Wood* authority to purchase silver ware in the name of the defendants of the plaintiffs, or to buy crockery of any body in the defendants' name, after *Wood* had become the occupant of the house.

But if, from the evidence in the case, the jury believed that previous to the reception of said goods from said *Wood*, the same goods were purchased of the plaintiffs by said *Wood*, claiming to be the defendants' agent, and were by the plaintiffs delivered to *Wood* and charged to the defendants, and notice was given by the plaintiffs to the defendants, of these facts, the reception and use of those goods by the defendants afterwards for their benefit, would amount to a ratification of *Wood's* acts, so far as to make the defendants liable to the plaintiffs for the value of the goods for which the action is prosecuted.

If these instructions were correct, the verdict for the plaintiffs

under them was to stand; but if erroneous, the verdict was to be set aside, and a new trial granted.

Preble argued for the defendants, contending that the instruction to the jury, requested in behalf of the defendants, was improperly withheld; and that the instructions given were erroneous.

Rogers argued for the plaintiffs, citing 7 *Cranch*, 299; 19 *John. R.* 60; 4 *Cowen*, 659; 2 *Gill & Johns.* 227; 2 *Conn. R.* 255; 1 *Pick.* 373; 8 *Pick.* 178; 3 *Har. & J.* 367; 3 *Halst.* 182.

The opinion of the Court was drawn up by

SHEPLEY J. — The lease from the defendants to *Wood* is referred to as part of the case. And it appears, that the lessee, among other things, was to purchase "all the glass, crockery, silver, and plated ware," and to give his note therefor; and on the determination of the lease, the lessors were obliged to repurchase the same, or what might remain of them, at a fair value. The lessee was to replace all things broken, lost, or injured; and the articles, which they were obliged to repurchase would not therefore necessarily be the same articles, which they sold. The lessee, after he had executed the lease and taken possession of the house, purchased of the plaintiffs articles of the description before mentioned and represented himself as purchasing for the defendants. These he received and may have placed them among other articles of like character already in the house. A difference having arisen between the parties to the lease, their rights and claims appear to have been adjusted by reference; and the furniture in the house to have been restored to the possession of the defendants. And they might thus have become possessed of the articles purchased of the plaintiffs. Before this took place, they had knowledge of the plaintiffs' claim, and had denied the authority of *Wood* to purchase on their account. The plaintiffs contended, that the defendants had received and appropriated to their own use the articles purchased of them. But their counsel contend, that there was no evidence in the case, that they were received from the lessee in payment of his note by a repurchase provided for in the lease. And that there was not therefore any testimony authorizing the counsel for the defendants to call upon the presiding Judge to instruct the jury as he was re-

quested to do. If the report does leave this doubtful, yet it appears, that the Judge proceeded to instruct the jury upon the legal effect of such a state of facts. And whether those instructions were correct, is a question reserved and presented in the report; and the defendants are entitled to have a decision upon it.

It does not appear from the lease, that the lessee was deprived of the right to purchase and use in the house other articles similar to those procured by the defendants. When they came to the knowledge, that he had made these purchases claiming to be their agent, they could do no more, while the lease operated, than deny such agency. If on the determination of the lease they knowingly received the goods so purchased as their own property, that would amount to a ratification of the agency. A purchase of them from *Wood* would be an admission of his title to them and a practical denial of their having obtained a title by the original purchase through their agent. It might be regarded as unfair, or perhaps fraudulent voluntarily to make a purchase of him knowing, that the plaintiffs had been deceived, when they parted with the goods. And this may perhaps have occasioned the instructions, which were given to the jury. The remedy however in such a case would not be by a suit against the defendants as the original purchasers of the goods. But if the defendants purchased them because they conceived, that they were obliged to do so by the stipulations in the lease, and thus received them in payment of a note due to them, they could not be justly charged with dealing unfairly. Whether they came to the possession of the defendants in this manner, or whether they received them as a part of their own furniture was one of the questions apparently presented to the consideration of the jury. The instructions on this point do not distinctly state, but leave the jury to infer, that the defendants knowing in what manner *Wood* came by the goods could not receive them of him by the decision of a tribunal selected by the parties in payment of *Wood's* note without a ratification of the original purchase. A purchase from *Wood* assumes, that he and not they became the owner by the original purchase, and tends, as before stated, rather to deny than to admit, that he purchased for them. If the schedule referred to in the requested instruction was not received in evidence, the defendants were not entitled to have

the requested instruction given. If that paper was not in the case the instructions which were given, left the jury to draw an incorrect inference from such other facts as might shew, that the defendants received the goods by purchase under the lease.

Verdict set aside and a new trial granted.

APPENDIX.

RULES FOR THE ADMISSION OF ATTORNEYS,

TO TAKE EFFECT ON THE 12th DAY OF APRIL, 1842.

Rule I.

The following course of studies will be pursued by candidates for admission to practice law, as Attorneys in the Courts of this State.

1. *On the law of personal rights and remedies.*

Blackstone's Commentaries.

Volume 1, omitting chapters 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13.
" 2, " " 24 to 32 inclusive.
" 3, " " 8 and 9.

Kent's Commentaries.

Volume 1, part 3, omitting lecture 23.
" 2.

Chitty on Contracts.
Do. on Pleading.
Long on Sales. Rand's Edition.
Selwyn's Nisi Prius.
Howe's Practice.
Starkie on Evidence.
Story on Conflict of Laws.
Revised Statutes, Titles 5, 6, 8, 9, 10.

2. *On commercial and maritime law.*

Kent's Commentaries, Vol. 3, Part 5.
Bayley, or Chitty, on Bills, latest editions.
Story on Partnership.
Do. on Bailments.
Do. on Agency.
Abbott on Shipping, edition by Story.

Phillips on Insurance.
Revised Statutes, Title 4.

3. *On the law of real rights and remedies.*
Blackstone's Commentaries.
Volume 2, omitting chapters 24 to 32, inclusive.
" 3, " " 5, 6, 7, 8, 9.
Kent's Commentaries.
Volume 3, part 6.
" 4.
Cruise's Digest.
Volume 1, omitting titles 7, 10.
" 2, " " 14.
" 3, " " 21, 22, 23, 25, 26, 27, 30.
" 4, " " 33, 34.
" 6.
Sheppard's Touchstone, omitting chapters 2, 3.
Stearns on Real Actions.
Revised Statutes, Title 7.

4. *On equity.*
Story's Commentaries on Equity Jurisprudence.
Maddock's Chancery.
Story's Pleadings in Equity.

5. *On the civil and foreign law.*
Gibbon's Roman Empire, chapter 44.
Kent's Commentaries, Vol. 1, Lectures 2, 3.
Justinian's Institutes, by Cooper.
Pothier on Obligations.

6. *On the law of nations.*
Kent's Commentaries, Vol. 1, Part 1.
Vattel.

7. *On constitutional law.*
Kent's Commentaries.
Volume 1, Part 2.
Story's Commentaries on the Constitution.
Volume 1, Books 2, 3.
" 2, chapters 16, 24, 25, 26, 27, 29, 32, 33, 34, 38, 40, 44.
Revised Statutes, Title 1.

8. *On crimes and punishments.*
   Blackstone's Commentaries, Vol. 4.
   Russel on Crimes.
   Revised Statutes, Title 12.
9. *On professional deportment and future improvement.*
   Hoffman's Course of Legal Study.

Rule II.

It will be the duty of the Committee appointed for that purpose, faithfully and thoroughly to examine candidates, resident in their respective counties, in the prescribed course of legal studies, and to grant or withhold certificates, as they may or may not be found qualified according to the provisions of the statute.

Rule III.

Any person producing a certificate from the Committee, stating that "he has acquired a thorough understanding" of the prescribed course of legal studies, and in other respects complying with the requirements of chapter 103 of the Revised Statutes, may be admitted to practice as an Attorney at Law in all the Courts of this State.

Rule adopted in August, 1841.

Persons who had, before the first of *August*, 1841, commenced and pursued a course of studies for admission to practice law, may be examined by the examiners appointed by the Court, and being found qualified as required by the Revised Statutes, *c.* 103, § 3, excepting so much thereof as requires them to pursue a course of studies prescribed by the Court, and having in other respects complied with the provisions of the statutes, may be admitted to practice as Attorneys at Law.

RULES FOR THE REGULATION OF PRACTICE IN CHANCERY CASES.

1. Rules repealed.

All former rules relating thereto are repealed.

2. Bills.

The bill must set forth clearly, succinctly, and precisely, the facts and causes of complaint, without circumlocution or repetition. A general interrogatory only shall be introduced, and it shall be sufficient to require a full answer to all the matters alleged. The usual formal averments of combination and pretence shall be omitted. Bills of discovery, and those praying for an injunction, must be verified by oath, as required in Rule 8.

3. Subpœna and service.

When the bill is inserted in a writ of attachment, in addition to the service required by law, a copy shall be left with each defendant, or at his last and usual place of abode. When not so inserted, a subpœna in the form annexed shall issue on the filing of the bill with the clerk, and be served by copy, accompanied by a copy of the bill; and it may be made returnable on a day certain in or out of term time.

4. Amendments.

Amendments may be made in bills, and new parties plaintiff may be inserted, at any time within fourteen days before the answer is to be filed, by filing such amendments with the clerk, and furnishing copies thereof to the defendants, or their attorneys. After that time such amendments may be made on leave granted, and on payment of the fees for the additional services required of counsel, and on such further terms as a member of the court may direct. The names of additional defendants may be inserted, or those in the bill may be struck out, on the terms prescribed in *c.* 115, § 11 and 12, of the Revised Statutes. Answers, pleas, and rules may be amended at any time on the like terms as a bill.

5. APPEARANCE.

Each defendant shall enter his appearance on the docket on the return day. And upon proof of neglect, when there has been personal notice, a default may be entered, the bill be taken as confessed, and a decree be entered accordingly. When a discovery is required, or when there has been a legal but not personal service, a writ of attachment in the form annexed may issue, on which the defendant will be bailable on a bond with sufficient sureties taken to the plaintiff in such sum, as a member of the Court may order, which is to be returned with the writ. And in case of neglect to enter his appearance on the return day thereof, the bond shall be considered as forfeited, and may be enforced by petition and notice thereon, and on a summary hearing, damages may be assessed, and an execution issued therefor; and a new writ of attachment may issue in term time on a special order therefor, on which he will not be bailable; or the bill may be taken *pro confesso*.

6. EXCEPTIONS TO THE BILL.

Exceptions may be taken to the bill for scandal or impertinence within twenty days after service, and such proceedings may be had thereon, as are provided in case of exceptions to an answer in Rule 9.

7. ANSWER AND PLEAS.

The defendant shall make his defence to the whole bill on the merits by demurrer, plea, or answer, within sixty days after the entry of his appearance, unless exceptions are taken to the bill; and in such case within forty days after they are disposed of. He may demur or plead in bar to parts of the bill, and answer the residue; or may have the benefit of a plea in bar by inserting its substance in his answer. Demurrers, pleas, and answers, will be decided on their own merits, and one will not be regarded as overruling another.

8. ANSWERS HOW VERIFIED.

Answers are to be subscribed and verified by the oath of the party. The oath administered shall be in substance, that he has read the answer or heard it read, and knows the contents of it, and that the same is true of his own knowledge, except the matters stated to be on his information or belief; and that as to those mat-

ters he believes them to be true. The certificate of the magistrate must state the oath administered. An affirmation may be administered, instead of an oath, in cases where the statute authorizes it.

9. Exceptions to an answer.

Exceptions to an answer should be drawn and signed by counsel and filed with the clerk, and notice thereof given within thirty days after the answer is filed. The defendant's counsel within sixteen days after notice shall admit the exceptions and amend the answer; or make his remarks on them in writing, and in either case give notice thereof; and in the latter case by copy. The excepting counsel may within ten days after notice make his remarks in writing in reply and give notice by copy; and may then forward copies of these papers and of the bill and answer to a member of the Court for decision. If a further answer be directed, it shall be made within twenty days after notice, that it has been directed. These proceedings may be repeated till the answer is perfected. After a third failure to answer fully, the party may be regarded as in contempt, and may be dealt with, as is provided in Rule 29. And he shall also be responsible for such costs as have been occasioned by his not answering correctly and fully at first.

10. General replication and notice of hearing.

Within thirty days after the answer is filed, unless exceptions are taken, or within fifteen days after it is perfected, the plaintiff's counsel shall file the general replication, and give notice thereof; or give notice of a hearing at the next term on bill and answer.

11. Enlargement of time.

When either party is apprehensive, that he may not be able to perform the act required within the prescribed time, he may, before the time elapses, and in case of mistake, sickness, or accident, afterward, file a rule with the clerk and give notice by copy, stating the enlarged time desired and the reasons for it. And within five days after notice the opposing counsel shall give notice of his assent or dissent, and in case of dissent may state in his notice the reasons therefor. If the enlarged time be assented to, it is to be regarded as the time for the performance of the act instead of the original time. If not assented to, the moving counsel may reply and give

notice, and transmit copies to a member of the court for decision, who may grant further time with or without terms imposed, and return his order to the counsel, who will give notice of the result.

12. WANT OF DILIGENCE IN PLAINTIFFS.

If the plaintiff does not use due diligence in performing all acts required of him, the counsel of the defendant may file with the clerk a rule to shew cause at the next term, why the bill should not be dismissed for want of prosecution, and give notice thereof. And if good cause be not shown, the bill may be dismissed, or the party may be relieved on terms. And if such rule be not filed at least fourteen days before the term, the objection to delay will be regarded as waived.

13. WANT OF DILIGENCE IN DEFENDANTS.

If the defendant does not use due diligence in performing all acts required of him, the counsel of the plaintiff may file with the clerk a rule to shew cause at the next term, why the bill should not be taken *pro confesso*, and give notice thereof. And if good cause be not shown, the bill may be taken *pro confesso*, or the party may be relieved on terms. And if such rule be not filed at least fourteen days before the term, the objection to delay will be regarded as waived.

14. TIME FOR TAKING TESTIMONY.

Ninety days after filing the general replication will be allowed for taking testimony. And it must be filed with the clerk within ten days after that time has elapsed; when publication will take place by his opening the depositions. No enlargement of the time for taking it will be allowed after publication. On petitions for a rehearing, the time for taking testimony will be sixty days.

15. MANNER OF TAKING TESTIMONY.

All testimony is to be taken in writing, by virtue of a commission issued on interrogatories filed with the clerk, except as hereinafter provided. The caption of the interrogatories will name the case, the names of the witnesses, and their places of residence; and notice thereof must be given by copy. Cross interrogatories may be filed within fourteen days after notice. Specific objections may be taken to any direct or cross interrogatory, and notice given,

and it may be amended or struck out; and if not so amended as to obviate the objection, or struck out, the objection to it, and to the testimony in answer to it, may be insisted on at the hearing. After the time for filing cross interrogatories has elapsed, a commission may issue directed to an attorney at law, or to a person specially appointed by a member of the Court, or agreed upon in writing by the counsel. The commissioner will examine each witness, no other person being present, except the counsel of the parties by their own consent in writing, and will draw from him all the facts within his knowledge relating to the matters embraced in all the interrogatories, and write his answers in a fair hand, so that they can be easily read. He will not permit the witness to examine the interrogatories, or to know their contents, except as each is put to him in its order. Nor will counsel or parties be permitted to furnish copies of them to the witness, before he is examined, under penalty of having the deposition suppressed at the hearing. Each witness is to be sworn according to law before the interrogatories are put, and he is to subscribe his name at the close, and then make oath to the truth of the facts by him stated. The only caption required of the commissioner shall state that he had this rule before him, when he executed the commission, and that he in all respects complied with its provisions. If the commission be not so executed, the testimony may be suppressed; and if the answers be not fairly written, as required, the commissioner will not be entitled to his fees, nor will they be taxed in the costs.

Depositions may be taken without interrogatories and according to the statute provisions, by persons authorized to execute commissions. When taken in this manner, the magistrate will make out his caption according to law, except that the cause of taking may be stated to be, that it is taken in chancery. And when so taken, counsel will be held responsible, that no irrelative or impertinent matter be introduced. And if such matter be introduced, the Court may direct, that the expense of taking the deposition be not taxed in the costs by the party introducing it. And the magistrate will be under like obligation to write in a fair hand or lose his fees.

16. DOCUMENTARY EVIDENCE.

All documentary evidence not requiring proof by the testimony of witnesses shall be filed with the clerk before the publication of testimony and notice thereof given. Deeds executed in due form and recorded, or copies of them, and other instruments in writing, may be so filed and used without proof of execution, unless the due execution be denied, or fraud in relation thereto be alleged, of which notice shall be given within ten days after notice, that they are filed.

Copies of any votes, entries, or papers found on the books of any corporation and attested by its clerk, may be received as testimony, instead of the books, unless it shall appear, that the opposite counsel has been refused access to such books at reasonable hours.

17. PRODUCTION AND INSPECTION OF BOOKS AND PAPERS.

When books, papers, or instruments in writing, are in the possession of the opposite party, counsel may file a rule with the clerk stating the fact, the ground on which a claim is made for their production or inspection, and the necessity therefor, and naming also the time and place; and give notice thereof. Within ten days after notice the opposing counsel will in writing express his assent, or his dissent with the reasons therefor; and may propose any modification of the time and place, and give notice thereof. The moving counsel within ten days shall in writing express his assent or dissent to the modifications or objections proposed, and may assign his reasons therefor, and give notice. And may when necessary transmit a copy of the rule and these papers to a member of the Court, whose decision and directions will be binding on the parties.

Extracts from any books and papers thus produced, verified by signature of counsel, may be filed as documentary evidence by each party and used as testimony instead of the books and papers. In like manner and with like proceedings a rule may be filed for the production or inspection of the books of any corporation, when copies are refused, but in such case a copy of the rule shall be delivered to the clerk or president of the corporation, and a reply there-

to may be returned within ten days and become a part of the proceedings.

18. Abstracts.

After publication of the testimony it will be the duty of the counsel for the plaintiff to make a concise, correct, and faithful abstract of all the material parts of the bill, pleas, answers, documentary and other testimony; omitting all formal parts of them inclusive of all the usual covenants of deeds, obligatory parts of bonds, and descriptions of estates, unless some question arises out of them. And to cause three copies thereof to be made in a fair handwriting, so that they can be easily read, or in print, preserving a margin of one inch at least in width, on which is to be noted against it, the bill, plea, answer, document, or deposition. These copies are to be presented to the Court at the hearing. And one of them is to be presented to the opposite counsel fifteen days before the session, for his use until the hearing, or he will not be required to enter upon the hearing at that session. If the opposing counsel considers the abstract materially incorrect, he may make out in like manner for the use of the Court three copies of "corrections of the abstract" at any time before the session, one of which is to be presented to the plaintiff's counsel for his use until the hearing.

19. Arguments.

The abstract will be read by the opening counsel for the plaintiff with assistance in reading if he desires it. He will then in argument present all the points and positions taken upon the law and the facts in the case, and make his references to books and cases to sustain them; and state what decree he hopes to obtain. The opening counsel for the defendant will then in like order present his case, and only when no other counsel argues for the defendant, also reply to the preceding argument. The reply may be made by another counsel, but he will be strictly limited to it; and cannot be allowed to make new points, or to repeat or reinforce the preceding argument. The reply to the argument for the defendant will then be made, and will in like manner be strictly limited to a reply. Counsel may present an argument in writing instead of one orally, or may submit his case without argument.

20. The Decree.

When an opinion is delivered, or a decision made, by which a party becomes entitled to a decree in his favor, it will be the duty of his counsel to draw the same in the proper form to secure his rights in strict conformity to such opinion or decision, and file the same with the clerk, to be by him recorded, and give notice thereof. If the opposing counsel considers the proposed decree unauthorized, he may file "corrections of the decree," and give notice thereof. The counsel drawing it will then submit to such corrections, or cause a copy of the proposed decree and corrections to be transmitted to a member of the Court for decision.

21. Costs.

When a party is entitled to costs, his counsel will tax each item of the bill in a fair handwriting, referring to the documents on file, or enclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days after notice, make his objections to the same in writing, and give notice. A reply may be made in writing, and the bill filed with these enclosed papers for the decision of the clerk, who will make his decision in writing, from which either party may appeal, and transmit the papers to a member of the Court for decision. The clerk may regard the costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill, that he does not find cause to object, or when no objections are made within two days after notice of taxation.

22. Bills Revived.

Bills may be revived in proper cases by an amendment filed with the clerk, on which a subpœna and other process may issue, and be served as in case of an original bill; and the appearance shall be entered, and the like proceedings be had as on original bills, so far as they have not before taken place.

23. Bills Supplemental.

When material facts have occurred since the bill was filed, which would entitle the plaintiff, to other or more extensive relief on the matters contained in the original bill, leave may be given to file a supplemental bill upon a rule being filed, verified according to rule 8, stating the facts, and notice given; and proceedings be had

thereon, as is provided in case of exceptions to an answer. The subsequent proceedings, so far as applicable, will take place as on other bills.

24. NOTICES.

Notices required by these rules will be in writing, and signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases are to be properly directed to him and placed in the post office. They are to be preserved and produced, and they will in all cases be regarded as received, when the counsel giving the notice produces a memorandum made at the time on his own court docket of their having been delivered or sent by mail on a day certain; unless the reception is positively, and not for want of recollection, denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case no one will be good unless given to him. And in case of a change of such counsel, notice will be given thereof, and the change noted on the clerk's docket.

25. COPIES.

Copies required by these rules may be verified by signature of counsel, for the accuracy of which they will be held responsible. When found to be inaccurate or badly written, they must be withdrawn, and others correctly made, furnished without additional charge.

26. ATTORNEYS PERSONALLY LIABLE.

The attorney making the application will be personally responsible for the payment of fees to commissioners or magistrates taking testimony; to the clerk for his fees; and for costs imposed as terms of amendment or relief, when the terms are accepted, by taking advantage of them. And when it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has after request, neglected to pay, he will, unless good cause be shown for such neglect, be suspended from practice in chancery cases, until payment is made. And when any attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner, until the further order of court.

27. APPLICATIONS TO THE COURT.

When an application for an injunction, or for a decision by virtue of these rules, is made to one member of the Court, and the same has been acted upon by him, it shall not be presented to any other member.

28. CLERK'S DUTY.

When a bill is filed out of term time, it will be entered on the docket of the last term. The day of issuing the subpœna and of its return will also be entered. The day of filing each paper will be noted on the back of it, and also on the docket. The day of the respondent's appearance will be noted on the docket, and also all orders or decisions by a member of the Court, and the day of their reception. Papers filed can be taken off only by special order, or when the rules permit; and in all cases the clerk will take a receipt for them; but this will not prohibit the use of them in open court, or in the presence of the clerk, who will be held responsible for them.

29. CONTEMPTS.

Contempts in refusing or neglecting to obey any decree, decision, direction, or order of the Court, or of a member of it, when a remedy is not provided by statute, may be punished by an attachment issued on a rule filed therefor by the counsel of the party injured, and notice thereof given; to which a response may be filed within ten days, and notice given. The moving counsel may file a reply and give notice, and transmit copies to a member of the Court for decision, who may order a writ of attachment, returnable to the next term, on which the party will be bailable, and the same proceedings may take place as provided in case of attachments by rule 5; and a new writ may issue in term time, on which he will not be bailable, but may be imprisoned until he comply, or till the further order of Court.

30. INJUNCTIONS.

Writs of injunction in the form annexed will be granted only as auxiliary to a bill in equity, except in cases specially provided for by statute; but will not issue before the bill is filed. A prayer for the writ, and the necessity therefor, should be clearly and concisely

stated in the bill. When granted without a previous notice and hearing, a rule may at any time be filed to dissolve, stating the reasons therefor; and the like course of proceedings may be had thereon as is provided on exceptions to an answer, except that only half the time will be allowed for the performance of each act; and the application will be made out of term time to the member of the Court who ordered the writ. And he may in his discretion appoint a time and hear testimony, taken as he may direct. When granted on a hearing a rule may be filed to dissolve, and notice given for a hearing on it only in term time. In the mean time a rule may be filed, if need be, with notice, for taking testimony in relation to it, as in other cases preparatory to such hearing.

31. REHEARING.

Applications to the discretion of the Court for a rehearing may be made on petition, verified as required by Rule 8, and setting forth particularly the facts, and the name of each witness, and the testimony expected from him. The petitioner can examine only the witnesses named, except to rebut the opposing testimony. The petition, having been presented to a member of the Court, and by him allowed, may be filed, and the same proceedings may be had thereon as on an original bill. If the decree has not been executed, such member of the Court may suspend its execution until the further order of Court, by a writ of *supersedeas* or order, on the petitioner's filing a bond, with sufficient sureties, in such sum, and to be approved in such manner as he may direct, conditioned to perform the original decree, in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

32. FEE BILL.

The following fees may be taxed and allowed to the party entitled to cost, when no fees are provided by statute for the like service.

ATTORNEYS.

Drawing and filing bill,	$5,00
" " answer,	5,00
" interrogatories, each set,	1,00
but all in one case not to exceed	5,00

Making abstract, when hearing is on bill and answer,	$2,50
" " when on bill, answer, and proof,	5,00
Drawing and filing decree when not requiring material alteration,	1,00
Drawing and filing each rule,	,25
Each notice given, not to be taxed also as copy,	,25

Copies of abstracts and other copies at the rate of ten cents for each page of 224 words.

The postage paid on notices and papers transmitted; no one postage to exceed twenty-five cents.

All papers transmitted to a member of the court to be free from charge to him.

For an amendment of the bill or answer, when such amendment is occasioned by an amendment made by the opposing party, half the fee for drawing a bill or answer.

CLERK.

For filing each paper required to be filed on the back, and noting the same on the docket, and carrying it forward each term,	$,05

COMMISSIONER OR MAGISTRATE.

For each jurat to bill, answer, or other paper requiring a like certificate,	,20
For each deposition not exceeding one page of 224 words,	1,00
and for each additional page,	,25
but no deposition to exceed	5,00

33. FORMS ANNEXED.

SUBPŒNA.

[*Seal.*] *State of Maine.*

To the Sheriffs of our counties and their deputies.

We command you to summon A. B. of ——— in our county of ——— to appear before our Supreme Judicial Court, next to be holden at ——— within and for our county of ——— on the ——— Tuesday of ——— next, to answer to C. D. of ——— in the county of ——— in a bill in equity, and to enter his appearance thereto by himself or his attorney. Hereof fail not, and make

due return thereof and of your proceedings at the time and place aforesaid. Witness N. W., Justice of said Court, the —— day of —— in the year of our Lord 18—.

——— ———, *Clerk.*

When made returnable out of term time, the words "the clerk of" are to be inserted between the words "before" and "our," and the statement, that a court is to be holden, is to be omitted, and in place of it, the day of the week, month, and year, for his appearance inserted.

WRIT OF ATTACHMENT.

[*Seal.*] *State of Maine.*

To the Sheriffs of our counties and their deputies.

We command you to attach the body of A. B. of ——— in our county of ———, so that you have him before our Supreme Judicial Court next to be holden at ——— within and for our county of ——— on the ——— Tuesday of ——— next, to answer for an alleged contempt in not [here insert the cause] and you may take a bond with sufficient sureties, to C. D., the party injured, in the sum of ———, conditioned, that he then and there appear and abide the order of court. Hereof fail not and make due return thereof and of your proceedings, at the time and place aforesaid. Witness N. W., Justice of our said Court, the —— day of —— in the year of our Lord 18—.

——— ———, *Clerk.*

When the party is not bailable, that part of the writ is to be omitted.

WRIT OF INJUNCTION.

[*Seal.*] *State of Maine.*

To the Sheriffs of our counties and their deputies.

We command you to make known to A. B. of ——— in our county of ———, that C. D. of ——— in the county of ——— has filed his bill in equity before our Supreme Judicial Court, therein alleging (here insert the allegations in the bill shewing the cause for issuing the writ) and that in consideration thereof he the said A. B. and his attorneys and agents are strictly enjoined and commanded by our said Court, under the penalty of ———, absolutely to desist and refrain from (here insert the acts enjoined) and

from all attempts directly or indirectly to accomplish such object until the further order of our said Court. Hereof fail not, and make due return thereof and of your proceedings, to our next Court, where the bill is pending. Witness N. W., Justice of our said Court, the —— day of —— in the year of our Lord 18—.

———— ————, *Clerk.*

When the injunction is to be perpetual, the writ is to be varied accordingly.

34. TIME OF TAKING EFFECT.

These rules will take effect and be in force after the 12th day of April, 1842, except so much as relates to the form of making and using the abstracts, which will take effect on the first day of the following August.

OPINIONS

OF THE

JUSTICES OF THE S. J. COURT.

STATE OF MAINE.

IN SENATE, February 4, 1842.

ORDERED, That the Justices of the Supreme Judicial Court be requested to communicate to the Senate their opinions in writing, upon the following questions:

1st. Did the Legislature of 1841, in forming a district for the choice of Senators, by the addition to the county of Oxford of portions of other counties, viz: the counties of York, Cumberland and Franklin, conform "as near as may be" to county lines, according to the true meaning and intent of the constitution?

2d. Was it competent for the Legislature of 1841, in forming the counties of Kennebec and Waldo into districts for the choice of Senators, to form one district by the addition of a part of Waldo county to the county of Kennebec — and one district out of the remainder of Waldo county, when by the addition of a *smaller* part of the county of Kennebec to the county of Waldo, one district could have been formed out of the county of Waldo and the part of the county of Kennebec so added, and another district out of the remainder of Kennebec county, and the apportionment of Senators would have been equally proportioned to the number of inhabitants?

3d. If the answer to the foregoing questions be in the negative, has the present Legislature a constitutional power to make a new division of the State into districts for the choice of Senators or to make any alteration of the Senatorial Districts as then established?

4th. Can the Legislature in apportioning the State for the choice of Representatives, deprive any town of the right of representation

in each and every year, which does not determine against a classification with any other town or towns, and which does not apply for a separate assignment of its right of representation for the portion of the time to which its population entitles it?

5th. The apportionment for the choice of Representatives made in 1841 being only for one year, under the provision of the Constitution, which directs that when the number of the House reaches 200 it shall be by the next Legislature, either increased or diminished as the people may require — was it competent for the Legislature of 1841 in apportioning for the choice of Representatives, to exclude any town from a voice in the Legislature of 1842, whether by its corporate powers it did or did not apply for a separate assignment of its right of representation?

6th. Was it competent for the Legislature of 1841, in apportioning for choice of Representatives, to exclude from a voice in the Legislature of 1842, the town of Buckfield in the county of Oxford, which contains by the census of 1840 more than 1,500 inhabitants, which did not determine against a classification with other towns, and which did not apply for a separate assignment of its right of representation for the proportion of time to which its population entitles it?

And whereas certain towns which did not determine against a classification with other towns, or apply for a separate assignment of their right of representation, were by the apportionment of 1841 not allowed a Representative themselves, or classed with other towns, but entirely excluded from a representation in certain years, and particularly from a Representative to the present House of Representatives — is it competent for the present Legislature to assess a tax upon such towns?

OPINION OF WHITMAN C. J.

To the Honorable the Senate of the State of Maine:

THE undersigned, Justice of the Supreme Judicial Court, having had under consideration the resolves of the 4th of February, 1842, passed by your body, propounding to the Justices of said Court certain questions on the subject of the apportionment of 1841, for the election of Senators and Representatives, begs leave respectfully to reply, as follows:

The constitution provides, that, for the choice of Senators, "the districts shall conform, as near as may be, to county lines; and be apportioned according to the number of inhabitants." This provision, as to county lines, cannot be regarded as altogether specific and precise, although by no means to be lost sight of in making an apportionment. The words, "as near as may be," show that something was to be left to the discretion of the Legislature; and are to be regarded as in some measure directory; and not as containing a mandate, of a nature so explicit, as that obedience must follow without consideration. Indeed the framers of the constitution could not be expected to foresee the variations, which might, and indeed must, inevitably take place, in reference to the state of the population, at different periods, and in each of the different counties contained in the State; and well understood that the lines of counties would also be continually changing; and that new counties, from time to time, would be created, of various conformation, and with various relative localities. Hence, much was necessarily confided to the discretion of the Legislature, in making the contemplated districts for the choice of Senators.

The other branch of the requirement, viz: "and be apportioned according to the number of inhabitants," is more specific, and more absolute in its terms, and would seem to contemplate the use of nothing but arithmetical rules to ascertain how it should be carried into effect. Yet even this requirement has been uniformly, and from imperious necessity we are bound to presume, regarded as allowing of the exercise of some discretion on the part of the Legislature. And indeed it can hardly happen, where legislative action is required to effectuate the object provided for in the constitution, that the exercise of some discretion should not be implied. If it

were otherwise, no legislative action would be requisite. The framers of the constitution, in such case, would have prescribed what should have been done without it.

The first apportionment, under the constitution, was made in 1821. County lines were not then broken in upon. But the apportionment, according to numbers, notwithstanding the imperative and unconditional nature of the mandate, was no further regarded than, in the exercise of a sound discretion, was deemed essential. It was provided that each county should elect a certain number of Senators. It could not be expected, that each county should contain precisely the required number of inhabitants for the purpose. Some counties contained many thousands over the requisite number, and some many thousands less. The three largest counties had, together, a surplus of population in the aggregate, nearly, if not quite, sufficient to entitle them to an additional Senator;—while two others, which were, each, allowed to elect two Senators, although deficient in population, nearly in equal proportions, to an amount in the aggregate, nearly equivalent to what would have been requisite to have constituted a district for the choice of one Senator.

In this a discretion must have been exercised; and exercised, too, in a particular, in which no authority from the terms used, as in the case of county lines, was implied for the purpose. But the Legislature were impressed, doubtless, with the belief, that such discretion was necessarily conferred. They, doubtless, saw, that county lines must be broken in upon, or that the numbers of the population, in each county, must be in some measure, disregarded, and in the exercise of their discretion they preferred the latter.

But in the apportionment, which took place in 1831, the Legislature exercised its discretion in both particulars. It avoided breaking in upon county lines, in all the counties but two, viz: Hancock, and Washington; although the population of the former greatly overran in some of them, and in others as largely fell short of the number required. Washington and Hancock were divided into three districts, without regard to any dividing lines between them; and each district, so formed, was allowed to elect a Senator; although the population of both counties together, fell some two or three thousand short of the number requisite to entitle them to elect three Senators.

Of this exercise of the discretion confided to the Legislature, in making the apportionment of 1821, and 1831, it is not known that any complaint, on constitutional grounds, was ever made; and if the question were otherwise doubtful, might be deemed, in reference to the article under consideration, a practical construction of the constitution, almost coeval with its adoption.

When it becomes necessary to depart from county lines, in the formation of districts, a selection must be made for the purpose, of towns to be taken from one county to be added to another. What towns should be selected must depend upon a variety of circumstances. One set of towns might contain more of the population, and another set less than the required number.

It might become necessary even to select towns that were not actually contiguous to the proposed district, in order to supply the number of the population required. It might happen that the number needed must be taken from several counties; and that, moreover, numbers must be drawn from the same counties to supply other districts; in which case it would become a question, as to how many could be spared from the one county, or the other, to meet the demands of the lesser county. It might happen, in case one county should have the lesser fraction, and adjoin another which had the greater fraction, that, many of the towns belonging to the latter, might be so nearly interlocked by the towns of the former, as, in the exercise of a sound discretion, all would agree, that it would be more expedient and judicious to assign to the former the towns so nearly interlocked, and thereby make a compact, well formed district, than that the contrary should take place. Again, it might happen that a county, with a population too small to form a district, might be entirely surrounded with counties each having the precise number, or sufficiently so for practical purposes, requisite to form a district. Here the Legislature must exercise a discretion. It might be necessary to take from one of such counties a certain number, to make, in connection with the smaller county, a district. The discretion of the Legislature must be exercised in determining which of the counties, having the proper number for districts, should be broken up to supply the smaller county with the requisite number; and from what other county, the county so broken up, should have an accession, adequate to the formation

of a district. And, in the exercise of such a discretion, it might be deemed proper, in reference to such small county, not to infringe upon the adjoining counties; they having just the number requisite to form districts; but to connect the small county with a fraction of some remote county, and thereby to form a district; and this might be deemed "conforming to county lines as near as may be."

And again, it may happen, as it did at the apportionment of 1831, that, in the exercise of legislative discretion, when two counties lie contiguous, having each a fraction, differing in amount, but, together, sufficient to form a district, it will be considered to be a dictate of sound discretion, that neither the counties having the small fraction should yield to the other, nor *vice versa*, but that a new district should be formed of the two fractions; and that thereby county lines must, in a good measure, be disregarded. In fact, it is utterly impossible to foresee all the cases, which may in the process of time occur, which may call for the exercise of a sound discretion, on the part of the Legislature, in departing from county lines, and also from the numerical population, in order to the discreet formation of the districts for the choice of Senators. All this seems to prove, incontrovertably, that legislative discretion was intended to be conferred in reference to formation of districts for the choice of Senators.

It may be urged, that this exercise of discretion is of a dangerous tendency — that it may be abused and perverted to nefarious purposes. But this may be said, with equal propriety, of every other power delegated to the legislature. If such power should be abused, in any case, the remedy is with the people. Those guilty of any such outrage will be very likely to become, in time, the victims of their own misconduct. In popular governments this, and the right, which it may be believed the people will exercise, of displacing bad servants, are the great checks to the abuse of power.

It is, then, the opinion of the undersigned, that the first and second of the questions propounded must be answered in the negative, there appearing in neither of the cases stated, so far as is discernable by the undersigned, to have been any thing, other than the exercise of that discretion, which results necessarily from the power delegated to the Legislature. Whether this discretion was

judiciously exercised, in the instances referred to, it is believed, was not intended to be submitted to the consideration of the undersigned.

It may be deemed superfluous to add, that, as to the third proposition, contained in the resolves, we see no provision in the constitution, either express or implied, that would authorize any districting anew for the choice of Senators, excepting at the periods expressly named in that instrument. When the constitution designates, in express and explicit terms, the precise time when a fundamental act shall be done, and is utterly silent as to its performance at any other time, we are not aware of any ground, upon which the doing of it can be authorized, at any other time. By article v, of part second, section 2, of the constitution, counsellors, to advise the Governor, are required to be chosen on the first Wednesday of January, in each year. Aside from the article ix, section 4, of the same instrument, would any person undertake to maintain, that these officers could be chosen, on any other day? And this special provision being made therein, in reference to the election of counsellors and some other officers, and none such being made in regard to any other time for the apportionment of Senators, goes far to negative the presumption, that it could be done at any other period than the one prescribed. In such case an agency is created, to be performed by a certain body of men, and at a certain time. Can any other body of men, to whom the power is not delegated, assume the power to perform it, and proceed to do it at a time different from the one prescribed.

It may be urged, that, if the districting for the choice of Senators should not take place as the constitution provides, and there be no power to form districts at any other time, the government would be at an end. And it might be so. But so it would be in numerous other extreme cases which might be put, and which would be equally remediless.

The preservation, and permanency, however, of every republican government, relies upon the presumption, that the people will do their duty by electing certain functionaries, and that those functionaries will do what is enjoined upon them, in order to uphold, and continue the established system of government.

To the fourth proposition, in the resolves contained, the under-

signed replies as follows. The constitutional provision, relative thereto, seems clearly to contemplate, that no town should be deprived of its annual representation, without its consent, manifested in due form, by some corporate action, at a legal meeting for the purpose. Whether such course has been pursued in the numerous instances, in which, towns liable to be classed with other towns, at the different apportionments of Representatives, have been authorized to be represented singly, for a portion only of the period for which the apportionment was made, is unknown to the undersigned. And whether it has been customary, in case one of the two towns, liable to be classed, has signified its desire to be provided with a separate representation, for a portion of the time, to grant such request as of course, and then consider, that, from necessity, the other town must be authorized to send a representative for the residue of the time, is also unknown to the undersigned. But in either case it could not be considered that the precedure was in strict conformity to the requirement of the constitution. The Legislature are not absolutely obliged to grant a request by a town, liable to be classed, for a separate representation. The constitution provides, only, that they may do it. And the undersigned would consider it erroneous to grant such request, unless the rights of the other town, liable to be classed with it, were preserved. Upon granting the request of one of two towns, liable to be classed, for a separate representation, care should be taken, that the other should be united to some other town or plantation, liable to be classed. If that could not be done the prayer of the town applying for separate representation should not be granted. But the town, so applying, should be suffered to remain united with the town, which had not applied.

It may be considered, therefore, in answer to this proposition, as the opinion of the undersigned, that the Legislature conducting as therein supposed, would be doing violence to the rights of the town liable to be classed, and which had not applied for a separate representation.

As to the fifth proposition, contained in said resolves, the undersigned does not understand, that the apportionment of Representatives, in 1841, was made for one year only. It does not purport to be so made; and but for an amendment of the constitution,

adopted since the passage of the act of apportionment, might have remained in force for the term of ten years. At the time of its passage it was liable, by the provisions of the constitution, then existing, to be affected in its duration, only, by a determination of the people, that the number of representatives should be increased or diminished, which they might have omitted or refused to do. The undersigned must, therefore, answer to this proposition, that, if a town, liable to be classed, had applied, in due form, for a separate representation, for a portion of the subsequent period of ten years, and the application could have been yielded to, without doing violence to the rights of another town, with which it was liable to be classed, it was competent for the Legislature, making the apportionment of 1841, to grant it; although the result might have been, that the town would, thereby, be deprived of a Representative in 1842.

To the sixth proposition, in said resolves contained, the undersigned replies, that it does not appear, in the case therein put, that 1500 inhabitants, or any other number, contained in Buckfield, were sufficient to have entitled it to elect a Representative, in each and every year, for the whole period of ten years, then next ensuing. If it had not the requisite number for such purpose, it could not be entitled to vote in the election of a Representative, unless classed with some other town or plantation for that purpose; or unless it had been allowed, on its own application for the purpose, to elect a Representative for its proportion of the period, between the time of making the apportionment of 1841, and the making of the next general apportionment; and could not then have elected a Representative for 1842, unless that year had been named as one in which it might send a Representative.

For any further answer to this proposition, the undersigned begs leave to refer to the answer to the fourth proposition.

To the seventh proposition, in the said resolves contained, the undersigned replies, that the omission, whether from one cause or another, to be represented in 1842, of any particular town, could not affect the right of the Legislature to impose a general tax. It has been said in former times, that taxation and representation should go together. This adage, however, was introduced into this country under a very different state of things from that alluded

to in the resolve in question. There was a time when our forefathers were attempted to be subjected to a taxation, by a legislative body, in which they were not, merely casually and for a single year deprived of representation, in one branch of it only; but the proposition was to tax them forever, without allowing them the right of representation, at any time, in any form, or in either branch of the legislative body. To this the case indicated in the resolve in question is utterly dissimilar. In one branch of the Legislature, and in the election of the chief magistrate, which may be considered as another branch, the inhabitants of the towns alluded to, are represented; and as to the other branch, the deprivation is casual and temporary only. If those towns had applied for, and had succeeded in obtaining a separate representation, it might have happened, that taxes would be imposed in years in which they would not have been represented. And there might be various casualties, which would prevent their being represented in one or the other branch of the Legislature, at the time taxes were imposed. It might happen, even, that some town or plantation might be overlooked, or be omitted by some misconception, as happened probably in the cases alluded to, in the general apportionment, and have no representation in the House of Representatives. This could form no impediment to the imposition of a tax, which must be general. We, therefore, answer this proposition in the negative.

EZEKIEL WHITMAN.

OPINION OF SHEPLEY J.

In answer to the questions proposed to the Justices of the Supreme Judicial Court by the Senate, and stated in their order bearing date the fourth day of February, 1842, the undersigned would observe; that he concurs in the result to which the other members of the Court have come, in answer to the last four questions; and that he is unable to do so in the opinions expressed on the first three questions.

By article four, part two, section two, of the constitution, it is declared, that the Senators shall "be apportioned according to the number of inhabitants," and that the Legislature for the purpose of electing them shall cause the State to be divided into districts, which

"shall conform as nearly as may be to county lines." The intention appears to have been to make it obligatory upon the Legislature to arrange the districts in such a manner, that their boundary lines should vary as little as might be practicable from the established lines of the counties; and not to restrain it so as to prevent an equal apportionment according to the number of inhabitants. When the required number of inhabitants are not found within a county, its boundary lines must yield so far as to embrace the required number. In considering and applying the elements of an apportionment, regard must be had to the whole number of inhabitants in the State, to the several counties and their boundaries, and to the several towns and plantations. To determine whether a district could be formed so as to embrace one county and parts of one, two, or three, other counties; the Legislature must take into consideration the effect, which it would have upon those and all other counties as well as upon the equality of the apportionment. If an equal apportionment throughout the State could not have been made without forming a district with such deviations from county lines, the Legislature might have formed such a district as is stated in the first question, without any violation of the constitution. For the mere fact, that the whole of one county and parts of three other counties were formed into one district, would not necessarily prove, that the Legislature did not conform as nearly as might be to county lines. The first question does not state, whether an equal apportionment could have been made so as to conform more nearly to county lines in this particular district. And whether one could have been so formed appears to the undersigned to be rather a question of fact than of law; and one which must necessarily be decided by the Legislature making the apportionment. Such decision, however, if made in manifest disregard of the constitutional provision, would, like other unconstitutional enactments, be void, and not binding upon the people or upon a subsequent Legislature. When the legislative department decides upon matters of fact within its sphere of action, it is not the province of the judicial department to review such decision, and come to the same or to a different conclusion. And it is not perceived how it could do it in this case, without attempting to take the duties of the Legislature upon itself, and to arrange an apportionment throughout the State in ev-

ery mode, which might be supposed to form districts more nearly coincident with county lines than the one alluded to. This being a legislative duty, the undersigned does not feel at liberty under the provisions of article third and section second of the constitution, to attempt the performance of it. And therefore answers the first question, that he is not authorized to conclude from the facts stated in it, that the Legislature of 1841 did not "conform as near as may be to county lines according to the true intent and meaning of the constitution."

The second question is considered as inquiring, whether the counties of Kennebec and Waldo could be constitutionally so formed into districts for the choice of Senators as to form one district by annexing part of Waldo to Kennebec, and another district from the remainder of Waldo; when one district might have been formed by annexing a part of Kennebec to Waldo smaller than the part taken from Waldo and annexed to Kennebec; and as asserting, that in the latter case "the apportionment of Senators would have been equally proportioned to the number of inhabitants." It will be perceived, from what has already been stated in answering the first question, that the undersigned does not feel at liberty to enter upon the legislative duty of ascertaining, whether districts could or could not have been formed from the territory composing the counties of Kennebec and Waldo more nearly in conformity to the county lines of those counties, than the districts which were formed. The question does not ask him to do so; and he confines himself to the question. And he considers, that the practicability of making an equal apportionment according to the number of inhabitants by annexing to Waldo a part of Kennebec smaller than the part taken from Waldo and annexed to Kennebec, is decided by the statement of the question. The constitution is considered as requiring, that the senatorial districts should be territorial districts, the lines of which could be traced upon the surface of the earth; and that they should be formed out of contiguous territory. If the constitution is to be regarded as requiring, that the districts should conform as nearly as may be to county lines according to the territory, and not according to the number of inhabitants included in them; for the purpose of deciding the question it only remains to prove, that the lines of the districts formed as proposed by the ques-

tion would necessarily more nearly conform to the county lines of both those counties, than the lines of the districts, as they are stated to have been formed.

And this is believed to be capable of being made certain by geometrical rules. For if a part of the territory of the county of Kennebec be annexed to the county of Waldo smaller than the part of the territory of Waldo, which was annexed to Kennebec, the county lines of Waldo would be departed from by extending them to embrace such part of Kennebec in a less degree, than they would be by contracting them to exclude the part of Waldo annexed to Kennebec. And the superficial contents of the district so formed, would more nearly correspond to the superficial contents of the county of Waldo, than the superficial contents of a district formed from the remainder of Waldo after taking off the part annexed to Kennebec would. And a like result, both as to lines and superficial contents, would be obtained by comparing the county of Kennebec with the district to be formed from the remainder of that county. To this reasoning it may be objected, that if such mathematical rules are to be considered as determining, when county lines are conformed to as nearly as may be, a district might be formed from one county and certain towns in another adjoining county, which might be so selected as to extend by very irregular lines nearly across the latter county, almost separating it into two parts; and yet there be no violation of these rules. But the constitution designed, and does in spirit, if not in the letter, require, that the districts should conform as nearly as may be to county lines in all respects, so that every part of the district lines should be as little distant from the county lines as may be practicable, while the equality of the apportionment is preserved. If the true construction of the constitution be, that it requires, that the districts should conform to county lines as nearly as may be, having regard to the number of inhabitants and not to territorial limits; it is not perceived that a similar result must not be obtained.

For the second question must be presumed to have for its basis a constitutional mode of proceeding to form the two senatorial districts. And on the construction of the constitution, now under consideration, the terms "smaller part," used in the question, must be considered as having reference to a smaller part of the popula-

tion or number of inhabitants, instead of a smaller part of the territory. And in such case it is unnecessary again to recur to mathematical illustrations to prove, that on this construction of the constitution, by the annexation of a smaller number of inhabitants to the county of Waldo, than were taken from it, the county lines would be less departed from by extending them than by contracting them to exclude the larger number. And that a similar result, by an inverse ratio, would take place with respect to the county of Kennebec, and the district to be formed from the remainder of it. Whichever may be considered as the true construction of the constitution, the spirit of the rule, as well as the letter, would seem to require, that when any apportionment for the State is regarded as one system, as it should be, that it should present the least practicable departures, considered as a whole as well as in districts, from county lines. If this be not necessary, the Legislature, instead of separating from the county of Franklin a part containing the few thousands of inhabitants more than sufficient to entitle it to send one Senator, and annexing it to some other county; might take a part of Kennebec three times as large and annex it to Franklin to form a district to send two Senators, if the remainder of Kennebec could have been formed into a district with a less number of Senators apportioned equally upon the remaining number of inhabitants. And more than half of a small county might be annexed to a large one to form a district, when a small portion of the latter might be annexed to the former to form a district, and the equality of the apportionment be preserved. These are put as examples, merely to illustrate a course of legislation, quite as objectionable in many other cases, which might be pursued, if there be no rule binding upon the Legislature and forbidding in any case a departure from it by the exercise of an enlarged discretion not limited strictly to that, which may necessarily arise, while acting upon the rule. The rule prescribed in the constitution for the apportionment of the Senate is not considered, by the undersigned, as an impracticable one; but as capable of being applied without serious difficulty. And so far as it relates to county lines, in nearly if not quite all cases, with mathematical certainty and exactness. If, however, cases could be presented, in which he perceived that there must be a slight departure from the rule from the necessity of the case, he would not

feel at liberty to answer this question differently, from what he now does; because the question submitted does not present or imply, that any such difficulty could arise in applying the rule to the case presented by it. It may be said, that the terms used in the constitution that, "the districts shall conform as near as may be to county lines," permit a departure from them; and that how far it shall extend is submitted to the sound discretion and judgment of the Legislature. But the very language limits, or more properly prohibits, any such discretion by declaring, that the conformity shall be "as near as may be;" that is, as near as it may be practicable to make them, having regard to the number of inhabitants. The language must have been used to define the rule, not to permit a departure from it at discretion, however soundly and justly exercised it might be. If there may be a sound and a just exercise of discretion, it cannot be overlooked, that there may be also an unsound and unjust exercise of it, if it be permitted at all in any other case, than when it arises out of an absolute moral necessity. And between such a discretion and any other, there is this great and most favorable distinction. It finds its own certain limit in the necessity, which gave rise to it; and it can extend no further than that necessity requires that it should; and it is not therefore liable to be abused. And this is the only discretion, that can in this case be admitted. Again, the constitution requires, that the Senators "shall be apportioned according to the number of inhabitants," and it may not in all cases be possible exactly to conform to this rule. It may not at any time of making an apportionment be possible to assign to each senatorial district the exact number of inhabitants required for any number of Senators without dividing towns or separating their inhabitants, which is inadmissible. And here also it may be said, there must exist a discretion to be exercised by the Legislature making an apportionment. That power, which a legislative body is compelled to exercise by such a moral necessity cannot properly be considered as discretionary. If, however, it be so designated, it is a discretion like that last named, limited in the same manner, and not subject to be abused. There can be no warrant for the exercise of this kind of discretion, if it may be so called, beyond what is required by the case to be provided for. If the Legislature has any other discretion, it is necessarily an unlimited

one in practice, however it may be attempted to limit it in theory. And the provisions of the constitution relating to this matter must become in practice merely directory. And an apportionment must then be considered as constitutional, although the county lines should be wholly disregarded and the number of inhabitants required to elect a Senator should be very unequal. It is not intended to intimate, that any one contends for a construction, that would knowingly authorize such results; but it is believed, that such is the legitimate and practical tendency of admitting any other discretion than that, which arises out of an absolute moral necessity. Any other discretion would in effect repeal or annihilate that clause in the constitution, which prescribes the rule for an apportionment, and would therefore violate one of the fundamental rules of interpretation, that effect is to be given to all the language, if it be possible. And without permitting that clause to have effect upon the legislation, the constitution would no longer secure the same rights, that are now believed to be secured; nor would it practically be the same instrument of government.

It may be said, that the manner, in which the power has heretofore been exercised by the Legislature, exhibits a practical construction of the constitution favorable to the exercise of a discretion more enlarged and different from the one herein admitted. If each past exercise of the power should be wholly irreconcilable with the provisions of the constitution in particular cases, if the clause alluded to should be considered as excluding a more enlarged discretion; those exercises, so far as they may be regarded as unauthorized by the constitution, have not been sufficiently well known to be so, and numerous, and free from complaint, to authorize the conclusion, that the construction, which would sanction them, would be a correct one, or that the people had acquiesced in it. The second question is therefore answered in the negative.

In attempting to answer the third question, it is proper to observe, that it is a well established rule of law, that an act of a legislative body containing several separate and distinct sections, clauses, or enactments, is not wholly void, because one section, clause, or enactment, may be unconstitutional, and therefore void. It is void so far as it may be unconstitutional, and no farther. When any enactment, which is determined to be unconstitutional is so con-

nected with other enactments, that they cannot without it operate, as the constitution requires, that they should; such other enactments thereby become unconstitutional and inoperative. To such extent as an apportionment is determined not to be made as the constitution requires, that it should be; the State may be considered as not divided into districts for the choice of Senators. And the duty required of the Legislature making it to such an extent as unperformed. If such must be the legal result in the present instance, it may be said, that the existing Legislature cannot perform that duty, because the constitution required it of the last and does not now permit it to be done oftener than once in ten years. When however the constitution requires an act to be done at a specified time, and there is an omission to perform it at the time; there is the discretion, if so it may be called, before alluded to, arising out of the moral necessity of the case, and limited to it and by it as before stated. And to deny the right and to withhold the power of performing it at the earliest possible time afterward, would be to annihilate the constitution and dissolve the government. Such a variety of unforeseen circumstances are presented to disarrange the prescribed course for conducting public business, and to prevent an exact and perfect performance at the very time specified; that it may be doubted, whether any written form of government could be sustained without some conservative principle to uphold it and prevent its dissolution. Upon what principle a discretion of this description, and one still more enlarged, is claimed as existing not only without any constitutional provision but against one, for the purpose of preventing a failure to apportion the Senate, thereby preserving the government; and at the same time its existence denied in a nearly similar case, and for a similar purpose, is not readily perceived. There is however another principle adapted to such a crisis. The law accommodates itself to these necessities in human affairs, and provides for those like the present by the maxim; that time is not of the essence of the compact, except where it becomes so by the nature of it, or is made so by it. And the time prescribed in the constitution for the performance of any legislative duty cannot be considered as within the first clause of this exception; for it cannot be considered as of the very nature of a compact of government, that a legislative act should be

performed on any particular day, or month, or year. And it cannot be considered as coming within the second clause of the exception, for time cannot be considered as made essential by it, unless it appears to have been the intention of the parties to it, that it should be so, and that it should cease to bind them and operate as formerly after a failure to perform at the time named. And it is not credible, when no indication of it is found in the constitution, that the people intended that their frame of government should cease to be operative for any practical or beneficial purpose, because an important act required of the Legislature was not performed at the very time specified.

It may be said, that the duty was confided to the particular persons composing that Legislature. It is believed however, that the duty was an official one confided to the members, whoever they might be, composing the legislative branches of the government in their official character; and not to them personally in their personal character. The answer to the third question is therefore in the affirmative with the restrictions before stated.

These are some of the reasons for the course, which the undersigned with regret feels obliged to pursue; and they are with diffidence and respect submitted to the consideration of the Senate.

ETHER SHEPLEY.

OPINION OF TENNEY J.

I, the undersigned, one of the Justices of the Supreme Judicial Court, to whom was sent an order of the Senate passed February 4, 1842, requesting their opinion in writing upon certain questions in said order contained, in answer thereto respectfully submit the following:

To the first question — I perceive no fact embraced in this question excepting that portions of the counties of York, Cumberland and Franklin were added to the county of Oxford and a district thereby formed for the choice of Senators. I do not consider that we can rest our answer upon any other fact. It is not our duty nor is it competent for us to determine whether that district conformed as near as may be to county lines and was apportioned according to the number of inhabitants, unless the facts given in the order

require it of us. To say what could have been done is not for us — it would be taking to ourselves the power to do what was entrusted by the constitution to the Legislature. We cannot test their doings by experiments of our own, and consequently in that manner we cannot say they exceeded their power. I think it is not to be inferred that that district did not "conform as near as may be to county lines" because it is formed by the addition of portions of the counties of York, Cumberland and Franklin to the county of Oxford.

To the second question — The only fact on which this question is predicated that can induce us to doubt the competency of the Legislature to form the present Senatorial Districts in the counties of Kennebec and Waldo, is — that a "smaller part" of the former county could be taken and annexed to the latter than by the act of 1841 was taken from Waldo and annexed to Kennebec. It does not appear in any other respect that a nearer conformity to the constitutional requirement could take place.

I do not feel certain whether this comparative term was intended to refer to number of inhabitants or to extent of territory, to "smaller part" of population or to less number of acres. Ceding a part of a State or country and invasion of a country by foreign power refer generally to territory — but in comparing one town, county or State with another in magnitude number of inhabitants is the basis of the comparison generally — and when we speak of the *larger* and *smaller* counties in this State, even in the formation of Senatorial districts, we often, if not generally refer also to population. I am the more induced to think the latter, the meaning of the Senate, inasmuch as the census, taken officially, furnished the certain means of knowing the comparative size of counties and towns in this respect and I am not aware that any official survey of the territory was ever taken or directed. Moreover, we do find by the census that there was a smaller fraction in Kennebec after providing for three Senators than there was in Waldo after providing for two. I propose to examine the question on each hypothesis of the meaning of the term and I am not aware that a dif ferent result will follow.

The constitution provides, that "districts shall conform as near as

may be to county lines and be apportioned according to the number of inhabitants."

Equal representation in the Senate so far as practicable was undoubtedly, in my opinion, the primary object to be secured. Although entire conformity to county lines is not required, yet a variation therefrom is to be as little as possible, consistently with other things, not to be put out of consideration. In *language*, the last clause of the quotation forbids any deviation from an exact apportionment according to the number of inhabitants — but when we consider that it was not contemplated that towns and plantations were to be divided — because their inhabitants are to express their wishes through a municipal organization which could only be done in meetings of entire towns and plantations, we may well conclude that the language was not intended to be inflexible. Any other construction would, in most instances, at least, arrest all legislative action on this subject; for, perhaps, no towns could be found, even without regard to county lines, containing the precise population requisite for the proper number of Senators. These three things, then, are to be kept in view in the formation of districts — lines of towns and plantations — apportionment according to the number of inhabitants — and conformity "to county lines as near as may be." If either of these must yield, and I think one or the other must to some extent — the second cannot be made to yield entirely to the last, and necessity requires that both should yield to the first.

What is the construction to be given to the term "shall conform as near as may be to county lines?" Not that county lines are necessarily the lines of districts, which would be taking away all effect to be given to the words "as near as may be" — but that the variation should be as little as possible and still preserve substantially the other two elements. The very use of the qualification implies the propriety of a departure from county lines. When such a departure takes place to secure a more equal representation, is not this conformity such as shall not only embrace the least territory, but be done by lines as direct, as comprehensive and as parallel to the county lines as possible, giving the district a compact and symmetrical character, instead of one that is misshapen and inconvenient? Districts are of a more temporary nature than counties. The latter are intended to be more permanent, and are

supposed to be formed for the accommodation and convenience of the people. Adherence as far as possible to the lines of them would be a check upon a disposition to form the districts for party or other sinister purposes. If these views are correct, we think it does not follow, because a "smaller part" of Kennebec could have been annexed to Waldo, *estimated by number of inhabitants*, that therefore towns could have been found in Kennebec containing the requisite population which would be separated from Kennebec and annexed to Waldo by a line more nearly conforming to the county line of Waldo than the one adopted, either in its direction, extent or amount of territory embraced.

I cannot consider that the words "smaller part," have legitimately such a meaning. As we are not informed how such supposed line is to be drawn, what towns and how much territory it is to embrace, we have not the means in this view of the question of saying that it was not competent for the legislature of 1841 to form the counties of Kennebec and Waldo into two districts as was done.

Are we drawn to any different result, if we suppose "smaller part" has relation to territory instead of population, the apportionment being equally proportioned to the number of inhabitants? If my definition of the term "shall conform as near as may be to county lines," is not erroneous, it does not follow that the part which could have been taken from Kennebec and annexed to Waldo, would conform more nearly to county lines because it would be smaller in this sense; and we have no criterion given by which to judge of its conformity thereto, excepting that it would be a "smaller part." Several towns containing the requisite number of inhabitants, extending from the dividing line of the two counties into the centre, or almost to the extreme part of the county of Kennebec, of the width of only one town, and embraced within lines irregular and of great extent, but containing a smaller amount of territory than that taken from Waldo and annexed to Kennebec, may be imagined to be the "smaller part" contemplated in the order—and I cannot think the lines embracing such towns would conform more nearly to the county line. Although I do not mean to suppose such a case was referred to by the Senate, still there is no fact in the question which precludes its existence, and before I can say that a solemn act of the legislature is a violation of the

constitution, I must be free from reasonable doubt, and the facts given or by which we are bound, must necessarily bring me to such a conclusion.

It was the duty of the Legislature of 1841 to form districts for the choice of Senators. They were to look faithfully to the great object of equal representation; they were to make the districts as nearly conformable to county lines as possible and preserve this object, and not divide towns and plantations. These three circumstances could not be overlooked. They could not all exist in perfect exactness. The Legislature could by no means disregard either of these restrictions. They were bound by them according to their true meaning, taken together, as imperiously as by any other constitutional requirements; but these could only be an approximation to entire perfection; and as by the term "as near as may be," implies a license to a deviation which could not be limited to any precise rules, I think it obvious that a discretion was intended from the necessity of the case, to be lodged with the Legislature. That discretion must be limited to such necessity. They are bound to exercise that discretion in a sound and proper manner, and in obedience to their high obligations, carefully keeping in view all constitutional restrictions and requirements.

But who are to judge of the existence and extent of that necessity, and where is the superior power that shall direct how they shall exercise that discretion?

In making senatorial districts a variety of formations may be presented. There may be so many changes of the lines, that it would be difficult to detect that form and those towns which shall certainly be the nearest in all respects to the literal constitutional demand. And when districts are formed, I am not prepared to assert that the act is unconstitutional, even if it should be made to appear that another form and another list of towns would have approached more nearly to a *strict* compliance.

I cannot believe an act of this importance is to have so uncertain existence, formed necessarily in the exercise of some discretion; that it is to be annulled when it shall be found that greater ingenuity, skill, and industry, perhaps aided by facts not known or required to be known by the Legislature, have been able to go deeper into the problem, and discover a line approximating nearer to per-

fection. I cannot think one supersedes the other because more exact, when both necessarily fail of being *strictly* correct.

In all former apportionments, in this State, it is believed that generally counties have been declared the districts for the choice of Senators, and some have had a large excess and others a large deficiency over and under the exact ratio. But there has been a general acquiescence in the propriety of such districts, and yet the great object of equal representation, which in its terms admits of no modification, has been made to yield undoubtedly to a conformity to county lines which is not by the constitution indispensable. There may be a departure from the requirements farther than is absolutely necessary, and still the spirit of the constitution is preserved inviolate. In another instance the course taken may be thought so palpably erratic that its restraints have been thrown off; but where a discretion must be exercised by the Legislature, and there is no unerring rule which can be followed for their guidance, I do not conceive that there is any thing in the constitution which can invest us or any other department of the government, with the power to determine that matter of fact, and say that the discretion of this court or any other authority is to be substituted for that of the Legislature, in whose hands is deposited the trust. I see the existence of no power to revise their acts, performed in the exercise of a discretion, if there be the right to its exercise, any more than to revise the doings of each branch of the Legislature in judging of the election of its members. In every such case there may be a gross abuse of power, but we look in vain for the authority for others than the people to sit in lawful judgment against them.

From the above considerations, aided by the reasons given by Chief Justice Whitman, I am of the opinion that the two first questions embraced in the order should be answered in the affirmative.

I concur in the views and results as expressed in his opinion in reference to the third, fourth, fifth, sixth, and seventh questions, contained in the order, and answer accordingly.

JOHN S. TENNEY.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

ADULTERY.

See DOWER, 4.

AGENT AND FACTOR.

1. A promise of indemnity to an agent, is implied from his employment as such. *Gower* v. *Emery*, 79.
2. If an agent, by order of his principal, commits a trespass upon the property of another, acting *bona fide* without suspicion of wrong, he has a claim for reimbursement from his principal, for all damages he sustains thereby. *Ib.*
3. The declarations of an agent are to be received only while in the discharge of the duties of that agency; and when he has performed an act, he cannot qualify it by his declarations made after it has been completed. *Maine Bank* v. *Smith*, 99.
4. Where an agent sells the goods of his principal, and takes a promissory note payable to himself, the principal may interfere before payment, and forbid it to be made to his agent; and a payment to the agent after this will not be good. *Pitts* v. *Mower*, 361.
5. And the principal may sue in his own name on the contract of sale, except when, as with us, it is extinguished by taking a negotiable promise, the law regarding the express contract made with the agent as made with the principal, and not extinguished by a note not negotiable. *Ib.*
6. When the payee of a note not negotiable, given to an agent in his own name, is notified, before payment, or judgment against him as trustee, that the principal was the owner of the property sold, and that he claimed to have the payment made to himself; if the payee disregard such notice, the rights of the principal are not impaired by such payment or judgment. *Ib.*
7. Where goods are purchased by one assuming without authority to be the agent of another, if the latter knowingly receives the goods so purchased as his own property, this will amount to a ratification of the agency. *Hastings* v. *Bangor House Propr's*, 436.
8. But if he denies the authority of the pretended agent to act for him, on having knowledge of his acts, and afterwards, in pursuance of a prior engagement to receive goods of that description, does receive them as the property of the assumed agent, in payment of a debt due from him, it will not amount to a ratification. *Ib.*
9. Although it may be regarded as unfair, or perhaps fraudulent, voluntarily to purchase of such assumed agent goods thus obtained, still the remedy would not be by an action against the last purchaser, as the original purchaser of the goods. *Ib.*

See VENDORS, &c., 2, 3, 5, 6.

AMENDMENT.

1. In an action against a bank, on its bills, where the declaration has no reference whatever to the statute, and makes no claim to the twenty-four *per cent.* damages; and where the defendants have been defaulted, and the plaintiff has received the amount of his bills and six *per cent.* interest; and the question, whether he is entitled to an additional eighteen *per cent.* has been argued; if a motion to amend the declaration be then made, it will not be granted. *Palmer* v. *York Bank*, 166.
2. By the law of this State, a debt due on account is considered as paid, and the contract extinguished by taking a negotiable promissory note for the amount; while the common law regards it only as security for an existing debt. *Newall* v. *Hussey*, 249.
3. As the original contract no longer exists after the taking of such note, it follows that the note must be a new cause of action; and in our practice, amendments are not permitted to introduce a new cause of action. *Ib.*
4. It is within the discretion of the Judge of the District Court to permit amendments in all cases where by law the writ or declaration is amendable, and this Court does not revise that exercise of discretion. But if an amendment be permitted, which the law does not authorize, the party has a right to except. *Ib.*
5. In an action for neglecting to perform militia duty, if the time when the neglect occurred be erroneously stated in the writ, the error may be corrected by amendment. *Hill* v. *Turner*, 413.

See PLEADING, 2, 4.

APPEAL.

1. When an appeal is claimed from a verdict or judgment rendered in the District Court, and time is given, under the *st.* 1831, *c.* 505, to enter into a recognizance to prosecute the appeal before a justice appointed for that purpose, the recognizance must not only be taken, but *must be filed in the clerk's office*, within ten days after the adjournment of the court, or the appeal cannot be sustained. *Knight* v. *Bean*, 219.
2. The *statute* of 1839, *c.* 373, § 4, determines and limits appeals from the District Court, and that section is not varied by the appealing clause in the twelfth section. The will of the legislature, as expressed in the fourth section, operates in effect as a repeal of all prior legislation inconsistent with it. *Emmons* v. *Lord*, 351.
3. In the *st.* 1839, *c.* 373, establishing district courts, there is no provision like that in some of the former acts for an *appeal* from a judgment on an issue in law or case stated by the parties, unless the damages demanded exceed the sum of two hundred dollars. *Kimball* v. *Moody*, 359.
4. In all cases therefore, not falling within the exceptions relating to certain descriptions of actions, where the damages demanded do not exceed that sum, the only provision made for bringing them before this Court is *by bill of exceptions*. *ib.*

ARBITRAMENT AND AWARD.

1. Parol evidence cannot be received to vary a written submission or award. *McNear* v. *Bailey*, 251.
2. An award *may be good* when it does not embrace all matters submitted by the parties, as it will be presumed that the matters not named in the award, were not made known to the arbitrators. *ib.*
3. But when it does appear that other existing causes of action submitted, and not named or acted upon by the award, were made known to them, the general rule is, that the award is bad for the whole. And parol evidence may be received to show, that such other causes of action were made known to the arbitrators. *Ib.*
4. When there is no clause in the submission, providing that the award shall be made on all the matters in difference, or points submitted; if the matters omitted are not connected with those decided, so that injustice will be done, the award may be sustained. But it will not be, if the matters omitted are so connected with those decided, that injustice will be done. *Ib.*
5. It is the settled construction of the statute, authorizing submissions before a justice, that a submission under it cannot authorize a decision upon the title to real estate. *Ib.*
6. But where the remedy for enforcing the award is not by a judgment of court, but by a bond between the parties, a submission of all demands would authorize a decision upon the title. *Ib.*
7. When the submission authorizes a decision upon the title to real estate, equity will decree a specific performance of the award. *Ib.*
8. An award not involving the title to real estate may be good without being reduced to writing. *Philbrick* v. *Preble*, 255.
9. An award in writing may bind the parties at common law, although it decides upon a difference respecting real estate; but the title to real estate cannot be effected by any agreement or award not in writing. *Ib.*
10. When the part of an award which would be otherwise good, is so connected with that which is void, as to show that justice might not be done by suffering it to have effect, the whole is void. *Ib.*

ASSIGNMENT.

1. In a suit by an assignee of a chose in action, in his own name, on an express promise of the debtor to pay the same to him, it is not necessary for the assignee to exhibit proof that the assignment was made for a valuable consideration. *Norris* v. *Hall*, 332.
2. And if such proof had been necessary, the deed of assignment, acknowledging the receipt of a consideration, was sufficient for that purpose. *Ib.*

See ACTION, 2.

ASSUMPSIT.

See OFFICER, 2.

ATTACHMENT.

1. The removal of a sheriff from office after the attachment of personal property on a writ, does not destroy his right to keep it to await the judgment and execution, or excuse his neglect to deliver it, to be taken on execution, upon a demand made therefor within thirty days after final judgment.
Tukey v. *Smith*, 125.
2. To constitute an attachment, it is not necessary that the officer should handle the goods attached, but he must be in view of them, with the power of controlling them and of taking them into his possession. And in case of an attempt by another to interfere or take possession, he should take such measures as to prevent it, unless resisted. *Nichols* v. *Patten*, 231.
3. The return of an officer, where he is a party, is *prima facie* evidence, and only so, of an attachment. *Ib.*
4. To preserve an attachment when made, the officer must by himself or his agent retain his control and power of taking immediate possession in all those cases in which the property is capable of being taken into actual possession, except in those where our statutes prescribe a different rule. And if he does not do this, the attachment will be regarded as abandoned and dissolved. *Ib.*
5. The mere request to a person to give notice, would not be sufficient, unless he consented to assume the trust of taking charge of the goods for the officer. *Ib.*
6. An attachment does not deprive the debtor of the right to convey his property subject to it, and any merely formal act of delivery, which does not resist or deprive the officer of the actual control of it, is no violation of his rights, and will not subject the purchaser to an action. *Ib.*
7. If an officer be ordered in the writ to attach to a specified amount and he attaches personal property by him valued at a greater sum, it does not necessarily follow that he acted oppressively or illegally, and a subsequent purchaser cannot set it aside for that cause, but the attaching officer, or his servant, may take the property from the possession of such purchaser whenever he might take it from the possession of the debtor.
Merrill v. *Curtis*, 272.
8. To preserve an attachment, under *st.* 1821, *c.* 60, § 34, of the description of property therein mentioned, if left in the possession of the debtor, it is not necessary to prove affirmatively that the receipter acted at the request of the debtor. *Ib.*
9. If goods are attached and receipted for to the officer, and the execution is delivered to him and he demands the goods of the receiptor within thirty days of the time when the judgment was rendered, the attachment is not dissolved nor the goods released therefrom; and the receipter may, after the expiration of the thirty days, take the goods and deliver them to the officer to be sold on the execution. *Ib.*
10. Property can be attached only to secure the demand sued; and if other demands are afterwards introduced, the attachment will not be good against subsequent attaching creditors. *Fairbanks* v. *Stanley*, 296.
11. But by *st.* 1838, *c.* 344, § 4, *(Rev. St. c.* 114, § 33,) no attachment of *real estate* can be valid, unless the plaintiff's demand, on which he founds his action and the nature and amount thereof, are substantially set forth in proper counts or a specification of such claim is annexed to such writ. *Ib.*
12. An officer returned on a writ that he had "attached all the real estate of the within named J. L. (the debtor) to wit, all the right and interest he owns, in the grist-mill and stream the said mill stands on in the town of *Wayne*, and his farm with his dwellinghouse and all other buildings thereon in said *Wayne*, in said County." The debtor owned a grist-mill and privilege; another tract of land of fifty acres on which was a house and barn; and another tract of three acres, near to but not adjoining the last tract, on which was a dwellinghouse in which he lived, a barn, and other buildings, all within the town of *Wayne*. The jury found that the three acre lot was not a part of the farm.
It was held, that the general words in the first clause of the return, were restricted and applied to the grist-mill and right of water only, and that the three acre lot was not attached under that description:—
Leadbetter v. *Blethen*, 327.
13. That what tract of land then constituted his farm, there being no boundaries named, could not be ascertained from the return, and that it must necessarily be submitted to a jury to determine that fact:— *Ib.*

has power to settle a prosecution under the bastardy act against the alleged father of the child, without the consent of the other, and a settlement with either one is no discharge; and therefore a note, given to the treasurer of the town, by the alleged father, on a settlement with the overseers, without the assent, approval or ratification of the mother of the child, is without consideration, and no suit can be supported upon it. *Harmon* v. *Merrill*, 150.

4. On the trial of a bastardy complaint, the admissions of the respondent that he was the father of the child, and his promise to marry the mother, although not of themselves sufficient to sustain the prosecution, may be given in evidence in corroboration of the testimony of the complainant. *Woodward* v. *Shaw*, 304.
5. The provision in the statute, that the mother of the bastard child "shall be constant in such accusation," refers only to the man accused; and a variance as to the time, place, or circumstances stated in her accusation, goes to her credit, but not to her competency. *Ib.*
6. Under the bastardy act, it is not necessary that the complaint and the examination should be separate instruments. *Ib.*
7. The complainant in a bastardy process, is not obliged to answer whether she had an illicit connexion with another man about the same time with her connexion with the man charged with being the father of her child. *Low* v. *Mitchell*, 372.
8. The complainant in such process, although under the age of twenty-one years, need not act by guardian or *prochein ami*, nor can her guardian control or dismiss the proceedings. *Ib.*
9. The respondent cannot give in evidence, that he had always sustained a good character in every respect. *Ib.*

BETTERMENTS.

1. A judgment for the recovery of land in a real action, is usually conclusive upon the question of title; and may well authorize the peaceable entry of the party, in whose favor it is rendered, without process of law. *Gilman* v. *Stetson*, 428.
2. But under the *st.* 1821, *c.* 47, § 1, where the other party has by the verdict of a jury established an interest in the same land in virtue of the buildings and improvements made thereon by him or those under whom he claims, if the demandant does not within one year from the rendition of judgment, unless he elects on the record to abandon the demanded premises to the tenant, pay into the clerk's office, or to such other person as the court may appoint, the sum with the interest thereof which the jury shall have assessed for such buildings and improvements, he can have no writ of seizin or possession on his judgment, nor can he maintain any action for the recovery of the same premises, unless he shall first have paid to the tenant all such costs as would have been taxed for him, had he prevailed in the first suit. *Ib.*
3. If therefore the demandant, in such case, does not make payment within the year, the judgment ceases to have any validity whatever, and will not authorize an entry into the land under it. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where it is the usual practice of a bank to retain their promissory notes and those left for collection in the bank, at the time demand of payment is made upon the maker, if he resides in the same city or town, and such usage is known to the maker and indorser of a note, a demand may be sufficient, although the note remains in the bank, instead of being taken with him by the person making the demand. *Maine Bank* v. *Smith*, 99.
2. If a mortgage be assigned, in writing, by the indorser of a note, as collateral security for the payment thereof, parol evidence is inadmissible, to show that the indorser was discharged from his liability upon the note, by such assignment. *Ib.*
3. If a promissory note be indorsed, for the benefit of the maker, and a mortgage is made by the maker to the indorser for his indemnity, but no benefit is derived by him from the mortgage, a demand upon the maker is not excused, in order to charge the indorser. *Ib.*
4. The *st.* 1824, *c.* 272, allowing three days grace on promissory notes, inland bills of exchange, drafts or orders for the payment of money only, when the same shall be discounted by any bank, or left therein for collection, does not

apply to such paper, unless the same shall have been so discounted or left for collection, *before it arrives at maturity by its terms.* *Rea* v. *Dorrance*, 137.

5. The indorser is always entitled to a notice, whether he becomes such for value, or lends his name for the accommodation of another party. *Ib.*
6. The indorsee can secure to himself by the indorsement of a note, when over due, only such rights as the payee himself could have then enforced. *Burnham* v. *Tucker*, 179.
7. A bill drawn in one State and payable in another, is a foreign bill, so as to make the protest admissible in evidence, although all the parties were residents in the State where the bill was drawn. *Freeman's Bank* v. *Perkins*, 292.
8. Where an indorsed bill is sent to a bank for collection, although the bank has no interest in it, yet for the purposes of making a demand, and of transmitting notices, they are to be considered as the real holders. *Ib.*
9. Where a bill, drawn, accepted and indorsed by residents of this State, was made payable at a bank in *Boston*, and was indorsed to a bank at *Augusta*, and by that bank transmitted for collection to the bank where it was made payable, and was by the direction of the cashier of the latter 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 were transmitted by the first mail to the cashier of the bank at *Augusta*, and were received by him at ten o'clock in the forenoon, two hours before the daily and only mail of that day to an adjoining town where the indorser resided, was closed, and where no new notice was made out by the latter bank, but the notice from the notary to the indorser was directed to him and put into the mail after it was closed for that day, thereby causing a delay of one day; — *it was held*, that due diligence had not been used, and that the indorser was not liable. *Ib.*
10. The payee of a negotiable note who has indorsed it "without recourse," is a competent witness for the indorsee, in an action against the maker, to prove that a material alteration of the note was made by the promiser at the time it was signed, and before its delivery to the payee. *Abbott* v. *Mitchell*, 354.
11. Where the presumption, that a blank indorsement of a note, was made on the day of its date, has been rebutted by proof, that it remained the property of the payee until after it became payable, the acts of ownership and declarations of the payee are admissible, in an action by an indorser, until evidence of a transfer to or possession by him has been introduced by the plaintiff. *Hutchinson* v. *Moody*, 393.
12. After a written agreement by the payee with the principal to delay the payment of a note, has been proved by the sureties, a note of the same date, given by the principal to the payee, is admissible in evidence to show a consideration for the agreement for delay. *Ib.*
13. A collateral agreement for a sufficient consideration, made by the holder of a note with the principal, giving day of payment, operates as a discharge of the sureties. *Ib.*
14. If an alteration in a note be made by one of the promisors, he cannot allege that it was fraudulent. *Hughes* v. *Littlefield*, 400.
15. If a note be made and signed by one, and another for the same consideration afterwards signs the note, and adds after his name the word surety, he is a joint promisor. *Ib.*
16. In an action by an indorsee on a note transferred when overdue, the declarations of the indorser while he held the note, may be given in evidence by the maker. *Merrick* v. *Parkman*, 407.
17. But if the maker of the note elects to call the indorser as a witness, he thereby waives the right to give his declarations in evidence. *Ib.*

BOND.

The bond contemplated by the *stat.* 1821, *c.* 36, § 3, is one which acts directly upon the title, requiring upon certain terms, a conveyance of it. *Noyes* v. *Sturdivant*, **104.**

See EXECUTORS, &c., 1.
REPLEVIN, 1.

CHANCERY.

Rules for the regulation of practice in chancery cases, 444.

See EQUITY.

COMMON LANDS.

See Proprietors of Common Lands.

CONFLICT OF LAWS.

See Corporation, 1.

CONSIDERATION.

The execution and delivery by a child to his father of a paper, not under seal, relinquishing all claim to the father's estate, on receiving a note against a third person indorsed by the father, is a good consideration for such indorsement. *Weston* v. *Hight*, 281.

See Contract, 1. Bastardy, 3.

CONSTITUTIONAL LAW.

1. Although the constitution of this State carefully guards the right of private property, and provides, that it shall not be taken from any one, unless the public exigencies require it, yet it does not prohibit the legislature from passing such laws as act retrospectively, not on the right of property or obligation of the contract, but only upon the remedy which the laws afford to protect or enforce them. *Oriental Bank* v. *Freese*, 109.
2. The legislature have power to take away by statute what was given by statute, except vested rights. *Ib.*
3. When a party, by statute provisions, becomes entitled to recover a judgment, in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount which may be recovered, does not become vested until after judgment. *Ib.*
4. The *st.* 1839, *c.* 366, "for the relief of sureties on poor debtors' bonds, in certain cases," is constitutional. *Ib.*
5. Order of the Senate, and opinions of the Justices of the Supreme Judicial Court, in relation to the formation of districts for the choice of Senators and Representatives, &c., 458.

See Prize Logs, 2.

CONSTRUCTION.

See Action, 3.

CONTRACT.

1. Where real estate is conveyed to trustees to be held, by written agreement under seal, for the benefit of stockholders, and the company is divided into shares, to be transferred by certificates in a mode pointed out; the transfer of shares is a sufficient consideration for a written promise to pay a sum of money therefor, although it results, that the project fails, and the shares purchased prove of no value. *Gore* v. *Mason*, 84.
2. And if the agreement provides, that the shares shall be transferred by the trustees, and that the transfer shall be made by certificates signed by the trustees, president and treasurer, and there is no president or treasurer, the transfer is a sufficient consideration, if signed by the trustees. *Ib.*
3. By the law of this State a debt due on account is considered as paid, and the contract extinguished, by taking a negotiable promissory note for the amount, while the common law regards it only as security for an existing debt. *Newall* v. *Hussey*, 249.
4. Whether the contract of one who engages to be responsible for another, is to be regarded as an original and joint, or as a collateral one, must depend upon the intention of the parties, to be ascertained from the nature of it and the language used. *Norris* v. *Spencer*, 324.
5. Where a written contract is made in form between two, and signed by the parties named, and *at the same time*, a third person adds, *I agree to be security for the promisor in the above contract*, with his signature, the latter is holden as a joint promisor. *Ib.*
6. Where, in consideration of the services of a minor son for a stipulated time, a mechanic entered into a written contract with the father to learn the son a trade, to pay a certain sum, and to board him, and where the minor, while on a visit at his father's house during the time, was taken sick there, the master is liable to the father for the board of the son. *Emmons* v. *Lord*, 351.

time of his leaving home, but after there was a reputation in the family of the death of her husband, without showing that he was then alive, does not furnish sufficient evidence that she was guilty of adultery. *Ib.*

ELECTION OF RESIDENCE.

See Towns, 1.

ENTRY ON LANDS.

See Seizin and Disseizin. Betterments, 1.

EQUITY.

The mortgagee brought his writ of entry against the assignees of the mortgagor, without declaring as upon a mortgage; the assignees by brief statement pleaded, that they were the owners of the equity and entitled to redeem, and that if any judgment should be rendered, it should be as upon a mortgage; to this the mortgagee replied that the right to redeem had been foreclosed, and that an unconditional judgment should be rendered; the action was tried, and the jury found, that the assignees were not entitled to redeem in manner and form as they in their brief statement had alleged; questions of law were reserved in the case, and a motion for a new trial filed, and the action was continued. During the pendency of the suit on these questions, and before any decision or judgment of the Court thereon, the assignees tendered the amount secured by the mortgage, and brought their bill in equity to redeem, wherein it was, among other things, alleged, that the suit at law was pending, and that the mortgagee was thereby contriving unjustly to injure the assignees; the mortgagee demurred to so much of the bill as *sought relief*, and pleaded the proceedings on the writ of entry in bar of so much of the bill as *prayed for a discovery.*

It was held: —

1. That where the cause is argued upon a demurrer and plea in bar, that for the purpose of considering their legal effect, the averments in the plea are to be taken as true. *York Man'g. Co.* v. *Cutts*, 204.
2. That if the mortgagee bring his writ of entry without declaring as upon a mortgage, the assignees of the mortgagor, have their election to suffer a default, or to plead that they have a subsisting right of redemption, and that a conditional judgment only should be rendered. If the latter course be adopted, it opens the whole field of inquiry as to the facts and principles, legal and equitable, upon which the alleged right to redeem is based. *Ib.*
3. That where a controversy has been submitted to the decision of a court of law, a court of equity cannot proceed upon the same subject matter. *Ib.*
4. That the plea in bar, if the averments therein are not controverted, is sufficient to preclude the maintenance of the bill for the discovery of facts, based on the assumption, that the right to redeem remained. *Ib.*
5. That if the plea be allowed by the Court, still the complainants may reply to the plea, and deny the truth of the facts contained in it, and put the defendant to establish them by proof. *Ib.*
6. And that the complainants have a plain, adequate and certain remedy at law, adapted to the relief prayed for; that the whole matter had been submitted to a court of law, and was in a train for final adjudication; and that the matter set forth in the bill to which the demurrer extends, does not entitle them to relief in this Court, sitting as a court of chancery. *Ib.*
7. The Court will not, in a bill in equity, as a general rule, proceed to a decree, until all parties whose rights are to be affected, are before it; but if the want of proper parties be not apparent on the face of the bill, and be not presented by a plea or answer; and the Court does not perceive that it cannot proceed, and by a final decree do justice to all parties before it without affecting the rights of others, it will not regard the objection. *Evans* v. *Chism*, 220.
8. Courts of equity do not consider any of the provisions of the statute of frauds as violated by giving effect to a trust, not originally created, but afterwards proved or admitted to exist, by some written document; and will protect the rights of a party so proved to be equitably interested. *Ib.*
9. If a party take a conveyance of land with knowledge of the equitable rights of others thereto, he will not be considered in a court of equity as a *bona fide* purchaser, and will be adjudged to hold subject to those equitable rights. *Ib.*
10. Where a submission to referees or arbitrators authorizes a decision upon the title to real estate, equity will decree a specific performance of the award. *McNear* v. *Bailey*, 251.

ERROR.

An appearance of a defendant at a time and place named for a trial without authority of law, under protest and for the purpose of insisting that any further proceedings would be illegal, cannot revive the process, or be regarded as a waiver of errors. *Martin* v. *Fales*, 23.

EVIDENCE.

1. To exclude a witness from testifying, on the ground of interest, it must appear, that he has a legal and certain interest, in the event of the suit, or in the record. All other matters of influence affect the credit only.
Marwick v. *Georgia Lumber Co.*, 49.
2. The expression of a hope of future benefit from a result of the suit in favor of the party calling him, by a witness, who at the same time asserts that he has no legal claim, does not exclude him from testifying. *Ib.*
3. A witness upon the *voire dire*, may be examined respecting the contents of written contracts or records not produced; but if produced, they may be examined; and if it appears thereby, that he is interested, he is incompetent to testify. *Ib.*
4. The assignment by a stockholder of his stock in an incorporated company to his creditor, the proceeds to go to the payment of a debt for which he is still liable, does not render him a competent witness for the company. *Ib.*
5. A counsellor at law is bound to disclose by whom he was employed in the management of a cause, and that he was instructed by one person to follow the directions of another in the prosecution of the business, although the knowledge was acquired by confidential consultations as counsel and clients.
Gower v. *Emery*, 79.
6. A witness who states, that he expects to get his pay from this suit, and has no other means of obtaining payment, is to be considered but as a creditor testifying for his debtor, and is a *competent* witness. *Noyes* v. *Sturdivant*, 104.
7. Where the question is, whether the vendee of personal property shall hold it, or whether it shall be subject to the attachment or seizure of a creditor of the vendor, upon the ground that the sale was fraudulent, the interest of the debtor or vendor is balanced, and he is a competent witness for the vendee or his assignee. *Cutter* v. *Copeland*, 127.
8. And if the vendor be made the agent of the vendee in managing the property, still he is a competent witness. *Ib.*
9. Parol evidence is inadmissible to prove the intention of the parties to have been different from that expressed in writing, and thereby to alter the legal operation of a written instrument. *Osgood* v. *Davis*, 146.
10. Thus, *in an action of assumpsit*, where it was shown, that one had made a written assignment "of all his right, title and interest in" a certain share in an incorporated stage company, without any covenants therein, parol evidence is inadmissible to prove, that he at the same time promised to make to the assignee, a good and effectual title to the share. *Ib.*
11. And if there be a special count on the warranty, and also the money counts, the cause of action being the same, there would exist the same objection to the reception of parol evidence under either count. *Ib.*
12. The *st.* 1833, *c.* 58, contemplates, that a belief in a Supreme Being is a prerequisite to the admission of a witness to testify. But after he has been admitted, no inquiry should be allowed as to his religious opinions.
Smith v. *Coffin*, 157.
13. The declarations of a witness are competent evidence of his disbelief of the existence of a Supreme Being. *Ib.*
14. When such declarations are proved, the person offered as a witness cannot be permitted to testify to his belief in a Supreme Being, in order to qualify himself for admission. *Ib.*
15. Although, after the proof of such declarations, an honest change of opinion may be shown, and the proposed witness thereby rendered competent, yet the testimony of another person, that the witness offered was then, and for many years next preceding, had been, a *Universalist*, and was an active member of a *Universalist* society, and has ever been, and then was, a firm believer in the *Christian* religion, was held to be inadmissible. *Ib.*
16. It is a principle well settled, that the admissions of a party, when given in evidence, must be taken together, as well what makes in his favor as against him. Both are equally evidence to the jury, who will give to every part of the testimony such credence as it may appear to deserve.
Storer v. *Gowen*, 174.

17. If the testimony of a witness has a tendency to lighten a burthen which the same testimony has first placed upon him; or if it has the effect to enable the party calling him to obtain his rights so perfectly from the other party to the process as to leave him less interested to proceed against the witness, and at the same time raises a liability to the adverse party on a covenant of special warranty sufficient to counterbalance it; these being matters not of certain interest in the event, affect the credibility, not the competency of the witness.
Evans v. *Chism*, 220.

18. The vendor, where the conveyance of personal property is alleged to be fraudulent, may be a witnes as well to defeat as to sustain the conveyance, his interest being a balanced one in either case. *Nichols* v. *Patten*, 231.

19. In an action against an administrator, if it be shown that a paper given to the intestate was in his hands shortly before his decease, and that due notice was given to the defendant to produce it on the trial and it is not produced, the plaintiff may give parol evidence of its contents. *Weston* v. *Hight*, 281.

20. Where a note had been given for the purchase money of a tract of land, and a bond had been given by the payee to the maker to convey the land on payment of the note, and where the note had been indorsed, and the indorser had deceased, and afterwards a partial payment had been made, but the land had not been conveyed; in an action by the indorsee against the administrator of the indorser, *it was held*, that the payee, under these circumstances, was not a competent witness for the defendant. *Ib.*

21. The records of a town cannot be contradicted by parol evidence, in respect to matters regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of law.
Crommett v. *Pearson*, 344.

22. The payee of a negotiable note, who has indorsed it "*without recourse*," is a competent witness for the indorsee, in an action against the maker, to prove that a material alteration of the note was made by the promiser at the time it was signed, and before its delivery to the payee.
Abbott v. *Mitchell*, 354.

23. The party whose name is alleged to have been forged, is a competent witness upon the trial, under an indictment for forgery. *State* v. *Shurtliff*, 368.

24. The rule that a witness is not obliged to criminate himself, is well established. But this is a privilege which may be waived; and if the witness consents to testify to one matter tending to criminate himself, he must testify in all respects relating to that matter, so far as material to the issue.
Low v. *Mitchell*, 272.

25. If he waives the privilege, he does so fully in relation to that act; but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue. *Ib.*

26. The vendor of goods may be a witness as well to defeat, as to sustain the sale, his interest being a balanced one in either case.
Morrison v. *Fowler*, 402.

27. In a suit by the vendee against the vendor of goods on his implied warranty of the title, it would not be a good defence to prove, that the plaintiff had obtained a release from a subsequent purchaser from him; and therefore such release would not affect the competency of the vendor as a witness. *Ib.*

28. In an action by an indorsee on a note transferred when over due, the declarations of the indorser while he held the note, may be given in evidence by the maker. *Merrick* v. *Parkman*, 407.

29. But if the maker of the note elects to call the indorser as a witness, he thereby waives his right to give the declarations in evidence. *Ib.*

30. The declarations of a witness that he is interested in the event of the cause, cannot be given in evidence to exclude him from testifying. The objection goes to his credit, but not to his competency. *Young* v. *Garland*, 409.

31. An objection made to the admission of testimony of a particular description or class, as to parol testimony to prove a contract to be fraudulent, does not extend to or imply an objection to any question, or to any answer of a witness, during the examination. *Irving* v. *Thomas*, 418.

32. Testimony appropriate to one count in the declaration, although not to all, is admissible. *Ib.*

See DEPOSITIONS, 1. POOR DEBTORS, 9. BILLS, &c. 7.

EXCEPTIONS.

See PRACTICE.

EXECUTION.

See EXTENT.

EXECUTORS AND ADMINISTRATORS.

EXTENT.

thereof, by the officer to the creditor; and any attempt to deliver seizin before the appraisement, can be of no validity. *Darling* v. *Rollins*, 405.

7. When an officer has been directed to levy an execution upon real estate, and an appraisement thereof has been made, it is his duty to deliver seizin and possession of the land to the creditor; and if the creditor declines to accept it, the officer should return that with the other facts upon the execution, and that the same is in no part satisfied. *Ib.*
8. The creditor is not obliged to accept seizin of the land appraised, and upon return of the officer of his refusal, is entitled to have an alias execution; but the original execution cannot be superseded. *Ib.*

FISHERIES.

1. In this State, the legislature may regulate fisheries, which, by the common law, would be private property *Peables* v. *Hannaford*, 106.
2. Where a statute provides, that a brook, on which a mill has been erected, shall be kept open and free for the passage of fish "from the fifth day of *May* to the fifth day of *July* in each year," the owner of the mill is entitled to the full use of the water until the *sixth* day of *May*. *Ib.*
3. The act to regulate the taking of fish in *Alewive Brook*, in *Cape Elizabeth*, (*spec. stat.* 1839, *c.* 557,) does not authorize the fish committee to enter upon the lands of others and remove obstructions to the passage of fish up and down the brook, prior to the *sixth* day of *May*, in each year. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. Where the indenture between the parties by which the tenancy is created, has fixed a definite period for its termination, the lessee is not entitled to notice to quit, to impose upon him the legal obligation to give up the estate to his landlord. *Clapp* v. *Paine*, 264.
2. By the law directing proceedings in forcible entry and detainer, as it formerly stood, they could not be based upon a mere refusal to deliver possession of land, when demanded; but the *st.* of 1824, *c.* 268, in relation to this process, has extended its provisions to an unlawful refusal of the tenant to quit, after he shall have had thirty days notice, requiring him to do so. *Ib.*
3. To bring the case within this provision of the statute, the tenant must wrongfully hold over for the space of thirty days after his estate is determined; and the notice there provided for is to be given after the tenancy has terminated. *Ib.*
4. Where the tenancy is limited to a definite period, the landlord may enter immediately upon its termination; and if his entry is forcibly resisted, he may at once avail himself of the remedy provided by this statute, without having given any notice whatever. *Ib.*
5. Under this statute the cause of complaint must exist before the aid of the law is invoked; and therefore the process cannot be maintained by proof of a forcible detainer after the making of the complaint and warrant, and before the service thereof, upon the same day. *Ib.*

FORGERY.

1. The party whose name is alleged to have been forged, is a competent witness upon the trial, under an indictment for forgery. *State* v. *Shurtliff*, 368.
2. On such trial, it is competent to prove by the party attempted to be defrauded, without notice to produce papers, that the defendant had previously brought to him the draft of an instrument which he saw and read, but never executed, and which was different from the deed afterwards brought to him as the same, and as such executed by him. *Ib.*
3. Where the grantee agreed with the grantor to purchase an acre of his farm, and procured the draft of a deed correctly describing the land agreed to be conveyed, and exhibited it to the grantor, who examined it, and found it right, but the execution of it was delayed, and the draft was retained by the grantee; and the grantee afterwards fraudulently procured the draft of another deed, describing the grantor's whole farm, and presented it to the grantor for his signature as the deed before examined, and it was executed and delivered; *this was held to be forgery*. *Ib.*

ship, yet as the jurisdiction of the Judge regularly attached by a proper representation and complaint, and he notified the party to be affected, the letter of guardianship is evidence, that the guardian was duly appointed. *Ib.*

3. And if the letter of guardianship misrecites, that this had been done upon an inquest of the selectmen, this does not vitiate the authority of the guardian, and a debtor of the spendthrift is protected in a payment to such guardian. *Ib.*
4. Where there are two guardians of a spendthrift, it is competent for one to receive payment of a debt due to the ward, of which payment his receipt is *prima facie* evidence. *Ib.*

HIGHWAY.

See WAY.

IMPOUNDING.

1. The *st.* 1834, *c.* 137, concerning pounds, &c. does not require, that the impounder of beasts should personally drive them to the pound, or deliver them to the pound keeper, and he may employ others to perform that service; but the certificate which is to be *sent or delivered* to the pound keeper, must be the personal act of the impounder, or if he employs the hand of another to make the certificate, it should be done in the name of the party impounding. *Eastman* v. *Hills*, 247.
2. The certificate left with the pound keeper determines who is to be regarded as the impounder, and the action of replevin for the beasts may be rightly brought against the person who signs such certificate in his own name. *Ib.*

INDICTMENT.

1. To maintain an *indictment* for the obstruction of a "town and private way," it must be shown, that such way was laid out and established, pursuant to the statute provisions. Proof of a user as such for twenty years or more, is not sufficient. *State* v. *Sturdivant*, 66.
2. In criminal cases, the jury are the judges of the law as well as the fact. *The State* v. *Snow*, 346.

INDORSER OF WRIT.

See WRIT, 1.

INSOLVENT ESTATES.

See EXECUTORS, &c. 3, 4.

INSURANCE.

Where a person has his store insured by a company, one of the rules in the policy being, "That no person whose property is insured in the company, shall be allowed to insure the same, or any other property connected with it, in any other company, or at any other office; and in case of any such insurance, his policy obtained from this company shall be void and of no effect; and where he afterwards insures the goods in the store at another office; the policy on the store is not made void by obtaining the policy on the goods. *Jones* v. *Maine M. Ins. Co.*, 155.

JOINT TENANTS.

See TENANTS IN COMMON.

JUDGMENT.

See BETTERMENTS, 1.

JURORS.

In criminal cases, the jury are the judges of the law as well as of the fact. *State* v. *Snow*, 346.

JUSTICE OF THE PEACE.

1. The jurisdiction and power of Justices of the Peace, in civil actions, are derived exclusively from statute provisions. *Martin* v. *Fales*, 23.

MONEY HAD AND RECEIVED.

See ACTION, 1. PLEADING, 2, 3.

MORTGAGE.

giving notice of his claim to the officer, or stating his account of the amount due on the mortgage, and without any refusal or neglect of the officer to pay his demand and discharge his lien. Under the *stat.* 1835, *c.* 188, it is the duty of the officer first to make his demand in writing.

Cutter v. *Copeland*, 127.

7. If an entry to foreclose a mortgage be made by one acting as attorney of a bank to which the mortgage had been assigned, without legal authority, and the fact that the entry had been made, is afterwards recited in an agreement executed between the bank and the assignees of the mortgagor, this is a sufficient ratification and adoption of the act of attorney to make it the act of the bank. *Cutts* v. *York Man'g Co.*, 190.
8. If the stockholders of the bank, by their vote, authorize one of their directors to execute an instrument under seal, waiving and relinquishing the entry made by order of the bank to foreclose the mortgage, and the instrument be executed in pursuance of such vote, it is no waiver of the entry, unless the instrument is delivered over to the holder of the equity. *Ib.*
9. Where land is mortgaged to secure the payment of a sum of money according to the terms of a bond, and the mortgagee assigns the mortgage and bond to secure a sum of money due from him, it is by no means certain that it is not to be treated as real estate and thus the assignor of the mortgage entitled to the statute period of three years, after breach of condition, before his interest can be foreclosed. But if it is to be treated as a mortgage of personal property, if the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption which may be asserted by the mortgagor, if he brings his bill to redeem within a reasonable time. *Ib.*
10. The institution and prosecution of a suit by the assignee of the mortgage against the assignor on the debt secured by the assignment, is evidence that the right to redeem is still open. *Ib.*
11. Although long before the expiration of the three years, the assignees of the mortgagor had paid to the assignees of the mortgagee the amount of their debt, and entered into the actual possession of the mortgaged premises, and had taken a written agreement to assign or convey to them on request, and to pay over the money, if the property should be redeemed; yet as the agreement provided, that the assignees of the mortgagee should proceed to consummate the entry to a foreclosure, if the assignees of the mortgagor requested it; *it was held*, that the entry to foreclose the mortgage was not waived as against them. *Ib.*
12. The release by the assignees of the mortgage to the assignor of "all the estate, right, title and interest in and to the said mortgaged premises by force of the conveyance made thereof by him to us, to hold in like manner as if he had never conveyed the same to us," does not preclude him from availing himself of the entry to foreclose the mortgage made by the assignees, but imparts to him all the power to pursue the entry to a foreclosure, which they would have had, if the mortgage had remained in their hands. *Ib.*
13. Where the question at issue was, whether an entry made by the assignees of the mortgagee against the owners of the equity of redemption, of which the tenants afterwards became the assignees, was waived and relinquished, it was held, that the declarations of the agent of the defendants, an incorporated manufacturing company, made to the assessors of a town, that the fee of the premises was in the assignees of the mortgagee, were either properly admitted in evidence, or had too slight a bearing on the issue to be a sufficient cause for granting a new trial. *Ib.*
14. By a conveyance of goods in mortgage, the whole legal title passes conditionally to the mortgagee; and if not redeemed at the time stipulated, his title becomes absolute at law; though equity will interfere to compel a redemption. *Flanders* v. *Barstow*, 357.
15. If a mortgage of goods be made, conditioned to be void on the payment of one note in sixty days and another in ninety days, the title of the mortgagee becomes absolute at law on the failure to pay the notes at the times they respectively become payable; but although the mortgage be under seal, the time of payment may be enlarged by parol, and the condition saved until the expiration of the extended time. *Ib.*
16. An agreement "to extend the mortgage fifteen or twenty days," gives an extension of the time of payment of each note for the term of twenty days beyond the time they respectively become payable, and no further. *ib.*
17. And if the goods be sold by the mortgagee, after the condition had been broken by the neglect of payment of one of the notes for more than

twenty days after it became payable, for a sum exceeding the amount of the notes, the balance cannot be recovered of the mortgagee in an action for money had and received. *Ib.*

See SHIPPING, 1, 2. EQUITY.

NEGLIGENCE.

See ACTION ON THE CASE, 1.

NEW TRIAL.

See PRACTICE, VERDICT, 2.

NONSUIT.

See PRACTICE, 12.

OFFICER.

1. Where it is proved, that an officer, who had collected money on an execution, on being inquired of by an agent of the creditor, why he had not sent the money, promised to send it to the creditor immediately, a jury may properly find, from such evidence, that a demand of the money had been made. *Currier* v. *Brackett*, 59.
2. If an officer, by direction of the creditor or party in interest, attaches goods in the possession of the debtor, the law implies a promise to indemnify the officer for any damage suffered in consequence of such acts. *Gower* v. *Emery*, 79.
3. Where goods, attached by a deputy of the marshal of the district, are left in the hands of receipters who give their written promise to deliver the property on demand, to any officer authorized to receive the same; an action for a breach of such contract, may be maintained, by the marshal, in his own name. *Smith* v. *Wadleigh*, 95.
4. In an action against an officer for neglecting to levy an execution on goods attached by him on the writ, he cannot defend himself by showing that he had previously sold the goods without the consent of the creditor, and received money therefor. *Fairbanks* v. *Stanley*, 296.

See SHERIFF, 1. ATTACHMENT, 1, 7, 9. EXTENT, 7.

PARTNERSHIP.

Two or more persons who are not partners, may take a note payable to themselves by their surnames only, which will be good evidence of a debt, upon sufficient proof of identity. And to establish the identity, it is not necessary to prove that they were partners at the time of the date of the note. *Rogers* v. *Read*, 257.

PAYMENT.

The taking of a negotiable promissory note for the amount of an account, is a payment of the account. *Newall* v. *Hussey*, 249.

PENAL ACTION.

See CONSTITUTIONAL LAW, 3. STATUTE, 1, 2.

PERSONAL PROPERTY.

See PROPERTY.

PLEADING.

1. When one institutes a suit, he may set forth his cause of action in any manner which the law allows; and if he does so by general counts, and is enabled without amendment to maintain his suit, the law will not deprive him of any right, because he has adopted one mode of declaring in preference to another. *Fairbanks* v. *Stanley*, 296.
2. When a writ contains the money counts, there may be some difficulty in determining what demands were put in suit. But in the absence of all contradictory proof, those will be considered as in suit, which the plaintiff then owned, and which were due and payable and liable to be introduced, without amendment, and which were in fact so introduced, and judgment rendered thereon. *Ib.*

3. A note given in payment for goods purchased, may be introduced in evidence under the money counts. *Ib.*
4. Where new counts are introduced, they will be regarded as introducing new causes of action, unless they appear to be for the same cause. *Ib.*
5. Where a misnomer of the defendant is pleaded, and the plaintiff replies, that the defendant is as well known by the one name as by the other, the jury may well find the issue for the plaintiff, if they are satisfied that the defendant was as truly known and called by the name given in the writ as by that given in the plea; although the number of persons who knew and called him by the latter name might be greater, than that of those who knew and called him by the former. *Frye* v. *Hinkley*, 320.
6. Where a misnomer is pleaded, and an issue of fact is joined and tried, the judgment is to be peremptory; and therefore if the issue be found for the plaintiff, the jury should assess the damages. *Ib.*
7. The complainant in a bastardy process, although under the age of twenty-one years, need not act by guardian or *prochein ami*. *Low* v. *Mitchell*, 372.
8. If two of three joint promisors of a note are sued, without assigning any cause for the omission of the third, the objection can be taken only in abatement. *Hughes* v. *Littlefield*, 400.

POOR.

1. A writ of error lies to the Court of Common Pleas, where the proceedings are first instituted before a Justice of the Peace, to remove a pauper to the place of his settlement, under the *st.* of 1821, *c.* 122, § 15, for the relief of the poor. *Standish* v. *Gray*, 92.
2. A settlement is gained in a town, under that statute, by the residence of a person therein, capable of gaining a settlement, for the space of five years together, without receiving supplies as a pauper within the time — although prior to the expiration of the five years, the inhabitants of that town, by their overseers, had made a complaint to a Justice of the Peace, to cause the removal of the alleged pauper to the place of his settlement, and a warrant had issued thereon, and had been served upon the town where his settlement then was. *Ib.*
3. Posthumous children have a derivative settlement from their father, if he had any; and in this respect are in the same condition, with such as are born in his lifetime. *Farmington* v. *Jay*, 376.
4. By the *Massachusetts statute* of 1793, *c.* 59, and also by the *statute* of this State of 1821, *c.* 122, legitimate children are to follow and have the settlement of their father, if he had any within the State, *until they gain a settlement of their own;* but if he shall have none, they shall follow and have the settlement of their mother, if she shall have any. *Ib.*
5. A legitimate child, therefore, whose father had a settlement within the State, and died subsequent to the *statute* of 1793 and prior to that of 1821, does not follow a new settlement, acquired by his mother under the latter statute, but retains the settlement of his father, until he acquires one in his own right. *Ib.*
6. It has become a principle of law in the construction of statutes for the relief of the poor, that minor children, until emancipated, are incapable of gaining a settlement in their own right. *Ib.*
7. A minor who was emancipated, might gain a settlement in his own right by dwelling and having his home in a town at the time of the passing of the act of *March* 21, 1821. *Milo* v. *Harmony*, 415.
8. A minor who was bound to service by the overseers of the poor, could, while so bound, gain a settlement under the provisions of that act. *Ib.*
9. And therefore a minor emancipated by the death of both his parents, whether under or over the age of fourteen years on *March* 21, 1821, and whether then bound to service or not, might gain a settlement in his own right by residence in a town at that time. *Ib.*
10. One who was a pauper when bound to service, cannot be considered as continuing to receive supplies as a pauper by reason of such binding. *Ib.*

POOR DEBTORS.

1. The *st.* 1839, *c.* 366, "for the relief of sureties on poor debtors' bonds in certain cases," is constitutional. *Oriental Bank* v. *Freese*, 109.
2. If a debtor be arrested on an execution, and committed to prison, and while

there, cites his creditor to attend to his disclosure at an appointed time and place, and attends at the time and place, and takes the debtor's oath, and after the citation, and before taking the oath, gives the debtor's bond to the creditor, having therein the condition that he will cite the creditor according to law, and submit himself to examination in manner prescribed in the poor debtor acts; the giving of the bond is a waiver of the notice, and the condition is not performed by the proceedings under the notice *given before the bond was made.* *Williams* v. *McDonald*, 120.

3. If the notice to the creditor states that the debtor intended to take the oath provided by the poor debtor act of 1835, instead of that of 1836, and the creditor appears without objection, and examines the debtor, the justices have jurisdiction, and are entitled to proceed. *Moore* v. *Bond*, 142.
4. Under those acts, in determining when the six months expire, the day of the date of the bond should be excluded. *Ib.*
5. The act of 1835, does not take away the power, given to the justices by previous acts on the same subject, to adjourn the examination to the next day. *Ib.*
6. If the justices, *at the request of the creditor*, adjourn the examination to the next day, being the day after the expiration of the six months, and then administer the oath and discharge the debtor, the law excuses strict performance, and will not suffer the creditor to take advantage from an act procured to be done by himself. *Ib.*
7. If the magistrates, in their certificate, refer to the act of 1835, instead of the act of 1836, as containing the oath administered, and annex a copy thereof, which shows that the proper oath was in fact administered, it is sufficient. *Ib.*
8. Under the poor debtor acts of 1835 and 1836, the certificate of two justices of the peace and of the quorum, that the debtor had notified the creditor according to law of the time and place of examination and administering of the oath to the debtor, is conclusive evidence of that fact, in a suit upon the bond. *Carey* v. *Osgood*, 152.
9. Parol evidence, therefore, that a notice of but *fourteen days* was in fact given, when the law requires fifteen at least, is inadmissible. *Ib.*
10. In an action upon a bond given to procure the release of a debtor arrested on execution, not only can the proceedings of the justices who admitted the debtor to take the oath, be proved by their record, or by a copy thereof, but the certificate of the justices is also competent evidence. *Granite Bank* v. *Treat*, 340.
11. No presumption is to be made in favor of inferior tribunals, and therefore the jurisdiction of the justices must appear upon the face of the proceedings. *Ib.*
12. Where the certificate of the justices states their own character, the parties to the process, the commitment of the debtor, his desire to take the oath, and that he had caused the creditor to be notified according to law; these facts are sufficient to make out a *prima facie* case of jurisdiction. *Ib.*
13. The certificate however would not be conclusive on this point, and it would be competent for the plaintiff to prove that they had not jurisdiction. *Ib.*
14. Where the condition of the bond does not expressly require, that the certificate should be filed with the keeper of the prison, the bond is not forfeited by the omission to file it. *Ib.*

See CONSTITUTIONAL LAW, 1, 2, 3, 4.

POUNDS.

See IMPOUNDING.

PRACTICE.

1. After a verdict is read in court, and before it is affirmed, the presiding Judge may rightfully inquire of the jury, upon what principles their verdict is founded. *Smith* v. *Putney*, 87.
2. When a paper offered in evidence is referred to in a bill of exceptions, by a particular name or description, the legal presumption is, that the whole paper is intended to be presented to the court of law, and not so much of it only as may best comport with the description of it. *Moore* v. *Bond*, 142.
3. Whether there has or has not been gross negligence, is a question of fact for the decision of the jury. *Storer* v. *Gowen*, 174.

PRINCIPAL AND SURETY.

each of the others to contribute has become fixed, each may look to his principal for a reimbursement of the share paid by him, on his separate account. *Gould* v. *Fuller*, 364.

2. If one of two sureties has actually paid the debt for which both were liable, he may recover of the other surety half the amount thereof, although after such payment he may have been repaid by the principal the other half expressly for his separate indemnity. *Ib.*
3. A collateral agreement for a sufficient consideration, made by the holder of a note with the principal, giving day of payment, operates as a discharge of the sureties. *Hutchinson* v. *Moody*, 393.
4. The consideration of the contract between the principal parties, is a good consideration for the promise of a surety. *Hughes* v. *Littlefield*, 400.
5. It furnishes no defence to a surety, that he voluntarily became such, without the assent or knowledge of the principal. *Ib.*

PRIZE LOGS.

1. By the words "prize logs," as used in the special act of 1835, *c.* 590, incorporating the *Kennebec Log Driving Company*, and in the additional act of 1838, *c.* 496, are intended only those logs to which, from the loss of all distinguishing marks or evidences of property, no title can be established by any claimant. *Ken. Log Driving Co.* v. *Burrill*, 314.
2. Those acts do no more than to interpose the protecting care of the legislature, by enactments similar to those respecting lost goods, rather for the preservation than the destruction of individual property, so far as it could be done after the loss of all the usual evidences of it; and are constitutional. *Ib.*
3. If the provisions respecting a sale of prize logs at auction, are still in force, it is for the legislature or the proper authorities only, to punish the corporation for a violation; and the purchaser of logs at private sale cannot set it up as a defence to an action for the price. *Ib.*
4. The corporation, as such, derives no benefit from the sale of prize logs, but the benefit is received by those members only who are owners of logs floating to market; it is not required, that the president of the corporation should be a member of it; and the president, having sold out all his logs, after the commencement of the suit and before the trial, is a competent witness for the corporation. *Ib.*

PROBATE COURT.

See GUARDIAN.

PROPERTY.

1. If one man builds a house on land of another by his permission, the house is personal property, and does not pass by the conveyance of the land to a third person, but remains the property of the builder. *Tapley* v. *Smith*, 12.
2. If the builder is not prevented from occupying or removing the house, he cannot maintain assumpsit therefor against the grantor of the land. *Ib.*

PROPRIETORS OF COMMON LANDS.

1. An illegal partition of lands, held by the proprietors of a township as common lands, does not give such seizin to one to whom a portion was thus assigned, as to enable him to recover against one in possession without title. *Evans* v. *Osgood*, 213.
2. Where it is required that a proprietor's meeting shall be called "by a petition signed by twelve of them at least," a less number than twelve proprietors cannot legally call a meeting, although they may own twelve rights or shares. *Ib.*
3. Where a statute provides, that the proprietors may by vote direct the mode of calling meetings, and where they vote, that the petition for the warrant, and the warrant issued thereon, shall contain each article to be acted upon at the meeting, no legal partition of the proprietors' lands can be made under a general article — "to transact any other business said proprietors may think proper, when met." *Ib.*
4. The seizin of land thus held is in the propriety, and the several proprietors own only as corporators. No individual proprietor can, therefore, maintain a writ of entry for his share of the land, until it is legally assigned to him to hold in severalty. *Ib.*

to another, notwithstanding that the obligee at the time of this conveyance produced his bond and gave notice that he claimed the land.
Millay v. *Millay*, 387.

2. One may make a peaceable entry upon his own land; and having so entered, he is entitled to protect himself from being turned off by one, who has no title therein. *Ib.*

SET-OFF.

1. The set-off of judgments is not restricted to cases where the parties to the record are the same. *Burnham* v. *Tucker*, 179.
2. Under our statutes, where a promissory note has been indorsed when over due, and judgment has been obtained thereon against the maker in the name of the indorsee, and a judgment in favor of the maker of that note has been rendered on a note given to him before the indorsement by the payee of the other; the latter judgment may be set-off against the former. *Ib.*

SHERIFF.

1. If a person, as sheriff, appoints another a deputy sheriff under him, this is to be regarded as sufficient proof, that they stood in the relation of sheriff and deputy, in an action against the former for the default of the latter, as his deputy. *Currier* v. *Brackett*, 59.
2. The sheriff is responsible for all official neglect or misconduct of his deputy; and also for his acts not required by law, where he assumes to act under color of his office. But he is not responsible for the neglect of any act or duty, which the law does not require the deputy officially to perform.
Harrington v. *Fuller*, 277.
3. Where the deputy takes the goods of one person on a writ against another, and afterwards sells them by the consent of the parties to that suit, the sheriff is liable while the property in the goods, or money received from the sale of them, remains unchanged. *Ib.*
4. But if the owner of the goods brings trespass against the deputy for taking them, and recovers judgment, and takes out execution, the property is changed, and it becomes a part of the estate of the deputy, and the sheriff is no longer responsible. *Ib.*
5. As this transfer of the right of property to the deputy is the legal consequence of the act of the plaintiff, it is not held by the deputy as a new fund in his official capacity; the debt due for it becomes the private debt of the deputy by the plaintiff's own election; and the sheriff ceases to be responsible for any after act or neglect of the deputy. *Ib.*
6. Where more than four years have elapsed after a cause of action has accrued against a sheriff for the misfeasance of his deputy, the operation of the statute of limitations is not prevented by a judgment in favor of the party aggrieved against the deputy, rendered within the four years. *Ib.*

SHIPPING.

1. The mortgagee of a vessel, who had never taken possession, or received a delivery thereof, is not liable for repairs or supplies furnished the vessel without his knowledge. *Winslow* v. *Turbox*, 132.
2. An absolute bill of sale of a vessel, with a bond given back at the same time to reconvey the same on the payment of a certain sum and all expenses arising in consequence of having received the bill of sale, by a stipulated time, is but a mortgage. *Ib.*

STATUTE.

1. Wherever penal damages are given by a statute to the party injured, where he had a remedy at common law, if he would claim the statute damages, he should do so by a reference to the statute. *Palmer* v. *York Bank*, 166.
2. A statute giving four times as much damage as is allowed by law for the detention of other debts, is penal in its character; but if it is given to the party injured who seeks the recovery of a just debt, to which these increased damages are made an incident, a suit therefor is not to be regarded properly as a penal action. *Ib.*
3. General words in a statute are to receive a general construction, unless there be something in it to restrain them. *Jones* v. *Jones*, 308.

STATUTES CITED.

Massachusetts Statute.

Maine Statutes.

Special Statutes of Maine.

TENANTS IN COMMON.

1. A recovery of an undivided portion of a tract of land against one who had been for many years in possession under a recorded deed of the whole, and an entry under the judgment, gives the demandant a rightful seizin of such share in his own right, but does not enure to the benefit of one having a similar claim to the remainder of the tract, or prevent its being barred by the statute of limitations. *Gilman* v. *Stetson*, 428.

TENDER.

See Executors, &c., 2.

TOWNS.

1. By the *8th sec.* of the *spec. act* of 1821, *c.* 78, dividing the town of *North Yarmouth* and creating the town of *Cumberland*, the right of election there given, to persons dwelling upon lands adjoining the division line, can operate only upon lands owned by such persons, at the time the act took effect. *Blanchard* v. *Cumberland*, 112.
2. Where one had erected a dwellinghouse on land, and lived thereon for a long time, although less than twenty years, claiming the same as his own, and of which he was the visible and apparent owner, this land adjoining land on the line of the towns, of which he was the undisputed owner; he is to be so far considered the owner, as to have the right to make the election to which of the towns the land should belong, and not the person who had the legal title thereto. *Ib.*
3. The records of a town cannot be contradicted by parol evidence, in respect to matters regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of law. *Crommett* v. *Pearson*, 344.

See Ways.

TRANSFER OF SHARES.

See Contract, 2.

TRESPASS.

See Seizin, &c.

TROVER.

1. If one legally in the possession of the personal property of another, misuse

that property, it is a conversion thereof, and the owner may immediately maintain trover therefor. *Ripley* v. *Dolbier*, 382.

2. Where a horse was conveyed to the plaintiff as security for a debt, to be paid in one year, and where there was an understanding between the parties, although not expressed in the bill of sale, that the debtor should retain the possession during the year; *it was held*, that any such management with the horse during the year as would unnecessarily injure his value, would be a violation of the agreement for his use, and would put an end to any right of the debtor to his possession. *Ib.*
3. The debtor can impart to another no rights to such property superior to his own. *Ib.*

TRUSTEE PROCESS.

1. The answers of a trustee are to be regarded as true and conclusive upon all matters of fact in them; but when the trustee sets up rights or draws conclusions, arising out of or resulting from the facts stated, such rights or conclusions are subject to the revision of the court.
Lamb v. *Franklin Man'g Co.*, 187.
2. When the trustee admits that he holds the property of the principal to a certain amount subject to this process, it must clearly appear from his answers, that he has just claims to an equal amount, before he can be discharged. Every doubtful statement is to be received as indicative that he could not truly make one, which would relieve the case from doubt. *Ib.*
3. The *st.* 1839, *c.* 368, § 3, respecting trustee process, is not imperative upon a Judge of the District Court to continue the action, when after a verdict and before judgment, the defendant has been summoned as the trustee of the plaintiff. *Hunnewell* v. *Young*, 262.
4. A judgment against a trustee, although not satisfied, is a protection against a suit by his principal; but such protection cannot extend beyond the amount due upon the judgment. *Norris* v. *Hall*, 332.
5. After the judgment against the debtor and his trustee, if the principal pay to the judgment creditor a part of the amount, and thus relieve the trustee from his liability to that extent, and then bring a suit and obtain a verdict against his debtor, the trustee, for the amount thus paid; although there may be some difficulty in permitting the debtor to make a partial payment, and divide one debt into several parts, and thus bring several suits; yet as the trustee might have avoided such result by payment of the amount due from him, as soon as charged, the Court will not set aside the verdict, if the plaintiff will release any further claim upon the trustee. *Ib.*
6. Although the debt for which the trustee is charged is one bearing interest, he will not be held accountable for interest after he was summoned as trustee, when there is nothing to rebut the legal presumption that he was ready to pay, and was holding the money unemployed to await the decision; but where the facts rebut such presumption, he is chargeable with interest. *Ib.*
7. If the trustee lives within the county where the suit is brought, and does not appear in Court and submit himself to an examination, but makes oath to his answer before a justice of the peace out of court, and was not about to leave the State, and did not obtain the written consent of the plaintiff; he is not entitled to costs under the *st.* 1821, *c.* 61, and of 1830, *c.* 469. *Ib.*
8. Where one summoned as trustee, appears and submits himself to examination at the first term, and is adjudged to be trustee, he cannot deduct his costs from the goods, effects or credits in his hands, under the provisions of the *st.* of 1828, *c.* 382, unless his costs are taxed and allowed in Court. *Ib.*
9. The disclosure of a trustee and the judgment upon it are to be received in evidence only between those, who were parties to the suit.
Pitts v. *Mower*, 361.

VENDORS AND PURCHASERS.

1. Where the question is, whether the vendee of personal property shall hold it, or whether it shall be subject to the attachment or seizure of a creditor of the vendor, upon the ground that the sale was fraudulent, the interest of the debtor or vendor is balanced, and he is a competent witness for the vendee or his assignee. *Cutter* v. *Copeland*, 127.
2. And if the vendor be made the agent of the vendee in managing the property, still he is a competent witness. *Ib.*

3. There is no legal objection to the employment of the mortgagor as the agent of the mortgagee. *Ib.*
4. After the making of a mortgage of personal property, an arrangement, where by the mortgagor is to continue in possession of the property as agent of the mortgagee, no visible alteration as to the property taking place, is not, in itself, *prima facie* evidence that the mortgage was fraudulent, but is only evidence to go to the jury in determining the question. *Ib.*
5. Possession of personal property by an agent is the possession of the principal. *Ib.*
6. The law does not require, that when the vendor is made agent of the vendee, he should declare or make known his agency. His failing to do so, may be evidence before the jury to prove fraud, but from its omission, the Court are not bound to declare the sale to be fraudulent. *Ib.*
7. If the chattels described in a bill of sale were, at the time it was made, upon the land or within the buildings of the vendee, and the vendor had no longer possession or control of the land or buildings, and they were within the exclusive control of the vendee or his agent, the sale is complete, and no formal delivery is necessary. *Nichols* v. *Patten*, 231.
8. A conveyance of chattels fraudulent and void as to creditors of the vendor, is still binding upon the parties to it; they cannot set up the fraud upon creditors, as against each other; the doctrine, *in pari delicto*, does not there apply; and the vendee, losing his title to the property by the acts of the vendor, may recover its value against him. *Ib.*
9. The vendor therefore, where the conveyance is alleged to be frandulent, may be a witness, as well to defeat as to sustain the conveyance, his interest being a balanced one in either case. *Ib.*
10. Where, upon one day, one party bargained to sell and the other to purchase goods; but there was no delivery, nor payment of any portion of the price, nor memorandum in writing, and on the next day a bill of sale was made, and a note given for the purchase money, the sale did not become valid against third persons before the second day. *Merrill* v. *Curtis*, 272.
11. Where goods have been sold and delivered, and the purchaser has not been molested in the enjoyment of the property, and no other claimant has appeared, the purchaser is bound to fulfil his contract, and cannot defend himself against an action for the price, by showing how the vendor obtained his title, and that the title is defective.
Kennebec Log Driving Co. v. *Burrill*, 314.
12. An innocent purchaser of goods for a valuable consideration from a fraudulent vendee, in possession thereof, obtains a good title against the creditors of the fraudulent vendor. *Neal* v. *Williams*, 391.
13. In a suit by the vendee against the vendor of goods on his implied warranty of the title, it would not be a good defence to prove, that the plaintiff had obtained a release from a subsequent purchaser of him.
Morrison v. *Fowler*, 402.

See MORTGAGE, 3.

VERDICT.

1. After a verdict is read in Court and before it is affirmed, the presiding Judge may rightfully inquire of the jury, upon what principles their verdict is founded. *Smith* v. *Putney*, 87.
2. If an instruction be given to the jury which leaves them to draw an incorrect impression from facts, material to the issue, the verdict will be set aside.
Hastings v. *Bangor House Proprs.* 436.

WAYS.

1. In an action against a town, to recover damages for an injury alleged to have been caused by a defect in a highway, if the question whether the town had, or had not, notice of the defect, is not, in every case, one of fact to a jury, it belongs to the *jury*, and not to the *Court*, to determine, whether the town is chargeable with notice, when no actual notice to any inhabitant of the town, is proved, and is to be established only by implication and inference from other facts. *Bradbury* v. *Falmouth*, 64.
2. To maintain an *indictment* for the obstruction of a "town or private way," it must be shown that such way was laid out and established pursuant to the statute provisions. Proof of a user as such for twenty years or more, is not sufficient. *State* v. *Sturdivant*, 66.

3. The *stat.* 1821, *c.* 118, does not require that the doings of the selectmen in laying out a town or private way should be recorded previous to being offered to the town for acceptance, and therefore they cannot properly become a matter of record until they are approved by the town or, on an appeal, by the county commissioners. *Limerick, Pet'r*, 183.
4. A statement in the record of the proceedings, that notice was given by the selectmen before they proceeded to act, is *prima facie* evidence of the fact. *Ib.*
5. All which the statute requires, as evidence that a road laid out by the selectmen is for the benefit of the town or of an individual, is, that it be approved and allowed by the town in a legal meeting called for the purpose of acting upon it, or by the county commissioners on appeal. *Ib.*
6. The selectmen, therefore, are not required to state in their report to the town, that the way will be beneficial to the town or to some one or more of its inhabitants. *Ib.*
7. A road laid out by the selectmen is still a town or private way, when brought before the commissioners by an appeal from the action of the town; and they are required to pass such judgment only as the town should have done. *Ib.*
8. The town has done its duty, when it has prepared a pathway in the road of suitable width, in such manner that it can be conveniently and safely traveled with teams and carriages; but the citizens are not thereby deprived of their right to travel over the whole width of the way laid out, without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path. *Johnson* v. *Whitefield*, 286.
9. To allow the sides of the traveled path to be incumbered by logs or other things unnecessarily placed there, subjects the town to the payment of damages occasioned thereby. *Ib.*
10. But if the accident happens through the neglect or fault of the person injured, or by reason of any obstacle naturally existing or necessarily placed in the highway, out of the traveled path, he cannot recover against the town. *Ib.*
11. In laying out a road, the selectmen of a town may lawfully perform their duty by a majority of the whole number. *Crommett* v. *Pearson*, 344.
12. The return of the laying out of a road to the town must be made and signed by a majority of the selectmen, but they may depute to one of their own number, or to any other person, the actual location by running out the road, and marking and setting up monuments. *Ib.*
13. And where one of their own number is employed, it is immaterial whether it was done in virtue of a previous consultation, or was subsequently approved and ratified. *Ib.*
14. One of the selectmen may employ the hand of another to affix his signature. *Ib.*
15. In an action against a town for an injury alleged to have been sustained by reason of a defect in a bridge, if the party injured *be bound to prove affirmatively* due care on his part which may well be doubted, yet direct and positive proof is not essential, but it may be inferred by the jury from facts in evidence. *Foster* v. *Dixfield*, 380.
16. The proceedings of a town in laying out a road, not authorized by any statute, although in accordance with a long usage of the town, are inadmissible to show the location or limits of a road. *Young* v. *Garland*, 409.
17. A county road, or common highway, may be proved by usage, without first showing that there is no location of such way on record. *Ib.*
18. In an action against a town for an injury alleged to have been sustained by reason of a defect in a county road within the town, the writ may be amended by substituting *common highway* for *county road*. *Ib.*
19. All have a lawful right to travel on a public river upon the ice; and if any one cuts holes through the ice upon or near the place where there has been a winter way for twenty years, he is liable to the payment of all damages sustained thereby by those travelling upon such way without carelessness or fault on their part. *French* v. *Camp*, 433.

WILL.

1. One cannot take a beneficial interest under a will, and afterwards set up any