REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

By JOHN APPLETON.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

HON. NATHAN WESTON, LL. D. CHIEF JUSTICE.
[TERM OF OFFICE EXPIRED October 22, 1841.]

HON. EZEKIEL WHITMAN, LL. D. CHIEF JUSTICE.
[APPOINTED December 10, 1841.]

HON. NICHOLAS EMERY,
[TERM OF OFFICE EXPIRED Oct. 22, 1841.]
HON. ETHER SHEPLEY,
HON. JOHN S. TENNEY,
[APPOINTED October 23, 1841.]
} JUSTICES.

ATTORNEY GENERAL,
HON. DANIEL GOODENOW.

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1841.

PHILIP GREELEY *& al. vs.* JOSHUA M. WATERHOUSE.

Bottomry bonds may be executed by the owner of a ship at a home port, and their validity does not depend upon the application of the money, when obtained by the owner, to the purposes of the ship or of the voyage.

It is of the essence of a bottomry bond that it is for money taken up on a maritime risk.

When bottomry bonds are given as collateral security for debts due, that fact may be shown when the interests of third persons are thereby to be affected, notwithstanding the recital in the bond, that they are given for money lent and advanced.

When a bottomry bond is given to secure past indebtedness, if that were discharged to the amount of the security by bottomry, it would seem that it might be regarded as a new loan on bottomry.

When unaccompanied by delivery, such bond cannot be regarded as a mortgage, unless recorded, as required by St. of 1839, c. 390.

THIS was replevin for the brig Albert and for two thirds of the brig Watson.

It appeared in evidence, that Luther Jewett, prior to Oct. 26, 1839, was indebted to the plaintiffs to an amount exceeding seven thousand dollars, for advances by them made to him; that on that day he executed, at Portland, in pursuance of the request of the plaintiffs, in their letters previous to that date, bottomry bonds of the brig Albert and of two thirds of the

brig Watson, which bonds he transmitted by letter, dated Oct. 28, 1839, to the plaintiffs who were merchants residing at Boston. The plaintiffs acknowledged by letter of Oct. 29, 1839, the receipt of these bonds.

It appeared from the testimony of George Jewett, who was an endorser on the drafts drawn by Luther Jewett on the plaintiffs, and which had been accepted and paid by them, that, at the time of the execution of these bottomry bonds, Luther Jewett was indebted to the plaintiffs in a much greater amount than the sum thereby secured, and so continued indebted; and, though the bonds recited that the sum of thirty-six hundred dollars had been on the day of the execution of the bonds lent and advanced on the brig Albert, and two thousand dollars on the said Jewett's interest in the brig Watson, at bottomry for one year, that in fact no new advances were made, nor new credits given by the plaintiffs at that time, but that the said bonds were given to secure prior existing debts.

The defendant justified as a deputy sheriff, by virtue of a writ in favor of the Exchange Bank against Luther Jewett, on which the vessels replevied were returned as attached on the 29th Oct., 1839, at half past eleven o'clock.

It was agreed that the plaintiffs' right to recover should not be prejudiced by reason of the credit of one year given in the bonds, but their rights should be regarded as good as if the suit had been after the expiration of the credit and failure of payment.

The defendant's counsel objected to the testimony of the plaintiffs, but consented to be defaulted, subject to the opinion of the Court whether the plaintiffs on this testimony or so much thereof as may be legal, are entitled to recover; if they are, judgment is to be for them, if not the default is to be taken off and the plaintiffs are to become nonsuit.

Rand, for the defendant. These are not bottomry bonds. They fail in every essential requisite to make them so. The *Draco*, 2 Sum. 157; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386. No advances were made on the strength of these bonds, but they were given to secure previous debts. There is no estoppel

by reason of the recital in the bond that it was given to secure advances. Co. Lit. 352, *a*; *Clapp* v. *Tyrrel*, 20 Pick. 247.

A bottomry bond is a contract for a loan of money, on the bottom of a ship, at an extraordinary interest, upon maritime risk to be borne by the lender, for a definite period. Each and all of these elements are wanting in the case at bar. This is the mere case of taking collateral security, and had the vessel been lost the debt would still have remained.

Fessenden & Deblois, for the plaintiffs, maintained the following positions:

1. George Jewett was properly admissible as a witness. *Adams* v. *Carver*, 6 Greenl. 392; *Buck* v. *Appleton*, 14 Maine R. 284; *Warren* v. *Merry*, 3 Mass. R. 27.

The indorser is under no obligation in any case to the accepter unless in case of an acceptance for his honor. Chitty on Bills, 122.

2. The delivery was seasonable, the bonds having been received on 29th Oct. by the plaintiffs; but whether they reached the plaintiffs before the attachment or not, still, inasmuch as the bonds were made by the previous directions of the plaintiffs, they were accepted as soon as made, and the transaction was perfected. *Harrison* v. *Trust. Phil. Acad.* 12 Mass. R. 461; *Wheelwright* v. *Wheelwright*, 2 Mass. R. 447. A delivery to the Register of deeds by the grantor for the use of the grantee, to be recorded, or to a third person for the same purpose, is effectual, and the assent of the grantee will be presumed. *Hatch* v. *Hatch & al.*, 9 Mass. R. 307; *Verplanck* v. *Sterry*, 12 Johns. R. 551; *Doe* v. *Knight*, 5 B. & C. 671; *Hedge & al.* v. *Drew*, 12 Pick. 141; *Copeland* v. *Weld*, 8 Greenl. 411; *Witt* v. *Franklin*, 1 Bin. 502. It is when committed to a third person the deed of the grantor presently. *Ward* v. *Lewis & al.* 4 Pick. 520.

3. The plaintiff could legally take security by means of bottomry bond for pre-existing debts.

The distinction is strongly marked between the powers which the master and the owner of a ship have to encumber the ship with a bottomry bond for the security of the payment of money.

The master has no power at places where the owners reside, nor abroad except in case of great extremity, or for the completing the voyage, to take up money on bottomry. Molloy, b. 11, c. 11, § 11 and 12. Extreme necessity is the only justification for the master. The *Hunter,* Ware's R. 249.

The owner may obtain money on bottomry in a *foreign* or *home* port; and it is not necessary the money should be advanced for the necessities of ship, cargo, or voyage. The essence of a bottomry bond is that the money be taken upon maritime risk, at the hazard of the lender; it is not necessary, that it should be employed in the outfit of the vessel or invested in goods on which the risk is run; nor is it material when the loan is made, nor upon what the risk is run. The *Draco,* 2 Sum. 157; *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 436–7; *Thorndike* v. *Stone,* 11 Pick. 183; *Simonds* v. *Hodgdon,* 3 B. & Adolph. 50, 56. It is only essential that if the subject on which the money be taken is lost by sea-risk or superior force, the lender shall lose his money; and that if the voyage be successful, the sum shall be repaid with a certain profit or consideration for interest and risk as agreed upon. 2 Bell's Com. 83, c. 5, § 1, art. 46; 3 Kent's Com. 2d ed. p. 361. The borrower may appropriate the money as he chooses, and the mode of its application does not change the rights of the lender. The *Jane,* 1 Dod. R. 465; *U. S.* v. *Del. Ins. Co.,* 4 Wash. C. C. 418.

It is not necessary to the validity of such bonds that they should be entered into at the precise time when the loan takes place. *La Ysabel,* 1 Dod. R. 276. Nor that bills were given, and that the lender looked to the bills, for there is no inconsistency in taking such collateral security. The *Jane,* 1 Dod. R. 461.

When the master borrows money on bottomry it must appear that the money was not advanced on the personal credit of the owner or any one else, but on the security of the bottomry alone. The *Augusta,* 1 Dod. R. 283; The *Virgin,* 8 Pet. 538; The *Rhadamanthe,* 1 Dod. R. 206. But the lender to an owner may look to his personal responsibility. *Thorndike* v. *Stone,* 11 Pick. 183; Marshall on Ins. 632—6. The owner

may pledge the vessel for money borrowed or for any purpose. The *Mary*, 1 Paine, 671; *Wilmer* v. The *Smilax*, 2 Pet. Adm. Rep. 295; The *Charles Carter*, 4 Cranch, 328; Abbott on Ship. 162.

In *Hurry* v. The *Ship John & Alice*, 1 Wash. C. C. 293, and *Walden* v. *Chamberlain*, 3 Wash. C. C. 290, it is decided, that a master cannot, leaving it to be inferred that an owner may, give a bottomry bond for a pre-existing debt. See *Miller* v. *Snow Rebecca*, 1 Bee, 151; *Robertson* v. *United Ins. Co.*, 2 Johns. Cases, 250.

The right to sell does not destroy this as a bottomry bond. The debt is at maritime risk, by taking bottomry. The question of whether above six per cent. or not is immaterial. It is not necessary that it should exceed legal interest. The *Aurora*, 1 Wheat. 104; 2 Johns. Cas. 250, and 4 Bin. 244 before cited.

4. If the plaintiff cannot recover on this as a bottomry bond, the instrument is good as a mortgage of the ship. *Holbrook* v. *Baker*, 5 Greenl. 309. Maine St. c. 390, requiring mortgages to be recorded, excepts the case of a ship if the mortgagee shall take possession of such ship or goods as soon as may be after the arrival thereof within the State. The attachment here was before the plaintiff had time to take possession. It may be valid as security for principal and interest. The *Hunter*, Ware's R. 249; *Rucher* v. *Conyngham*, 2 Pet. Adm. Rep. 295.

The opinion of the Court was by

Weston C. J. — The plaintiffs, as acceptors, having paid the bills, indorsed by George Jewett, he had no remaining interest or liability in relation to them, and was clearly a competent witness. And the interest of Luther Jewett is balanced in the case, it being a contest between bona fide creditors of his for security. The objection made at the trial to the testimony cannot prevail, and is not pressed by the counsel for the defendant.

The doctrine in relation to bottomry and respondentia bonds is very elaborately considered and exhausted by Mr. Justice

Story in *Conard* v. *the Atlantic Ins. Company*, 1 Peters, 386, and in the case of the brig *Draco*, 2 Sumner, 157. He investigates, with his accustomed ability their origin and history, illustrated by adverting to the authorities, English and American, bearing upon the question, as well as to the works of distinguished jurists on the continent of Europe. It is very satisfactorily made out, that they may be executed by the owner of a ship at a home port, and that their validity does not depend upon the application of the money, when obtained by the owner to the purposes of the ship, or of the voyage. But it is of the very essence of a bottomry bond, that it is for money taken up on maritime risks, at the hazard of the lender. Case of the *Draco*, 2 Sumner, 187; *Simonds & al.* v. *Hodgson*, 3 Barn. & Adol. 50.

The instruments, upon which the plaintiffs rely, copies of which make part of the case, are based upon loans apparently of this character. Nothing is there disclosed, which shows that the loans were not made upon the risk, essential to this species of contract. But when the rights and interests of third persons are to be affected, the true nature of the transaction is open to investigation. Property is not to be put out of the reach of vigilant creditors, and the truth shut out by the mere form of instruments. *Clapp* v. *Tirrell*, 20 Pick. 247.

Looking at the facts proved, it appears that the money, intended to be secured by the bonds, was not originally advanced upon the credit or hypothecation of the vessels named in the conditions, but as security for debts, due from Luther Jewett to the plaintiffs, which had accrued some months before, principally for advances on bills drawn on them by Jewett. If the account of the plaintiffs had been thereupon discharged, as far as the same had been secured by the bonds, it might have been regarded virtually as a new loan on bottomry. In *Conard* v. *the Atlantic Ins. Company*, 1 Peters, 435, one of the loans obtained was applied in part to the payment of a prior loan. But in this case the bonds were manifestly proffered and received as collateral security. It does not appear that Jewett was discharged from his indebtedness on account, or as drawer

of the bills, or that he had credit in account for the sums stated to have been advanced by the plaintiffs in the condition of the bonds. From the correspondence it appears, that they were looking to the sales of goods belonging to Jewett under their control, which after the receipt of these bonds, they insist must be made available for their benefit, although the market was unfavorable. In Jewett's letter to the plaintiffs, enclosing the bonds, he advises that he sends them as a guaranty, and as such they must be presumed to have been accepted. The movement appears to have been altogether voluntary on his part. If the security was collateral, which is plainly deducible from the facts, the debt was not at risk, although the collateral security was to be available only upon a contingency. It results, that these instruments cannot have effect as bottomry bonds, as the obligation of the debtor to refund the consideration, upon which they were based, did not depend upon a maritime risk, but remained in force at all events.

It is insisted, however, for the plaintiffs, that if their title cannot be sustained as lenders upon bottomry security, they have a right to hold the vessels in question as mortgagees. It is an objection fatal to their claim upon this ground, that their mortgage was not recorded, as required by the statute of 1839, c. 390. This is dispensed with only where delivery and possession accompanies the mortgage. No delivery was made by Jewett, nor did the plaintiffs attempt to take possession until some time after the bonds were executed. According to the agreement of the parties, the default must be taken off and the plaintiffs became nonsuit.

NATHANIEL BLAKE *vs.* NATHAN NUTTER.

Real estate purchased with partnership funds for partnership purposes, and so used and enjoyed, is held by the members of the firm as co-tenants — and the superior right of the partnership creditors over the creditors of the individual partners does not apply at common law to real estate thus purchased.

Whether a different rule in equity should be adopted in this state against the express provisions of St. of Maine, c. 35, § 1, which provides, that all lands conveyed to two or more persons, shall be held by them as tenants in common, and not as joint tenants, unless the conveyance contain express words clearly showing a different intention — quære.

ASSUMPSIT for rent. It was agreed in this case that the premises for a portion of which rent was claimed, were purchased in 1822 by N. & L. Dana and L. Cutter, who then were and for a long time after continued to be partners in trade under the style of N. & L. Dana & Co.; that the land was purchased with partnership funds and for partnership purposes, and was occupied and enjoyed by the firm, till May 13, 1837, when the same was sold to Thomas Chadwick, under whom the plaintiff in this case claims title. Said Chadwick gave his note for the purchase money to the firm of N. & L. Dana & Co. by whom the same was transferred to Smith & Dole in payment of a debt, which existed prior to the attachment herein after named as made by the President, Directors & Co. of the Bank of Cumberland. The firm of N. & L. Dana & Co. failed on or about the 13th of May and were deeply insolvent.

The defendants claimed title by virtue of an attachment of the premises made on the 28th April, 1837, on a writ sued out by the *President, Directors & Co. of the Bank of Cumberland* v. *L. Cutter*, on which judgment was obtained at the Nov. Term of the S. J. Court, 1838; judgment being rendered thereon the 31st. Dec. 1838. On 15th. Jan. 1839, the plaintiffs in that suit levied their execution issued on said judgment on one undivided third part of the premises purchased by the firm of N. & L. Dana & Co, as before stated, as the property of L. Cutter, and thereby satisfied a part of said execution.

The rent claimed is for the third part of the premises levied on by the Cumberland Bank, and which the plaintiffs claim by virtue of a conveyance from the firm of N. & L. Dana & Co. The defendant claims to be tenant of the Bank of Cumberland, and judgment is to be rendered as the title shall be found to be either in the plaintiff or in the said Bank of Cumberland.

The cause was submitted on the briefs of counsel.

Fessenden & Deblois, for the plaintiff.

The plaintiff claims title through and under the firm of Dana & Co. The property levied upon was partnership property, and was pledged to the payment of partnership debts, and has been thus appropriated. The partners could not, if they would, divert this property from its legal appropriation; still less can it be done by others. As between themselves they may be deemed tenants in common, but as respects their creditors, the real estate equally with the personal is held for the payment of the debts of the firm. The Bank of Cumberland taking by levy can have only the rights of the debtor, and the firm being insolvent they acquired nothing thereby. 3 Kent's Com. 2d ed. 24, 36, 38. *Fisk & al.* v. *Herrick & T.*, 6 Mass. R. 271; *Edgar* v. *Donally & al.*, 2 Munf. 387; *Sigourney* v. *Munn*, 7 Conn. 11; *Coles* v. *Coles*, 15 Johns. 159; *Commercial Bank* v. *Wilkins*, 9 Greenl. 28; Watson on Partnership, 57.

From the whole law of partnership, the property of the firm is held by the several members as joint tenants. This relation is unchanged by statute of Maine, c. 35, § 1. Real estate purchased by a firm for partnership purposes and with the funds of the firm is to be considered as excepted from the operation of the statute, it being liable by the general law on the subject to the debts of the firm, and the partners, as appears by the facts in this case, intending to hold it as joint tenants. Their intention should govern. *Anderson* v. *Parsons & al.* 4 Greenl. 486.

A. Haines, for the defendant. There is no such tenure of lands known to the law as a copartnership tenure. They must be either held in joint tenancy or co-tenancy. Unless the contrary

be specially provided for, all lands are to be taken to be estates in common by st. of Maine, c. 35, § 1. The rules of law regulating the personal property of a partnership do not apply to its real estate. *Coles* v. *Coles*, 15 Johns. 159; 3 Kent, 1st ed. 15; *Goodwin* v. *Richardson*, 11 Mass. R. 469; *Pitts* v. *Waugh*, 4 Mass. R. 424. When partners purchase real estate for the purposes of the partnership, it is always held by them as tenants in common. Courts of law exclude from their consideration the funds with which, or the objects, for which, the lands were bought. Watson on Partnership, 73; Collyer on Partnership, 69.

The opinion of the Court was by

WESTON C. J. — That partnership creditors have rights, if seasonably asserted and in a proper manner over the partnership funds, superior to the rights of the creditors of the individual partners, is well established. In order to bring this doctrine to bear upon the case under consideration, the counsel for the plaintiff insist that the property in controversy, while held by N. & L. Dana and company, was a part of their partnership funds.

They derived title from Andrew Fernald and Joel Hall, who conveyed to them by deed, on the second of February, 1822. The tenancy, by which they held, depends upon the terms of their deed and of the statute of 1821, c. 35, § 1. It is therein provided, that lands conveyed to two or more persons, shall be held by them as tenants in common, and not as joint tenants, unless it is set forth in the conveyance, that they are to hold jointly, or unless it contain other words, clearly and manifestly showing that intention. Their deed contains no terms, indicating such intention, either expressly, or by any implication whatever. The language of the statute is too plain and decisive, to render proof of such intention, aliunde, admissible. If the grantees were partners, or if the consideration was paid from partnership funds, these facts do not appear in the deed.

But if we were at liberty to look elsewhere for these facts, and for the further fact that the purchase was made, and the

property used, for partnership accommodation, it could not thereby, in contravention of the statute, become a joint estate. Such also is the common law doctrine. Collyer on partnership, 68. No decision at law, laying down a different principle, has been cited. In equity real estate conveyed to grantees, who are partners, or were when conveyed to one of them, if purchased with partnership funds, has been treated as joint property, and as such, subject to the claims of partnership creditors. *Edgar* v. *Donnally & al.* 2 Munf. 387, and *Sigourney* v. *Munn & al.* 7 Conn. R. 11, cited for the plaintiff, were cases in equity. Hosmer C. J. who delivered the opinion of the court in the last case, admits, that where partners purchase real estate, for the accommodation of their partnership business, courts of law, who look at the legal title only, will consider them merely as tenants in common. And in *Coles* v. *Coles*, 15 Johns. R. 161, the court say distinctly, that "the principles and rules applicable to partnerships, and which govern and regulate the disposition of the partnership property do not apply to real estate."

The case of *Goodwin* v. *Richardson*, 11 Mass. R. 469, is a strong and direct authority to the same point. That the property in controversy there, was purchased with partnership funds, and was taken in payment for a partnership debt, appeared on the face of the title. If from these facts, a plain and manifest intention was deducible, that the estate was to be held jointly, it might have been so regarded, consistently with the statute. And yet they were regarded and held as tenants in common. If the doctrine, for which the plaintiff contends, is warranted by law it should have been applied in that case. A stronger one requiring its application, cannot well be imagined.

Whether a different rule should be adopted in equity in this state, the court is not at present called upon to determine. Whenever such a case arises in equity, it will be matter of grave consideration, what effect the express terms of our staute is to have upon the question.

The case before us is not even a conflict between separate and partnership creditors. Thomas Chadwick, under whom

the plaintiff holds, was a purchaser, not a creditor. The subsequent application of the consideration paid, cannot affect his legal title. It is not easy to discern, upon any principle, why the subsequent deed of Levi Cutter, in connection with the Danas, passes his title in preference to his own prior deed. The levy of the Cumberland Bank has the same effect, as if they had taken a deed from Cutter, on the day of their attachment. And the court is of opinion that the legal title to the part in controversy is in them.

Judgment for defendant.

PRESIDENT, DIRECTORS & CO. OF CASCO BANK *versus* CHARLES MUSSEY.

Mem. Shepley J. being interested, took no part in the hearing or decision of this cause.

It is sufficient to charge the indorser of a note signed by the standing committee of a parish, to prove a demand on the committee and notice of such demand to the indorser.

A demand on the treasurer is unnecessary, the parish being under obligation to pay within the time limited by their note.

THIS was an action of assumpsit against the defendant as indorser of a note given by the second Unitarian Society of Portland, signed by the defendant, W. E. Greely and others, their Parish Committee for that purpose, duly authorized, dated Jan. 29, 1838, for $2575, payable to the defendant or order, in 60 days and grace, and by him indorsed. The general issue was pleaded and joined.

Upon the trial before *Emery J.* it was proved that the parish committee had authority to give the note, that it had been indorsed by the defendant; that a demand upon the several persons constituting the committee had been seasonably made, and that due notice was given of such demand and non-payment to the defendant. No demand was made on the parish treasurer, and it was proved that there were no funds in his hands to meet this note, had a demand been made.

John Chute, called as a witness, stated that he was a stockholder in the Casco Bank, as appeared by the books of the bank, but he was only so nominally, the stock standing in his name belonging to others. He testified, subject to the objection to his competency, that the defendant was a director in the bank and acquainted with its usages.

There was likewise evidence tending to show a waiver by the defendant of demand and notice.

Upon the foregoing evidence the cause was withdrawn from the jury and the defendant submitted to a default, subject to be taken off and a nonsuit to be entered against the plaintiff, if on this evidence the action is not maintainable.

Rand, for the defendant, argued, that a demand on the parish committee was not sufficient and that it should have been made on the treasurer — and that the want of it was not excused by the want of funds in the treasury. Bayley on Bills, 155–6.

Adams, *contra*, cited Maine Law, c. 503, § 3; *Varner* v. *Nobleborough*, 2 Greenl. 121; *True* v. *Thomas*, 16 Maine R. 36; *Kinsley* v. *Robinson*, 21 *Pick.* 327; *U. S. Bank* v. *Smyth*, 11 Wheat. 171; *Woodbridge* v. *Brigham*, 13 Mass. R. 556; *Flint* v. *Rogers*, 15 Maine R. 67; *Shaw* v. *Reed*, 12 Pick. 132; Bayley on Bills, 201.

The opinion of the Court was by

Weston C. J. — Had the instrument declared on been an order, drawn by persons duly authorized, in behalf of the second Unitarian Society in Portland upon their treasurer, a demand on the treasurer must have been made by the holder, before an action could have been maintained against the society. *Varner* v. *Nobleborough*, 2 Greenl. 121. But upon this note, the society had assumed affirmatively the obligation to pay, within the time limited. As against them no demand was necessary. It was not a promise to pay at the treasurer's office, nor that the treasurer should pay. But aside from the effect of the waiver, upon which the plaintiffs rely, a demand of payment was necessary to hold the indorser. The standing

committee were specially authorized to charge the society by giving this note as their organ. From this special authority, as well as from their general powers, we are of opinion, that a demand upon them as representing the society in relation to the subject matter, was sufficient. It appears, that the treasurer was without funds, and it devolved upon the standing committee, rather than upon him, to devise ways and means, to meet the obligations, which the society had assumed. And to this end, as well as for other purposes, the standing committee are clothed with authority to call special meetings of the society. St. of 1821 c. 135, § 3.

We regard it as entirely immaterial to the decision of this cause, whether the defendant was or was not connusant of the usages of the Casco Bank. The admission therefore of Chute, who stood upon their books as a stockholder, as a witness to prove this fact, even if interested, affords no sufficient ground for taking off the default. And a demand being duly made, it becomes unnecessary to decide upon the effect and extent of the waiver proved in the case.

Judgment for plaintiffs.

ZOPHAR REYNOLDS *versus* DANIEL PLUMMER & BENJAMIN HAMILTON *et al.* Trustees.

Where the plaintiff moved to dismiss his own writ for want of jurisdiction, and the defendant claimed costs, they were allowed.

EXCEPTIONS to the ruling of WHITMAN J.

This action was returnable to and entered at the Oct. Term, 1839, of the District Court for the Western District, to be then holden at Portland, for the county of Cumberland. Both of the trustees and the defendant lived in the county of York. At the Oct. Term, Hamilton appeared, disclosed, and was adjudged not to be a trustee. At the March Term, 1840, the plaintiff moved that the action be abated, because all the trustees named in the writ lived in the county of York, and be-

cause this Court has no jurisdiction, the blank on which the writ was made not being under the seal of the District Court, but under that of the C. C. Pleas, and thereupon the presiding Judge ordered that the writ abate, and that the defendant be allowed his costs — to which ruling as to costs, the plaintiff excepted.

Morgan, in support of the exceptions, cited St. of Maine, 1839, c. 373; *Ball* v. *Brigham*, 5 Mass. R. 406; *Bailey* v. *Smith*, 3 Fairf. 196.

McArthur, contra. *Greenwood* v. *Fales & Tr.*, 6 Greenl. 405.

By the Court. — The writ having been brought in the wrong county, where the defendant could not be legally held to answer, after the trustees were discharged, he had a right to move, that for this cause, the writ should abate and for his costs.

It would be against all precedent, as well as the manifest justice of the case, to permit the plaintiff in that stage of the cause, to avoid the payment of costs, to move to dismiss his own writ.

Exceptions overruled.

William H. Wood *versus* Thomas Warren.

When a suit is brought by the holder of a note indorsed over due, against the maker, he is not entitled to the benefit of his counter claims against the indorser, unless they are filed in set-off.

This was assumpsit on a note signed by the defendant for $681,24, and dated March 28, 1838, and payable to Stephen Waite, jr. or order, and by him indorsed, and on a memorandum check of which the following is a copy: —

"$1230,68 (Memo. Bank) Portland, Nov. 13, 1838.

"Pay to No. 57 or bearer, twelve hundred and thirty dollars $\frac{68}{100}$. "Tho's Warren.

"To the Cashier."

It appeared in evidence that this check was given in payment to Joshua Gordon, and to have been by him, with the note, passed to the plaintiff some time after it was drawn, as collateral security.

There was testimony introduced by the defendant tending to prove, that when Gordon owned the note and check, and had them in possession, the accounts and claims justly due from Gordon to him were greater than all the claims which Gordon then held against the defendant. There was no account filed in set-off.

SHEPLEY J. instructed the jury, that it was not sufficient for the defendant to prove such a state of the accounts and dealings between him and Gordon, but he must show some agreement between the parties so to apply the note and check in account as to constitute between him and Gordon a payment or in some way to prove a payment of the note and check to be entitled to their verdict.

The jury returned a verdict for the plaintiff and the defendant's counsel excepted to the above instructions.

Fessenden & Deblois, for the defendant, cited *Shirley* v. *Todd*, 9 Greenl. 83; *Holland* v. *Makepiece*, 8 Mass. R. 418; Mass. St. 1784, c. 2, § 12; Mass. St. 1793, c. 76, § 4; *Peabody* v. *Peters*, 5 Pick. 1; *O' Collaghan* v. *Sawyer*, 5 Johns. R. 118; *Hendricks* v. *Judah*, 1 Johns. R. 319; *Sargent* v *Southgate*, 5 Pick. 312; *Barney* v. *Norton*, 2 Fairf. 352.

A. Haines & W. P. Fessenden, for plaintiff, cited *Clark* v. *Leach*, 10 Mass. R. 51.

The opinion of the Court was by

EMERY J. — Joshua Gordon was the fair holder of the note, mentioned in the report, *indorsed* by Stephen Waite, Jr., to whom or his order, it was payable. No question against the validity of the claim upon that demand can fairly be raised.

The memorandum check too against the defendant seems to have been delivered to said Gordon in payment. He might therefore, considering the *mere language* of the instruments, *one payable to Waite, or order*, and the other to *No.* 57, *or*

bearer, come to the plaintiff with apparent honest right to deliver both of them to him, as collateral security for the amount of Gordon's note to the plaintiff, for which amount, the verdict in this case is rendered against the defendant.

The defendant's counsel has yielded to the conviction that the check is a negotiable paper, and ceases to press any objection that it is of a different character. But the counsel still urge, that on the evidence tending to prove that at the time Joshua Gordon owned the check and note and had them in his possession and due, the accounts and claims justly due from Gordon to him were greater than all the claims, which Gordon then held against the defendant, he ought to avail himself of this state of facts in defence against the plaintiff's claim, though there was no account filed in set-off.

In *Shirley* v. *Todd*, 9 Greenl. 83, it was left undecided, whether an account in offset might be filed against the indorsee of a dishonored note, because in that case it appeared, that the order in question was drawn to pay the account, and it must have the same effect, as if the articles charged in the account were subsequently delivered to pay the order.

The case of *Clark* v. *Leach*, 10 Mass. R. 51, is a strong authority against the defence here attempted, for though the Judge, in that case, directed the jury that the unsettled account of the defendant against the original payee of the note could not be admitted without proof that it was delivered in actual payment of, or advance made by the defendant to Dyer, the payee, towards the note, the full Court held, that the direction of the Judge was right, and admitted, that the defendant was entitled to the same defence in this action as if Dyer had been plaintiff. But in that case, he could not have availed himself of the defence urged at the trial, unless he had filed his account by way of set-off, pursuant to the statute. No account had been filed in offset.

The case of *Barney* v. *Norton*, 2 Fairf. 350, virtually sustains the position that the account in set-off should be filed, and goes the length too of shewing that such a measure may not make out a successful defence against the note. For "the

offset may be disproved. It may be shewn to have been otherwise discharged; and that the defendant's right of set-off is limited to the balance due from the payee to the defendant upon a full adjustment of all their mutual accounts of every description, at the time the note was indorsed to the plaintiff, and if no such balance was found due to the defendant, they should return a verdict for the plaintiff."

There may be some inconvenience attending this species of liberal investigation of the rights as it were of third persons. But the giver of a negotiable paper has no right to complain, for he deliberately invests the payee or holder with the power to exhibit a *prima facie* claim to the whole amount of the paper. And when the payee does negotiate it, and the promiser would resist by his unsettled claims against the payee before the transfer, the least which can be required of him is to give the purchaser or holder notice by filing his account against the payee in set-off against the plaintiff's demand, and so giving the plaintiff notice of the nature of the defence against which he is to prepare.

We are satisfied that the true construction has been given in *Sargent et al.* v. *Southgate*, 5 Pick. 312. All the object of justice is obtained by the defendant's satisfying the jury, that he had paid, as his account filed in set-off shows, to the original payee the whole of the demand before the transfer. If he establishes a greater claim against the payee it is not necessary that the law should compel the purchaser of the note, bill or check, to pay the overplus. Indeed it would be *purely unjust* that such should be the consequence. When such a result may occur it must be in an action between the original parties. In the present case, as no account was filed in set-off, we consider that the instructions to the jury were conformable to law, and that judgment must be entered on the verdict.

Bank of Cumberland *versus* Ira D. Bugbee *& als.*

Mem. — Shepley J. and Emery J. being interested took no part in the hearing or determination of this cause.

Two or more persons may adopt the same seal and it has the same effect as if each had affixed his separate seal.

The recital in a bond with fewer seals than signatures, that it was "sealed with our seals," is a plain and manifest adoption by each of one of the seals.

When without any opposing proof, a verdict was rendered against such recital, it was set aside as against evidence.

This was an action of debt on bond, given by Ira D. Bugbee & als. to the plaintiffs, as security for the faithful performance of the duties of cashier of the Bank of Cumberland by said Bugbee, during his continuance in that office. The defendants pleaded *non est factum*, which was joined by the plaintiffs and a brief statement alleging a performance by said Bugbee of all and singular the things which he was required to do by the condition of said bond, and a counter statement by the plaintiffs setting forth the breaches upon which they relied.

The signatures of the several defendants were not denied, but the objection was taken that the instrument declared on was not the deed of the defendants, because upon inspection it appeared there were but five seals when there were six signatures, and the counsel for the defendants moved a nonsuit, which was declined, on the ground that whether or not each of the defendants sealed the bond was a question of fact, which should be left to the jury.

Upon the issue of *non est factum*, Weston C. J. before whom the cause was tried, instructed the jury that the bond had now six signatures and five seals — that if, as was contended by the counsel for the plaintiffs, there had been a sixth seal, the remains of which they insisted were apparent — that this would be an end of the question. That if originally there were but five seals they might have been affixed by the first five signers — that by law however one seal might be adopted by two or more signers, and it was for the jury to consider

whether the last signer had not adopted one of the seals — that of this the language of the instrument which he signs "sealed with our seals" was presumptive evidence — and that if two of the obligors adopted one seal, it was as well as though there had been six seals.

The jury found that the writing obligatory declared on, was not the deed of the defendants — and upon inquiry by the Court why they had so found they replied, because the bond had not been sealed and executed by all the signers, and that that was the only point which they had considered.

There was likewise a motion for a new trial, on the ground that the verdict was against law and evidence.

Davcis & Haines, for the plaintiff. It is well settled law, that two or more signers to a deed may adopt the same seal. *Bradford* v. *Randall*, 5 Pick. 496; *Mackay et al.* v. *Bloodgood et al.*, 9 Johns. R. 284; *Ludlow et al.* v. *Simond*, 2 Caines' Cas. in Er. 42, 55; *Ball* v. *Dunsterville et al.* 4 D. & E. 314; *Lord Lovelace's Case*, Sir W. Jones, 268; *Cady* v. *Shepherd*, 11 Pick. 400; *Pequawkett Bridge* v. *Mathes et als.*, 7 N. H. Rep. 230; 2 Hill. Abr. 293.

It is sufficient if the obligor acknowledge any impression already made to be his seal. 1 Stark. Ev. 332; 1 Phil. Ev. 360.

Preble, for the defendants. The jury have found that the bond was not the bond of all the defendants, not having been executed by all the signers. By the common law, signing was not necessary, but the seal the essential requisite. 2 Coke, 5 a; 7 Petersd. Abr. 659; *Wright* v. *Wakeford*, 17 Ves. 459.

While the sanctity of the seal is retained — and that is the act which makes the deed obligatory, it would be absurd to consider the signing which was regarded as immaterial as conclusively binding. In all the cases cited, the seals were adopted by the consent of all. Here the whole question is, whether a signature by one of the signers is conclusive evidence of an adoption by him of a seal previously affixed. The verdict can only be set aside on the ground that "sealed with our seals" is peremptory on the jury. If it be not conclusive — then different juries may come to different conclusions. This was sub-

mitted to the jury as a matter of fact. It was either a matter of fact, or of law — if of law, the Court should have so instructed the jury. If of fact, then it was for the special determination of the jury — and the Court will be slow in setting aside a verdict as against evidence, when they have deliberately settled the fact submitted. It was a mockery to leave the jury to infer or not an adoption by one of the seal of another, if after they have drawn such an inference, as to them the evidence seemed to require, the verdict is to be set aside, because that inference is not such as the Court would have drawn.

The opinion of the Court was by

WESTON C. J. — Under the plea of *non est factum*, the plaintiffs were called upon to prove the execution of the bond, on which they declare. They adduced the usual proof, arising from the testimony of such of the subscribing witnesses as were within the jurisdiction of the court, and from evidence of the handwriting of such as were not, and of the handwriting of the defendants, whose signatures they attested. And it is conceded, that the bond has the genuine signatures of all the defendants. The objection to the execution of the bond, is based upon the fact, that it has but five seals, although subscribed by six persons. And upon this ground, the counsel for the defendants moved the presiding Judge to direct a nonsuit, which he declined to do. This motion was founded upon the assumption that the instrument to be legally binding should contain as many seals as signatures.

I am very clear upon the authorities, that the law is otherwise, and that two or more persons may adopt one seal, and that it has the same effect, as if each had affixed his separate. It is the doctrine of the elementary writers, and is equally sustained by adjudged cases. Shep. Touchstone, 57; Com. Dig. Fait, A 2; 4 Cruise's Dig. 27, 8. The earliest decision, which has been cited for the plaintiffs, is *Lord Lovelace's Case*, Sir W. Jones, 268. I have not had access to that authority, but what was there held is stated as a quotation from it in *Ball* v. *Dunsterville & al.* 4 T. R. 314 in these words, "if one of the

officers of the forest put one seal to the rolls by assent of all the verderers, and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all." And in the case last cited, one seal was regarded as sufficient for two persons. *Mackay* v. *Bloodgood*, 9 Johns. R. 285; *Bradford* v. *Randall*, 5 Pick. 496; *Pequawkett Bridge* v. *Mathes & als.* 7 N. H. Rep. 230, are authorities to the same effect. No opposing case has been adduced; and there can be no doubt, that the motion for a nonsuit was properly overruled.

The plea of *non est factum* raises an issue to be tried by the jury, and when joined, it belongs to them to decide, whether the instrument was duly executed or not. But in determining this question, they are not at liberty to disregard the evidence. There were seals enough to bind legally all the defendants, provided one of them was adopted by each. They all declare themselves bound and obliged. The term, "sealed with our seals," is affirmed by, and embraces every one, who affixed his signature to the instrument. The signature of each is a plain and manifest adoption of one of the seals. The delivery, which was proved by the testimony, or the attestation of the subscribing witnesses, by each of the parties, in connection with the language, leads to the same result, by necessary implication. There was no opposing proof or any testimony whatever, calculated to raise a suspicion, that any one of the defendants acted under a misapprehension, or was not apprized of the full effect of the language.

In my judgment, the verdict is manifestly against the evidence, and the justice of the case requires that it should be set aside.

New trial granted.

ALGERNON S. HOWE *versus* SAMUEL A. BRADLEY.

By Stat. of 1824, c. 272, a note left with a bank for collection is entitled to grace, and cannot be demanded till the last day of grace.

It is not necessary to charge an indorser, that the notice of the non-payment of the bill should state the name of the holder or the place where the note or bill was to be found.

The holder is excused from making further exertion to notify an indorser, when he finds during business hours, his place of business closed and the door locked.

Where a note is made payable at some future period, with interest annually till its maturity, and no demand is made for the annual interest as it becomes due, or if made, no notice thereof is given to the indorser; if duly notified of demand and non-payment when the note falls due, he is liable for the whole amount due, both principal and interest. — Emery J. dissenting.

Interest is to be regarded as incidental to the debt and not a part of it.

Annual interest cannot be recovered by a separate action for it after the principal has become due.

THIS was assumpsit, against the defendant as indorser of a promissory note signed by B. Cushman, for $1118,67, dated June 15, 1835, and payable in three years with interest annually.

From the report of the case by SHEPLEY J. before whom the trial was had, it appeared by the testimony of H. Ilsley, the notary public by whom the note was protested, that on the 18th of June, 1838, he received the note from the cashier of the Maine Bank, with whom it had been left for collection, and presented it in person to the maker and demanded payment, and received for answer that he could not pay it: and on the same day went with the note to the public house in Portland, kept by Moorhead, and there inquired for the defendant, and learned that he had left the city on a visit to Fryeburgh — that he left a notice for him at Moorhead's, and enclosed a duplicate of it to him at Fryeburg, and on the same day put it into the post office at Portland — that defendant had boarded at Moorhead's for some years, and had a room there in which he had transacted business with him and had seen his name on the door of the room for near ten years; that he demanded the interest of the maker on the 15th of June, 1836, but could

not say that he notified defendants of such demand. The following is a copy of the notice left at Moorhead's: —

"Portland, June 18, 1838.

"Samuel A. Bradley,

"Sir — Bezaleel Cushman's note for eleven hundred and eighteen dollars $\frac{67}{100}$, dated Portland, June 15, 1835, at three year's date, in favor of and indorsed by you, due this day the last of grace is protested for non-payment. The holder requires of you payment thereof with interest.

"Yours, &c. Henry Ilsley, Jr., Notary Public."

On the part of the defendant it was proved by A. Moorhead, that defendant had occupied for years a separate chamber at his house, which he had under his own control by lock and key; that he owned most of the furniture in it; that his name was on the door; that it was his usual place for transacting business, and was well known to be so; that the notary left the notice with him as he thought and if not, left it in his house and that he handed it to the defendant on the 20th of June, after his return from Fryeburgh where he had been for a few days; that the defendant's room was locked on the 18th of June and during his absence; and that defendant boarded and lodged with him.

The defendant was defaulted subject to the opinion of the Court, whether upon the facts before stated he is by law liable to pay the note; if not so liable, the default is to be taken off and the plaintiff to become nonsuit.

For the defendant, a very elaborate brief by *John D. Hopkins, Esq.* was furnished the Court and it was likewise argued orally by *S. Fessenden*, for defendant, and by *Eastman*, for the plaintiff.

For the defendant. 1. The notice was too late. It should have been given June 15. The note does not express grace. St. of Maine, c. 272, does not apply to this case. The defendant's liability was conditional only, upon due demand on the maker and notice to him. To bring an indorser within the purview of this statute he should have been named. The legislature might give grace to makers, but could not to bind the

indorser by a deferred notice, without altering his contract. The maker may have grace and not the indorser. The statute does not claim to alter the time in which notice is to be given; and if applicable, that time will vary accordingly as the note was or was not in the bank.

The contract being determinate in its language and construction it cannot be varied or altered. There is no proof that it was in a bank, and if in a bank for collection, that evidence of that fact was given to the maker. *McDonald* v. *Smith*, 2 Shepl. 99; *Pickard* v. *Valentine*, 1 Shepl. 412. The statute not altering the law as to indorsers — the notice is not binding. *Jones* v. *Fales*, 5 Mass. R. 101; *Putnam* v. *Sullivan*, 4 Mass. R. 45; *Buck* v. *Appleton*, 2 Shepl. 284; *Smedes* v. *Utica Bank*, 20 Johns. 370.

2. The notice sent to the indorsers is defective — naming no holder and no place where it could be found nor person to whom it could be paid, and giving no information which could be useful to the indorser. *Reid* v. *Payne*, 16 Johns. 218.

3. The note declared on is one payable with interest annually — and a demand for the annual interest was duly made, but no notice thereof given to the indorser — and this neglect discharges him for the whole and not *pro tanto*. *Tucker* v. *Randall*, 2 Mass. R. 283; *Greenleaf* v. *Kellogg*, 2 Mass. R. 568; *Cooley* v. *Rose*, 3 Mass. R. 221; *Mason* v. *Franklin*, 3 Johns. 202; *Lenox* v. *Leverett*, 10 Mass. R. 1; *Lenox* v. *Cook*, 8 Mass. R. 460; *Blesard* v. *Hirst*, 5 Bur. 2670. The contract was, that the indorser should have notice of each defalcation, so that he might take measures to protect himself.

4. The notice was not left at the proper place — it should have been left at Bradley's room.

For the plaintiff. The notice left at Moorhead's was sufficient. Chitty on Bills, 9th ed. 408, 502. The notice sent was binding. *Ogden* v. *Cowley*, 2 Johns. 276; *Bowes* v. *Howe*, 5 Taunt. 30. *Ireland* v. *Kip*, 11 Johns. 231; *Freeman* v. *Boynton*, 7 Mass. R. 483; *Lord* v. *Appleton*, 15 Maine R. 270; *U. S. Bank* v. *Hatch*, 6 Pet. 250.

If the notice was insufficient, due diligence to give notice is

proved. *Shed* v. *Brett*, 1 Pick. 401; *Williams* v. *Bank of U. S.*, 2 Pet. 96; *Blakely* v. *Grant*, 6 Mass. R. 388. The notice sent was in due season. Maine St. c. 272; *Pickard* v. *Valentine*, 13 Maine R. 412; *McDonald* v. *Smith*, 14 Maine R. 99, and was sufficient in point of form. *Reeder* v. *Seixas*, 2 Johns. Cas. 337; *Smith* v. *Whiting*, 12 Mass. R. 6; *Shed* v. *Brett*, 1 Pick. 401; *Granite Bank* v. *Ayers*, 16 Pick. 392; *Bank of Utica* v. *Smith*, 18 Johns. R. 230; *Cross* v. *Smith*, 1 M. & S. 545.

The opinion of the Court was by

SHEPLEY J. — The objections made to the plaintiff's right to recover are: —

1. That the notice to the defendant as indorser was too late. That the St. c. 272 does not change the rights of an indorser, and that he is entitled to notice at the same time that he would have been without the provisions of that statute. And it is said, that such a construction is necessary, or the provision would be contrary to the provisions of the constitution respecting contracts. The statute was enacted in the year 1824, and this note was made in the year 1835. Parties are presumed to know and to make their contracts with reference to the state of the law at the time. A demand could not be legally made upon the maker until his note became payable, and that was not until the last day of grace. A notice to the indorser before the note became due would have been of no effect. He could not be legally called upon until the maker was in fault. The construction contended for instead of favoring the indorser, would deprive him of the important information, that the maker had neglected to pay at maturity. The point was decided in *Pickard* v. *Valentine*, 13 Maine R. 412.

2. That the proof is not satisfactory, that the note was left in a bank for collection. The notary testified, "that before the note became due, he left it in the Maine Bank for collection." The statement that he received it from the cashier of that bank to demand payment is not inconsistent with it.

3. That the form of the notice does not sufficiently describe

the note, or inform the party where it was to be found. It states the date, amount, name of maker, time of credit, and indorsement of the defendant correctly. And disregarding the blank space arising from the use of a printed form it also states, that it was made payable to the defendant. It was not necessary, that it should state, who was the holder. *Mills* v. *U. S. Bank*, 11 Wheat. 436.

4. That the chamber occupied by the defendant should have been regarded as his dwellinghouse, and that the notice should have been left there. The testimony proves, that it was locked on the day when the notice was left, and that the defendant was absent from the city. It would have been but a useless ceremony, which the law does not require, to have called and knocked at the door after the notary had been informed, that he was absent. It has been decided, that a call during business hours at the house or place of business, which is found locked, excuses the holder from making further exertions. *Cross* v. *Smith*, 1 M. & S. 545; *Williams* v. *U. S. Bank*, 2 Pet. 96. Whatever may be the proper character of the apartment occupied by the defendant, there is proof of due diligence to give the notice.

5. That there is no proof of demand and notice when the yearly interest became payable. Interest is regarded as incidental to the principal debt and not as a part of it. The interest accruing before an act of bankruptcy cannot be added to the principal to form a sufficient petitioning creditor's debt. *Ex parte Burgess*, 8 Taunt. 660; *Cameron* v. *Smith*, 2 B. & A. 305. It has been decided, that an action cannot be maintained to recover the interest after payment of the principal. *Tillotson* v. *Preston*, 3 Johns. 228; *Johnston* v. *Brannan*, 5 Johns. 268; *Williams* v. *Houghtaling*, 3 Cow. 37; *Stevens* v. *Barringer*, 13 Wend. 639. In *Fake* v. *Eddy's Ex.*, 15 Wend. 76, it is said, "that in cases where there is no special agreement to pay the interest, if the party accepts the amount agreed to be paid in full satisfaction of the principal debt, he cannot afterward maintain an action for the mere incidental damages. But when there is an express agreement to

pay the interest as well as the principal of the plaintiff's demand, I apprehend, that the performance of one part of the agreement would be no bar to an action for the non-performance of another part thereof." And it is said, that "the dictum of the court in *Williams* v. *Houghtaling*, 3 Cow. 37, was probably misapplied to the circumstances of that case, as there was an express agreement to pay the interest as well as the principal of each payment." Taking the law to be settled, that an action may be maintained to collect the interest after payment of the principal, when there is an express contract to pay it, that does not alter the established doctrine, that interest is an incidental matter arising out of, and constantly accumulating from the principal.

In *Du Belloix* v. *Lord Waterpark*, 1 D. & R. 16, Abbott C. J. says, "interest upon such securities is no part of the debt." And Bayley J. says, "interest upon a bill of exchange or promissory note is no part of the debt." Whether there be a special promise to pay what the law would give to the party without it or not cannot change the thing itself, though it may the remedy to enforce the payment of it. The case of *Doe* v. *Warren*, 7 Greenl. 48, arose on a promissory note payable with interest annually. The C. J. says, "What is interest? It is an accessary or incident to the principal. The principal is a fixed sum, the accessary is a constantly accruing one. The former is the basis or substance from which the latter arises and on which it rests." The holder in such cases may maintain a suit to recover the interest payable before the principal, but cannot have a separate action for it after the principal has become due and while it remains unpaid, because he may recover it in the action for the principal. The obligation imposed by law upon the holder is only to demand payment and give the required notice, when the bill or note becomes payable. No decided case has been cited to show, that it has ever been extended further, or that he is in fault or loses any of his rights by neglecting to demand the interest until the principal is payable.

Judgment for the plaintiff.

EMERY J. — With that portion of the opinion already agreed to by my brethren, as to the first four objections to the plaintiffs' right to recover, I concur. As to the fifth objection, it appears to me, that there is a fallacy in the reasoning in the opinion upon this case against the indorser, in the same manner as might be reasoned against the maker, who is liable at all events for both principal and interest according to law in this State. Although interest be deemed an incident to the principal so far as to disallow an attempt to give it compounded, where delay has been practised in calling for the interest, after payment of the principal, or the principal and part of the interest has been accepted in satisfaction, as in *Tillotson* v. *Preston*, 3 Johns. 228; *Johnston* v. *Brannan*, 5 Johns. 268; and *Williams* v. *Houghtaling*, 3 Cowen, 37; yet the indorser is entitled to every protection fairly arising on the terms of the contract.

In the case cited, *Cameron* v. *Smith*, 2 Barn. & Ald. 305, as to what shall constitute a good petitioner's debt, it was an acceptance by the bankrupt of a bill of exchange drawn for £96, 17*s.* 10*d.* due on the 18th Jan. 1810. And Bayley J. stated that the *distinction is between those cases where there is an express undertaking by the party to pay both principal and interest, and those where he undertakes to pay the principal only.* In the latter case, the interest is no part of the debt but only in the nature of damages. In such cases he says, "though it is a usage of trade to allow interest, yet it may go to the jury and they may allow 4 or 5 per cent. or nothing as damages. The case of a bond is different, for there the penalty is debt, and the principal money due and the interest thereon, may be considered as part of the penalty." If the interest constitute part of the debt the chancellor cannot refuse to allow the holder to prove for it. The case of *Du Belloix* v. *Lord Waterpark*, 1 D. & R. 16, cited in the opinion, was assumpsit by the payee against the maker of a promissory note for £800, dated 27th day of Dec. 1787, at Paris, payable six months after date. The suit was in the Court of King's Bench, in 1822. There was no evidence that

the plaintiff had been in England since the making of the note which had been drawn in Paris, in the plaintiff's favor, as it was alleged, for money lent to the defendant. The jury asked whether they were bound to give the plaintiff interest as well as principal. The C. J. Abbott charged them, that interest being the damage for the detention of the debt, the question was peculiarly for their consideration; and the jury found their verdict for the plaintiff for the principal sum mentioned in the note only. Manning moved for a rule to shew cause why the amount of the verdict should not be increased by adding interest due on the note, from the day it became due up to the time of signing final judgment, or why there should not be a new trial granted, and contended, that the plaintiff was entitled as a matter of course to his interest, and cited Com. Dig. Dam. E. 7, m. 10, H. 6, 24, b. pl. 84; 1 Roll. 572, l. 27; Ib. 150; *Feize* v. *Thompson*, 1 Taunt. 121.

Abbott said, "on principle and upon decided authorities, that the question in the case, whether the plaintiff was entitled to interest upon his principal debt was peculiarly within the province of the jury to decide. Interest upon such securities is no part of the debt, and where it is given, it is upon the ground of the injury which the party has sustained by the detention of his debt after it may lawfully be demanded, and juries give it as damages." He said, he "told the jury they were not bound to give the plaintiff any more than the principal sum mentioned in the note, and they did not think it right to give him the interest. He thought the plaintiff singularly fortunate in recovering his principal money after a lapse of thirty-four years. But there was another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country. And at all events, during that portion of the time, interest could not run, and it would have been illegal to pay the bill whilst the plaintiff was an alien enemy."

Bayley J. observed, that "the question of interest was entirely for the decision of the jury and he thought they decided

rightly. Interest upon a bill of exchange or promissory note is no part of the debt, and it has been decided in the case of bankruptcy that interest on such securities cannot be added to the principal to make good the petitioning creditor's debt" — citing *Cameron* v. *Smith*, 2 Barn. & Ald. 305. It has been clearly decided that the interest is the damages for the detention of the debt, referring to 2 Burr. 1085; 2 T. R. 58; *Seaman* v. *Dee*, 1 Vent. 198; *Lee* v. *Lingard*, 1 East, 403; *Ex parte Williams*, 1 Rose P. C. 399; *Hume* v. *Peploe*, 8 East, 168; *Herries* v. *Jamieson*, 5 T. R. 553; *Ex parte Marlar et al.*, 1 Atk. 151; *Blaney* v. *Hendrick*, 2 Sir Wm. Blac. 761; *Ex parte Champion*, 3 Bro. C. C. 439; *Lowndes* v. *Collens*, 17 Ves. 28. Holroyd concurred."

In New York too, notwithstanding the decisions cited from Johnson & Cowen, which last states the rule there of casting interest, in *Stevens* v. *Barringer*, 13 Wend. 639, it was held, that an action may be sustained for the recovery of interest, although the principal of a debt has been paid, *when the payment of interest is stipulated for in the contract.* It is only where interest is not stipulated for in the contract, and is recoverable merely as damages, *or as an incident to the debt,* that a creditor is precluded from sustaining an action for its recovery after accepting the principal.

In *Fake* v. *Eddy's Ex.*, 15 Wend. 76, the same doctrine was maintained, and the chancellor said the counsel for the plaintiff are wrong in supposing that the rule of law, that an action cannot be sustained for the interest of a demand after the principal has been paid, is applicable to this case. The cases of *Tillotson* v. *Preston*, 3 Johns. R. 229; *Johnston* v. *Brannan*, 5 ib. 268; and the *People* v. The *County of New York*, 5 Cowen's R. 333, were all cases in which there was no contract for the payment of interest, and it could only be recovered as damages for the non-payment of the principal debt when it became due.

The case of *Doe* v. *Warren et al.*, 7 Greenl. 48, I infer, was against the makers of the note. And the principal inquiry was, whether interest upon interest should be adjudg-

ed to the plaintiff. "The question," it is said in the report, "was briefly spoken to." What was said by the counsel is not communicated.

None of the cases cited in the opinion, present the question fairly raised in the present case, as to the indorser. Here is an express promise, by the maker, to pay the interest annually.

The inquiry then is, could the plaintiff have maintained an action against the principal, and also one against the indorser, on proper demand and notice, for each year's interest, on failure of the maker of the note to pay that interest.

That such action can be maintained, and recovery be had, although all the instalments have not become payable is settled by the cases *Tucker* v. *Randall*, 2 Mass. R. 283; *Greenleaf* v. *Kellogg*, 2 Mass. R. 568; *Cooley* v. *Rose*, 3 Mass. R. 221; *Hastings* v. *Wiswall*, 8 Mass. R. 455, which was against an indorser, and we must suppose, from the default, that the proper steps were taken to charge him, and *Estabrook* v. *Moulton*, 9 Mass. R. 258. This last case however, was a real action to recover possession of certain premises mortgaged by the tenant to the demandant as collateral security for a sum of money by sundry instalments, all of which had not arrived at the commencement of the suit. The objection on demurrer was, that the action was brought too soon. The Court said there was nothing in the objection, and that it had been repeatedly overruled.

In *Doe* v. *Warren et al.*, 7 Greenl. 48, it is said, that "the law does not permit the debtor to detain the interest he has promised to pay annually, but furnishes a remedy if not paid to the creditor at the end of each year to recover it, if he chooses to exact it. But that case does not say that the creditor may lay by from year to year, and finally hold the indorser to pay all the interest, which has not been seasonably demanded of the maker — because it is an incident.

Under the circumstances of the present case, it is my opinion that as the demand and notice are not proved at the expiration of any year, but the last before the suit, the indorser cannot legally be chargeable with the interest accruing on the years

previous to the time when he was deemed to have been properly charged by demand and notice. An indorser might well believe that the interest was kept down, if he was not informed that it was otherwise. It seems to me grossly inconsistent to say, that an action might be maintained for the annual interest, at the expiration of each year, and yet that the indorser shall be charged for it, without demand on the maker, and notice of his failure or delinquency as to the payment. It is not a plain and natural conclusion, but metaphysically deduced upon an hypothesis or assumption, as it appears to me, contrary to a series of decided cases upon the liability of indorsers.

Supposing the whole debt had been secured by four several notes indorsed by defendant, one promising to pay the amount of one year's interest, naming the dollars and cents, in one year from the date of the note, in another note, the same amount in two years, the same in another note in three years, and the principal sum of the debt in another note in three years. Could recovery be had against the defendant indorser, without demand as to each note on the maker, and notice of his default to the defendant? Yet interest after the expiration of the time of payment might be recovered of the maker.

As against the indorser, the plaintiff is to have no greater benefit by reason of the whole contract being on one piece of paper, designating the interest to be paid annually.

In a large principal sum, say $50,000, in a note made by one or more persons, and indorsed by another, payable in three years from date of the note, with interest annually, upon the strength of the opinion formed in this case, the most disastrous consequences might arise to an indorser, if the yearly interest were omitted to be demanded of the maker, and notice omitted to be given to the indorser. He might have rested in the well founded supposition, having received no intimation to the contrary, that the interest was regularly paid. But, by the doctrine of this opinion, he would be holden to pay $59,000, instead of $50,000 and one year's interest, at the end of three years, if the proper demand and notice were *then* made and given.

Some case or cases directly deciding this important point,

against an indorser, on solemn argument, ought to be produced, before such oppression should be visited upon one, who as indorser, made only a conditional contract to be answerable on default of the maker, as to every portion of the contract, to be performed at different times, on proper demand of the maker at those several times, and notice of his delinquency being given to the indorser in due season.

GEORGE A. WHITNEY *& al. versus* JOSEPH L. MUNROE, AND PRESIDENT, DIRECTORS AND CO. OF BANK OF CUMBERLAND *& al. Trustees.*

Though a usual it is not a decisive test, to determine the question, whether trustee or not, that the principal has a right of action against the supposed trustee.

The interest of a joint contractor may be reached by a trustee process though the effect of this may be to sever the joint contract.

If the joint creditors of the parties to a joint contract would claim a priority over the several creditors of either of the contractors, they should assert it by suits against both, and by summoning the same trustees and thus present the question to the consideration of the Court.

IT appeared in this case, from the disclosure of the trustees, that on the 24th of Oct. 1839, Joseph S. Munroe and Joseph Goodwin made a contract with Ira Crocker as agent for the Bank of Cumberland, by which they were to cut and haul lumber, for the bank, on land in No. 3, R 12, near Chesuncook, and were to be paid therefor, on the completion of their labor, by the bank according to certain terms and conditions specified in the contract. It appeared that they went on under this contract and complied with its terms, and that at the time of the service of the Plaintiffs' writ there was due seven hundred and sixty dollars and seventy eight cents.

The liability of the trustees was submitted to the court on the above facts — on the briefs of counsel.

Haines, for the trustees. 1. To charge the trustees the principal must have a cause of action against them. *Maine F. &*

M. Ins. Co. v. *Weeks & Tr.*, 7 Mass. R. 438. This was a joint contract with Munroe & Goodwin, and neither could maintain an action against the bank.

2. To hold the debtors of a copartnership, all the members of the firm should be summoned and it should appear from their examination, that a balance after all debts are paid, is due from the firm to the copartner. *Fiske & al.* v. *Herrick & Tr.*, 6 Mass. R. 271. *Upham & al.* v. *Naylor & Tr.*, 9 Mass. 490. *Pierce* v. *Jackson*, 6 Mass. R. 242. Here was a copartnership, 3 Kent's Com. 6, and Munroe's interest is only a moiety of the net profit of the winter's operation, and here no residuum is shown.

The cases of *Harding* v. *Foxcroft*, 6 Greenl. 76; *Post et al.* v. *Kimberly*, 9 Johns. 469; *Holmes* v. *Un. Ins. Co.*, 2 Johns. Cas. 329, all relate to the ownership of vessels; but here was a partnership contract — the parties being interested in the profits or loss of it, which constitutes the essence of that relation. There was no joint tenancy — for there was nothing in which to create a joint tenancy. 3 Kent's Com. 1st Ed. 19.

Fessenden & Deblois, for the plaintiffs.

It is obvious, unless the property of the principal can be reached by this process — that there is one mode by which an insolvent and fraudulent debtor may place his property beyond the reach of his creditors.

A person indebted, one of several defendants, is chargeable as trustee, *Thompson* v. *Taylor*, 13 Maine R. 420, and it is not easy to perceive why the converse may not be equally true.

It is not true that one cannot be charged as trustee unless the principal can maintain an action against the trustee. One may be charged as trustee where no action could be sustained against him — and discharged where he might be sued by the principal debtor and a recovery had. *Staples* v. *Staples & Tr.*, 4 Greenl. 532; *Perry* v. *Coates & Tr.*, 9 Mass. R. 537; *Lupton* v. *Cutter & Tr.*, 8 Pick. 303; *Gore* v. *Clisby & Tr.*, 8 Pick. 555; *Andrew* v. *Ludlow & Tr.*, 5 Pick. 28; *Clark* v. *Brown & Tr.*, 14 Mass. R. 271; *Hathaway* v. *Russell*, 16 Mass. R. 476.

This was the case of a joint contract — and the law of partnership, that partnership property is pledged to the payment of partnership debts — and that therefore the remainder after the payment of debts may be reached by trustee process, does not apply to a joint contract. *Thorndike* v. *De Wolf & Tr.*, 6 Pick. 100; *Post* v. *Kimberly*, 9 Johns. 469; *Holmes* v. *Un. Ins. Co.* 2 Johns. Cas. 329; *Harding* v. *Foxcroft*, 6 Greenl. 76.

The opinion of the Court was delivered by

WESTON C. J. — The policy of the law of foreign attachment is, to render the effects and credits of the principal debtor, in the hands of the trustee, available for the benefit of the creditor. The law should receive a liberal construction, in furtherance of this object. With respect to credits, one of the usual tests, to determine the question, whether trustee or not, is, whether the principal has, or has not, a right of action against the supposed trustee. But this test is not in all cases necessarily decisive, as there are exceptions to its application, of which the counsel for the plaintiff have put some examples.

The alleged trustees in this case are the holders of funds, of which the principal debtor is entitled to a moiety. He has it not in his power, without joining the party entitled with him, by any coercive process, to compel payment. The principal reason for the necessity of this joinder usually given is, that otherwise the party indebted might be liable to the cost and inconvenience of two suits upon one contract. Hence if he himself sever the cause of action, by paying one of his joint creditors his proportion, he is liable to the several creditor. So the law, in carrying out its remedial provisions, may sever a contract, so as to subject the debtor to the liability of two suits upon one contract. The death of one of two jointly contracting parties, renders the survivor and the administrator of the deceased party each liable to a several suit. So if the trustee be indebted to the principal in an entire sum, beyond the amount wanted to satisfy the judgment recovered by the attaching creditor, he will remain liable to the action of his prin-

cipal for the residue. The trustee is but a stakeholder; and the law indemnifies him for the expense of the suit, by allowing him to deduct it, as a charge upon the fund in his hands. Notwithstanding, therefore, if the trustees are charged in this case, an entire liability will thereby be divided into two parts, in the judgment of the court, this objection cannot prevail.

The counsel for the trustees further insist, that they ought to be discharged, because the fund may be wanted for the joint creditors of Munroe and Goodwin, who it is said in the business, from which it accrued, are to be regarded as partners. It is not necessary to decide, whether they stood in this relation or not, as it does not appear that they had any joint creditors or if they had, that they have any occasion to interfere with this attachment. If they would claim and assert any such superior right, it was easy for them to have done so, by suits against both, summoning the same trustees. The court would then have been called upon to determine who had the better title to the fund. But no such question arises in the case, as now presented. The attaching creditor is entitled, if wanted to satisfy his judgment, to one half the debt disclosed.

Trustees charged.

JOHN DOW *& al. petitioners for certiorari, versus* ASA W. TRUE *& al.*

Certiorari is the regular process under which the errors of inferior tribunals, from which there is no appeal, are to be examined and corrected.

St. 1839, ch. 412, which makes provision for the appraisement of the property disclosed, not exempt from attachment and which cannot be come at to be attached, does not dispense with the full disclosure of the actual state of the debtor's affairs and of all his estate required by St. 1835, c. 195.

Where under these statutes a partial disclosure was made and the debtor was thereupon discharged from arrest by the justices, the proceedings were quashed on certiorari.

A motion to quash the proceedings on certiorari, because the writ was sued out, without serving a rule on the debtor discharged from arrest, to shew cause, was denied, when upon scire facias served upon him, the debtor appeared, and the cause was argued on his behalf on its merits.

PETITION for a certiorari to bring up the records and proceedings of the respondents in relation to the disclosure of J. W. A. Brewster, a poor debtor, who had been arrested on *mesne process*, by virtue of a writ in favor of the petitioners against him, and had been brought before the respondents, two justices of the peace and quorum for the county of Cumberland, in which the arrest had been made. A copy of the petition and order of Court thereon was duly served on the respondents and a *scire facias* sued out, which was served on Brewster.

A motion was filed by the respondents to quash the writ for reasons which appear in the opinion of the Court.

From the return of the respondents it appeared, that the debtor, Brewster, having been arrested on a writ in favor of the petitioners against him, was brought before them; and that he then commenced his disclosure — and after having disclosed, as he said, and as the justices adjudged, "sufficient property," to pay the debt on which he had been arrested, declined disclosing other property, but offered to make oath that the disclosure as far as it was made was true — and requested the appointment of disinterested appraisers to appraise off "sufficient property" to pay the plaintiff's claim — that the justices adjudged that the debtor was not required to make a full disclosure of the

actual state of his affairs — that he had disclosed sufficient property to pay the debt on which he had been arrested, and that they accordingly proceeded to appoint appraisers to appraise enough of the property disclosed to pay the plaintiffs' claim; that the debtor chose one appraiser and the justices two, the plaintiffs' attorney declining to appoint one on their part — that these appraisers thus selected were sworn and proceeded to appraise one hundred acres of land in the county of Oxford, without describing it by metes or bounds, being part of a large tract disclosed by the debtor — that the debtor then offered to convey by deed of warranty, or in mortgage, the premises appraised — upon which, the debtor having made oath to the truth of this disclosure by him signed, was discharged by the magistrates from arrest.

Rand, for the petitioners. Certiorari is the proper remedy. *Haywood, petitioner*, 10 Pick. 358; *Fay, pet'r, &c.*, 15 Pick. 248. The Statute of 1835, c. 195, § 4, requires a full disclosure. Statute of 1839, c. 412, § 2, relates to property which is not liable to attachment, but here the property disclosed might have been.

J. Morgan, for the respondents, cited *Commonwealth* v. *Downing*, 6 Mass. R. 72.

F. O. J. Smith, for Brewster, argued, that the magistrates having no interest could not properly be made a party to the record; that they have no contest with any one, and having certified their doings have only to abide the order of Court thereon.

Both debtor and creditor are bound by the existing legislation; all that is wanted is sufficient to pay the demand due; all beyond is oppression. St. 1835, c. 195, § 3, 4; St. 1836, c. 245, § 1, 7.

The disclosure was under St. 1839, c. 412, § 2, which differs from the statute of 1835 in requiring only sufficient property to pay the debt due. That and more was disclosed here. If on a debt of fifty dollars, five hundred dollars in bullion were disclosed, could the creditor enforce a further disclosure? Certainly not.

The justices are the exclusive judges when a full and fair disclosure has been made — they are judges both of fact and

law — and this Court have no right to prescribe to them any particular conclusion to which they are bound to come. *Heywood, petitioner*, 10 Pick. 358; *Rutland* v. *County Commissioners of Worcester*, 20 Pick. 79.

The opinion of the Court was delivered by

WESTON C. J. — The justices had jurisdiction of the subject matter, in regard to which the plaintiffs seek relief. It was in its nature of a judicial character. No appeal lies from their decision. This Court has a superintending power over inferior tribunals. As the proceedings of the justices were not according to the course of the common law, a writ of certiorari is the regular process from this Court, under which their errors are to be examined and corrected.

The justices appear and move, that the writ of certiorari be quashed, because it was issued, without serving a rule upon Brewster, the debtor discharged from arrest, to show cause. And they rely upon the case of the *Commonwealth* v. *Downing & al.* 6 Mass. R. 72, where a writ of certiorari was quashed, because a rule had not been served on the opposite party to show cause. The order of court upon the petition in this case, would have justified, and perhaps required, the service of the rule upon Brewster. But as it was served upon the justices who appeared before the writ issued, and as a scire facias has been served upon Brewster, and the case has been fully argued in his behalf, upon the merits, the motion interposed by the justices is overruled.

The disclosure before the justices was made in pursuance of the St. of 1835, c. 195. That required a full disclosure of the actual state of his affairs, and of all his estate, property, rights and credits. It is only upon such a disclosure, that the St. of 1839, c. 412, § 1, makes provision for the appraisement of the property disclosed, not exempt from attachment, and which cannot be come at to be attached. The debtor declined to make the full disclosure required of him by the statute. We are therefore very clear, that the subsequent proceedings were not warranted by law, and they are accordingly quashed.

BENJAMIN F. SAWYER *versus* JAMES MASON *et al.*

The liability of the receipters for property attached is limited by that of the attaching officer, and when that has been discharged the receipters are no longer holden.

The officer may show that the property attached did not belong to the debtor and the same defence is open to the receipters, unless they have suffered their own goods to be attached and without interposing any claim have receipted for them, in which event they would not be permitted to avoid their liability.

The right of redemption of personal property mortgaged is attachable on mesne process by virtue of St. of 1835, c. 188.

The sum at which property attached is valued in a receipt, is *prima facie* the measure of damage.

If there be an over valuation it may be shown in reduction of damages.

THIS was an action of assumpsit on a receipt given by the defendants to the plaintiff, a deputy sheriff, for certain articles of household furniture of the estimated value of one hundred dollars, which were attached by him on a writ in favor of *Nathan P. Davis* v. *Benj. Graffam.* The receipt recited the articles attached to be the property of the defendant in the suit on which they were attached.

Judgment was duly recovered in the suit *Davis* v. *Graffam,* at the April Term, 1840, of the Supreme Judicial Court — and within thirty days after the rendition of judgment, the goods attached were demanded by the plaintiff — a demand having previously been made on him — but were not delivered up.

The articles attached, excepting one dining set and looking glass, of the value of fifteen dollars, had been mortgaged to one Rooney previous to said attachment — but that fact was unknown to the officer making the attachment. The mortgage was not then required by law to be recorded and was not. Since the attachment and before judgment in the suit against Graffam, one Hay purchased of the mortgagee the property mortgaged, cancelled the mortgage, and paid the mortgage notes by giving new notes with surety to Rooney for the amount due him. As a further consideration he paid other debts of Graffam not secured by the mortgage — and a debt secured by

a mortgage given since the attachment — these payments in all amounting to one hundred dollars.

The case was submitted to the Court upon so much of the foregoing statement of facts as they should adjudge to be legal and competent testimony. If the plaintiff is entitled to recover, the Court are to assess the damages with costs, otherwise the plaintiff is to become nonsuit.

The cause was argued in writing by *Codman & Fox*, for the plaintiff, who contended that the receipt admitted the property attached to be Graffam's, and that the defendants were estopped to contest his ownership. *Johns* v. *Church*, 12 Pick. 561; *Robinson* v. *Mansfield*, 13 Pick. 144. The value of the property is fixed by the agreement of parties. It is in the nature of fixed and stipulated damages. *Lowe* v. *Peers*, 4 Burr. 2225; *Birch* v. *Stephenson*, 3 Taunt. 469; *Farrant* v. *Olmius*, 3 B. & A. 692.

The interest of the mortgagor was attachable by virtue of St. 1835, c. 188, § 2. The equity of redemption was worth more than the plaintiff's debt — and, as it appears from the evidence, has been sold for more.

J. Appleton, contra, contended, that the liability of the receipter was limited by that of the officer. *Carr* v. *Farley*, 3 Fairf. 328. It is a good defence to show that the property attached does not belong to the debtor. *Tyler* v. *Ulmer*, 12 Mass. R. 169; *Loomis* v. *Green*, 7 Greenl. 390; Story on Bailments, 98. The officer here is not entitled to recover, for he is answerable to no one for damages. *Fisher* v. *Bartlett*, 8 Greenl. 124.

The articles attached were mortgaged at the time of the attachment and have since been sold for the benefit of the mortgagee. The interest of the debtor, Graffam, was not liable to attachment by virtue of the provisions of St. 1835, c. 188. It could only be reached in one of three ways; 1st, by trustee process; 2d, by a tender of the mortgagee's claim, and selling the property as in other cases. Neither of these modes was adopted; 3d, the statute provides as follows, "or the plaintiff may at-

tach the property so pledged, mortgaged or held, and sell the same on execution as in other cases, subject however to the rights and interest of such mortgagee, pledgee or holder." This proviso could not have been intended to authorize an attachment without a tender, for it would be absurd to allow a man's property to be taken out of his possession, "subject to his rights," and detained for years to await the result of a contested action between other parties, and then sell it on execution. The statute says nothing of attaching on *mesne process;* but refers only to attaching and taking on execution.

The property could not have been taken out of the possession of the mortgagee by the officer or receipter, without being liable as trespassers.

The value of the property is not found by the agreed statement of facts — and had it been sold at auction would not have been sufficient to meet the mortgage debt. If so, then the plaintiff is not entitled to recover.

The opinion of the Court was delivered by

WESTON C. J. — The defendants are liable to the plaintiff in this action, according to the terms of their contract. But his right to prosecute has been understood to depend on his liability over to the attaching creditor, wherever it has been made to appear, in suits upon receipts of this description, that such liability does not exist, or has been discharged, the receipters have not been holden. Apparently every thing has been done here to render the officer accountable for the property attached, and the defendants are therefore liable to him unless the facts by them adduced would be available in defence by the plaintiff, the officer, against the claims of the creditor.

If the officer has returned an attachment of the personal property of the debtor, he may notwithstanding show, against the creditor, that he acted under a misapprehension, and that the property did not in truth belong to the debtor. *Fuller* v. *Holden*, 4 Mass. R. 498. It is said, however, that the receipters are estopped to do this, against the admissions in their receipt. And in aid of this position, the cases of *Johns* v.

Church, 12 Pick. 557, and of *Robinson* v. *Mansfield et al.* 13 Pick. 139, have been cited. It was there held, that a receipter is estopped to set up property in himself. And with good reason; for if he will suffer his own goods to be attached as the property of another in his presence, without interposing his claim, and will thereupon recognize the title of the debtor thereto, by an instrument under his hand, he should not be permitted afterwards, to avoid his liability as receipter, any more than he would be permitted to defeat a sale of his goods, which he sees made as the property of another, without notifying the purchaser of his own title.

But the right of another is a very different affair. The receipter may have been ignorant of it, at the time of his contract. He is bound to yield to the superior title of the true owner; and if he can furnish the officer with the means of defending successfully against the claims of the creditor, there is no just reason why he should be further holden. It may however deserve consideration, whether, if he would avoid his contract, this should not be done at his expense.

A portion of the property attached was not included in the mortgage, and for this the defendants are clearly liable. With respect to other parts of the property, they do not show, that it did not belong to the debtor. He had undoubtedly an attachable interest in it, subject to the right of Rooney, the mortgagee. St. of 1835, c. 188. They might not be able to resist the claim of Rooney to take possession, but they could do nothing, by their voluntary act, to prejudice the rights of the attaching creditor.

With regard to George S. Hay, we think he must be regarded as holding under the debtor, since the attachment. He succeeded to his establishment; and in part consideration of his purchase, discharged a subsequent mortgage, and discharged the demands of certain other creditors. The case states, that he purchased of Rooney, the mortgagee, but he did not take an assignment of the mortgage. He caused that to be cancelled. All that he paid was for the benefit of the debtor, and this after the attachment. There was sufficient to pay the

mortgagee, and to cover the attachment, at the time it was made. And we are of opinion, that the facts agreed, in respect to this part of the property, are not sufficient to discharge the defendants from their contract. They have not succeeded in showing, that the plaintiff would not be answerable to the creditor; but the aspect of the case does rather justify a different conclusion.

As the whole amount, at which the property was valued in the receipt, is wanted to satisfy the judgment of the attaching creditor, and there is no evidence, that it was an over valuation, that sum should be the measure of the plaintiff's damages.

Judgment for plaintiff.

MARTIN GORE *versus* THOMAS JENNESS *et al.*

As between mortgagor and mortgagee the property in timber cut on the mortgaged premises is in the latter and a purchaser from the mortgagor takes it subject to the paramount rights of the mortgagee.

If the mortgagee seizes the lumber thus cut, he holds it subject to a liability to account for the proceeds to the mortgagee, if the premises be redeemed.

THIS was assumpsit, and was submitted on the following statement of facts.

The plaintiff on August 19, 1835, became the mortgagee of certain lots of land in Chester — upon which, in the winter of 1837—8, certain timber was cut under permits from the mortgagors — but without his knowledge or consent. The defendants furnished supplies to the person by whom the timber was cut and afterwards without a knowledge of the existence of the mortgage purchased the timber. After the purchase by the defendant, the timber was seized by the directions of the plaintiff — and subsequently an agreement was made by the parties to this suit, by virtue of which the defendants were to manufacture the logs and sell the boards manufactured from them — the proceeds from which to be held subject to the decision of the Court upon the question

of the legal right of either party to the same. The plaintiff has brought this suit to recover those proceeds.

The condition of the mortgage had been broken previous to the cutting of the timber above referred to — and it was agreed judgment should be rendered for the plaintiff, if in the opinion of the Court the seizure of the timber was legal, or if he had a right to the possession of the same against the defendant — otherwise judgment for the defendant.

Arguments in writing were furnished the Court by *Willis & Fessenden*, for the plaintiff, and *G. B. Moody*, for defendant.

For the plaintiff, it was contended, that the mortgagor can make no contract and do no act relating to the mortgaged premises which can bind the mortgagee or affect his title.

That the right of possession of the land is in the mortgagee both before and after entry for condition broken — that the mortgagor, though in possession, has no right to remove a fixture — or any thing which would diminish the value of the security — and that trespass could be maintained by the mortgagee against any person for removing fixtures, or cutting down or carrying away timber. These principles, which conclusively settle the case for the plaintiff, are fully established by the following authorities: *Perkins* v. *Pitts*, 11 Mass. R. 130; *Hatch* v. *Dwight*, 17 Mass. R. 299; *Blaney* v. *Bearce*, 2 Greenl. 137; *Smith* v. *Goodwin*, 2 Greenl. 175; *Stowell* v. *Pike*, 2 Greenl. 386.

For the defendants, it was insisted — that here had been no entry to foreclose — and that before such entry the mortgagor had a right to possession of the premises mortgaged. 4 Kent's Com. 148. And that being in possession no action of trespass could be maintained against him. 4 Kent's Com. 151. The mortgagor in possession may maintain trespass against the mortgagee. *Runyan* v. *Mersereau*, 11 Johns. 534. The mortgagee has no such property in trees, cut on the land mortgaged, as will enable him to maintain trover. *Peterson* v. *Clark*, 15 Johns. 205. Even after entry the mortgagee is but a trustee — before entry he has simply the right to assume that

relation — and until he enters he can maintain no suit for any thing, which being severed, has become a chattel — still less can he maintain assumpsit for the proceeds of it.

The opinion of the Court was delivered by

WESTON C. J. — According to the decisions in Massachusetts before the separation, and of this state since, cited for the plaintiffs, he is clearly entitled to judgment. The principles established by these decisions are necessary for the security of the mortgagee. It often happens, that the timber upon wild or unimproved land, constitutes its principal value. Unless it is protected for the mortgagee by adequate remedies, the value of his lien may be defeated or greatly impaired. The timber, standing and growing upon the land, is as much a part of the realty, as the land itself. No equitable or legal considerations have been urged by the counsel for the defendant, which did not apply with equal force in the case of *Smith* v. *Goodwin*, 2 Greenl. 173. Indeed, that was a stronger case, for the house, which *Goodwin* purchased and removed, was built by the mortgagor subsequent to the mortgage, and did not constitute originally a part of the security of the mortgagee.

As between the plaintiff and the mortgagor, and those claiming under him, the property in the timber was in the plaintiff. He must doubtless take it, subject to a liability to account for the proceeds, if the land should be redeemed; but a third person, purchasing the timber, which is a part of his security, takes it subject to the paramount rights of the mortgagee, as much as if he had purchased the land.

Judgment for the plaintiff.

William Hooper *et al. versus* John Day and Daniel Hood, Trustee.

Where goods in trunks locked and in boxes nailed, were deposited in one of the chambers of the house belonging to the person summoned as trustee — and it did not appear that the officer did or could know the contents — nor whether they were attachable or not — nor where they were to be found — nor that he would be permitted to search for them — the depositary was charged as trustee.

Goods so deposited cannot be regarded as liable to be attached by the ordinary process in the sense contemplated by the statute.

Exceptions to the ruling of Shepley J. by whom the trustee had been charged upon the following facts, which appeared in his disclosure.

Previous to the time of the service of the plaintiffs' writ, Mrs. Day left, by the permission of the wife of the trustee, certain trunks and boxes of bed clothes and wearing apparel at his house — and subject to the order of her husband, the defendant in this suit. These were in a chamber in the trustee's house, at the time of the service of the trustee writ. The trustee had no claim whatever upon the goods, but received them as an act of neighborly kindness. The day after the service of the plaintiffs' writ, they were attached by one Waterhouse, a deputy sheriff, on a writ, *Aitcheson* v. *Day*, and were by him removed.

These facts, the trustee disclosed, were obtained from his wife and Mrs. Day, he being absent when the trunks, &c. were left.

The case was submitted on briefs.

Codman & Fox, in support of the exceptions, argued, that this process would not lie where the property could be attached, as this might have been in this suit, and was subsequently. St. c. 61, § 1 enacts, that any person having any goods, effects or credits *so intrusted* or deposited in the hands of others, that the same cannot be attached by the ordinary process of law, may have trustee process. But the trustee had no lien upon these goods — and having none — nothing prevented the officer's seizing them. Had they been held by him by virtue of

any claim or lien, this process could have been maintained. *Allen* v. *Megguire*, 15 Mass. R. 490.

Rand, contra. In this case goods were *entrusted and deposited*, in the very words of the statute. Trustee process will lie though it may not be physically impossible to attach. *Burlingame* v. *Bell*, 16 Mass. R. 318; *Platt* v. *Brown*, 16 Pick. 553; *Parker* v. *Kinsman & Tr.*, 8 Mass. R. 486; *Swett* v. *Brown & Tr.*, 5 Pick. 178. The attaching officer holds subject to trustee process.

The opinion of the Court was delivered by

Shepley J. — It is contended, that the goods were so entrusted or deposited, that they could be attached by the ordinary process of law; that the attachment made on the following day by such process should be regarded as the only legal one; and that the trustee should be discharged. And reliance is placed on the cases of *Allen* v. *Megguire*, 15 Mass. R. 490, and *Swett* v. *Brown*, 5 Pick. 178, to sustain these positions. In the former case it is said, that the trustee process "will lie only where the goods cannot be come at to be attached by the ordinary process of law." This is only a statement of the statute provision, and it does not assist one to determine, when they are so deposited. There is a more important intimation in the case, that a person summoned as trustee, "and not disclosing any thing by which it might be inferred, that he exposed them to attachment," may be considered as the trustee and charged accordingly. The latter case decides, that a person having possession of the goods of the debtor without his consent or contract, may be liable to this process, when they cannot be attached by the ordinary process. In the case of *Burlingame* v. *Bell*, 16 Mass. R. 318, it was decided, that a construction so close as to be confined to the literal effect of the words of the statute was inadmissible; and it is said that goods may be so placed in the hands of another "as to be physically within the reach of an officer to attach; and yet there may be difficulties in the way of attaching them, which a creditor may fairly wish to avoid." In this case the trustee

does not state, that he exposed the goods so that they could be attached by the ordinary process. They were in trunks locked and boxes nailed, which were placed in one of the chambers of the dwellinghouse of the trustee. It does not appear, that the officer did or could know the contents of them, or in what part of the house they were to be found, or that he would be permitted to search for them. He as well as the creditor might well desire to avoid the risk of attaching articles not exposed to sight, and which might not be liable to attachment. They were not so situated as to enable the officer acting with prudence to make an attachment without the danger of subjecting himself to an action of trespass for taking goods not liable to attachment. Goods so situated cannot be regarded as liable to attachment by the ordinary process in the sense contemplated by the statute.

Exceptions overruled.

ELIZABETH FICKETT *versus* LEMUEL DYER.

Where the devisor, seized of the estate in which dower was demanded, by his will, after making divers legacies, directed the same to be sold by his executor, and devised whatever should remain after paying debts and legacies to the husband of the demandant — *it was held* — that the husband acquired thereby no seizin — and that the devise was of such portion of the proceeds of the sales made by the executor as might not be wanted for the payment of debts or legacies.

When the executor, with power to sell by the will, conveyed the estate of his testator with covenant of the seizin of his testator, and the devisee of the remainder after the payment of debts and legacies by deed of warranty against all persons, but without covenants of seizin conveyed the same estate to the same grantee on the same day on which the deed of the executor was made and delivered — *it was held*, that the deed of the devisee operated only to confirm the title conveyed by the executor — and that the grantee was not estopped to deny his (the devisee's) seizin.

THIS was an action of dower. The marriage of the demandant with Asa Fickett and his decease were admitted. It appeared that a demand of dower was duly made.

To prove the seizin of Asa Fickett the plaintiff read a deed

of warranty against all persons, but containing no covenant of seizin, from Asa Fickett to Samuel Wells, dated April 24, 1826, conveying the premises in which dower was claimed for "the consideration of five hundred dollars, and of a conveyance this day made by John Jones, as executor of the last will of Moses Plummer, deceased, of the same premises, to said Samuel Wells." From Wells, the title was conveyed by deed dated April 21, 1830, to the tenant.

The defendant, to rebut any proof of seizin, read the following deeds conveying the same premises. A deed dated March 26th, 1795, from John Butler to Moses Plummer, Jr. — a deed dated Dec. 19, 1807, from Moses Plummer, Jr. to Moses Plummer — also a copy of the will of Moses Plummer, which had been approved and allowed, by which it appeared that John Jones was appointed executor — and that after making certain legacies, he ordered all his estate, both real and personal, to be sold by the executor for the payment of his debts and legacies, after the full payment of all which, he devised whatever should remain to his son-in-law, Asa Fickett, and his heirs, to be paid him or them by his executor — and that he authorized his executor to make sale and dispose of said property for the purposes mentioned in the will.

It further appeared that John Jones took upon himself the trust of executor, and being duly qualified by deed dated April 24, 1826, in which he covenanted that said Plummer died seized, conveyed the premises aforesaid, as executor, to Samuel Wells. To the introduction of the testimony offered by the tenant, the plaintiff's counsel objected.

Upon this evidence, Shepley J. being of opinion that the seizin of the husband was not proved, the plaintiff submitted to a nonsuit, which was to be set aside and a new trial granted, if that opinion was erroneous.

Fox, for the demandant, argued, that Wells, by receiving a deed from Fickett, was estopped to deny his seizin. *Kimball* v. *Kimball*, 2 Greenl. 226; *Nason* v. *Allen*, 6 Greenl. 243; *Hains* v. *Gardner*, 1 Fairf. 383.

If not estopped by the deed of Fickett, by the will of Plum-

mer the legal estate vested in Fickett as residuary legatee. Such seizin is sufficient to entitle the widow to dower. 8 Co. R. 96; 2 Vernon, 404.

Haines & Preble contended, that st. 1821, c. 40, § 6, required seizin in the husband. That here Fickett was never seized — that Plummer was seized till his death — and that Fickett never entered into possession.

If here was a vested remainder, that would not give such a seizin as would entitle the demandant to dower. *Eldredge* v. *Forrestal & ux.* 7 Mass. R. 253.

The title to Wells passed from Jones as executor — and the deed from the husband was only to confirm that title. The doctrine of estoppel applies only where the title is held under the husband — but in no case is the wife of a grantor under whom the title is *not* held, entitled to dower. But estoppels are not to be favored. *Marshall* v. *Fisk*, 6 Mass. R. 32; *Emery* v. *Chase*, 5 Greenl. 235; *Leicester* v. *Rehoboth*, 4 Mass. R. 180; *Bridgewater* v. *Dartmouth*, Ibid. 273.

The opinion of the Court was delivered by

Weston C. J. — From the facts in the case, it is quite apparent, that the husband of the demandant was never seized of the premises, in which she claims dower. It was part of the estate, of which Moses Plummer died seized. By his last will and testament, he had authorized his estate to be sold by his executor. And the authority thus given was duly exercised. We are satisfied, that the residue of the estate, devised or bequeathed to the husband of the demandant, was such portion of the proceeds of the sales made by the executor, as might not be wanted for the payment of the debts and legacies, if he thought proper to sell under the power. That power was plainly given, and was exercised, with the assent of the party interested in the residuum, although the validity of the power was not made to depend upon such assent.

It is however urged, that Samuel Wells, under whom the tenant claims, having taken a deed from the husband, he and all who derived title from him are estopped to deny the seizin of

the husband. And the doctrine is well established that a party, holding from the husband, is estopped to deny a seizin thus derived. The cases of *Kimball* v. *Kimball*, 2 Greenl. 226, and of *Nason* v. *Allen*, 6 Greenl. 243, with the authorities there cited, upon which they are supported, turn upon this principle. In *Hains* v. *Gardner & al.* 1 Fairf. 383, the tenants were held estopped for the same reason, namely, that they held under the husband. They had also, through mesne conveyances the deed of another party; and it was a question much discussed, whether that party or the husband was in fact seized. The court however held the tenants estopped, because they or those under whom they claimed, had taken a deed of general warranty from the husband to whom the greater part of the consideration was paid. And it was regarded as a fact, having an important bearing upon the decision, that they accepted from the husband a deed containing a covenant of seizin.

The case before us differs essentially and materially from those cited. The tenant does not hold under the husband. He derived seizin and title from the executor of Plummer under his will. The husband did not claim to be seized. His deed contains no covenant of seizin. He passed only his right, title, and interest, whatever it might be. He recognizes the previous conveyance made by the executor under the will, as one of the considerations of his deed. His general covenant of warranty neither establishes nor admits his seizin. That would be sustained and made good by the previous valid title, which the grantee had received from the executor. It was manifestly taken as a matter of precaution by the purchaser, and ought not, in our judgment, upon the facts in the case, to prejudice him, or those claiming under him.

Nonsuit confirmed.

ILUS F. CARTER *versus* SAMUEL A. BRADLEY.

To charge the last indorser, it is not necessary that the first indorser should be notified of demand and non-payment.

The holder may notify him or not at his election, without losing his claim against subsequent parties, who may have been duly notified.

The last indorser, if he wishes his preceding indorser held, should notify him, to do which, he has one day, after being duly notified himself.

Where the notice delivered the indorser misdescribed his name, it was held good if the defendant thereby knew that the notice was intended for him, and that the note therein described was the note in suit — which facts were submitted to the jury.

Notice to Samuel A. Bradbury — which was meant for and delivered to Samuel A. Bradley — held sufficient.

THIS was assumpsit on a promissory note, dated Nov. 5, 1838, for $200, made by Osgood Bradbury, payable to William Bradbury or order, in sixty days and grace, at either of the Banks in Portland, and indorsed by said Bradbury and the defendant.

It appeared in evidence from the testimony of Henry Ilsley, that on Jan. 7th, 1839, he received from the cashier of the Manufacturers' & Traders' Bank, in Portland, notices signed by the cashier and directed to the maker and first indorser at New Gloucester, where they resided, stating that the note was due and unpaid, and requesting payment, which he on the same day put in the post-office at Portland — and that he likewise received a notice from the cashier, of which the following is a copy:

"Manufacturers' & Traders' Bank,
"Portland, Jan. 7, 1839.

"Samuel A. Bradbury:

"A note signed by Osgood Bradbury and indorsed by you for $200 —— cents, became due this day, which is the last day of grace, and is unpaid. You are therefore requested to pay the same. E. GOULD, Cashier."

That this notice he left at Moorhead's, in Portland, where the defendant resided, and it appeared in evidence that the same was on that day delivered in hand to him.

It further appeared that there were three post-offices in New Gloucester, that the maker and first indorser of the note resided at the Upper Gloucester post-office, which was about two miles distant from the New Gloucester post office — that a letter directed to Gloucester would be expected to stop at that office — and that if directed to a person known to be resident at another office, it would be expected that it would be forwarded at the next mail to such office — that the mail passed from the New Gloucester to the upper office every other day.

Upon this testimony SHEPLEY J. before whom the cause was tried, instructed the jury, that the note having been made payable at either of the banks in Portland, it was the duty of the maker to search for it at the several banks in Portland on the day that it fell due and pay it, and that it was not necessary for the holder to cause him to be notified where it was to be found — and that a demand of the maker of payment at any one of the Portland Banks, or by the cashier of the Manufacturers' & Traders' Bank, at his bank, if the note was left there, was a sufficient demand — and submitted it to the jury, whether such an one was proved. That it was not necessary to enable the plaintiff to recover in this suit, that he should prove any notice to the first indorser.

That it was necessary for the plaintiff not only to prove a demand of the maker, but also that on the same day notice of such demand and neglect was given to the defendant.

That if they were satisfied that the defendant received the notice produced on the day stated, that would be sufficient if the defendant thereby came to the knowledge that it was intended for him, and that he knew thereby that the note designed to be described was the note now in suit — and submitted to the jury to decide whether such knowledge was communicated to him by that notice — and that if the plaintiff failed to satisfy them that he had performed all on his part to be performed he could not recover.

The jury found a verdict for the plaintiff, which is to be set aside and a new trial granted, if these instructions were erroneous, otherwise judgment is to be entered upon it.

A written brief by *J. D. Hopkins, Esq.*, for defendant, was furnished the Court — and it was argued orally by *S. Fessenden*, for the same side, and by *F. O. J. Smith*, for the plaintiff.

It was contended for the defendant, that when a note is payable at a place certain, the demand must be made at the place designated. *Smith* v. *Thatcher*, 4 B. & C. 200; *Treacher* v. *Hinton*, Ibid, 413. This was not a note payable at a place certain. *North Bank* v. *Abbott*, 13 Pick. 465.

It was necessary to notify the first indorser, which was not done. Bayley on Bills, 124; *Stanton* v. *Blossom*, 14 Mass. R. 116; *Ex parte Barclay*, 7 Ves. 597; Bayley, 161, 3; *Smedes* v. *Utica Bank*, 20 Johns. 370; *Scott* v. *Lifford*, 9 East, 347; *Langdale* v. *Trimmer*, 15 East, 291.

The notice sent was insufficient. It is not directed to the defendant, and describes a note with but one indorser. *Warren* v. *Gilman*, 3 Shepl. 70; *Thorn* v. *Rice*, 3 Shepl. 263.

For the plaintiff, were cited *Page* v. *Webster*, 3 Shepl. 249; *Smith* v. *Whiting*, 12 Mass. R. 6; *Shed* v. *Brett*, 1 Pick. 401; *Reedy* v. *Seixas*, 2 Johns. Cas. 337; *Edwards* v. *Dick*, 4 B. & A. 212; Bayley on Bills, 163.

The opinion of the Court was delivered by

Weston C. J. — The instructions first given by the Judge, are fully sustained by the case of *Page* v. *Webster*, 15 Maine, R. 249, to which we refer.

The holder of a bill or note is bound to notify all the prior parties, to whom he intends to resort. Chitty on Bills, 295. If he notifies his immediate indorser only, he waives his remedy against a prior indorser; but in running back the series of liabilities, each party receiving seasonable notice, has generally a day to give notice to such as stand before him, by which their liability becomes fixed, whether notified by the holder or not. Bayley on Bills, 263, and the cases there cited. If the plaintiff failed to give seasonable notice to the first indorser, he may have lost his remedy against him, but may charge the defendant, the second indorser, if he has caused him to be legally notified. If the defendant would charge the first indorser,

it became his duty to take care, that due notice was forwarded to him.

It appears, that the defendant had indorsed such a note as is described in the notice, which he is proved to have received. The question is, whether the misnomer in the latter part of the surname, did so vitiate the notice, as to render it legally ineffectual. The jury have found that the defendant knew that the notice was intended for him, and that the note designed to be described therein was the one now in suit. If this was a point to be determined upon inspection of the paper alone, it was more proper that it should have been settled by the presiding Judge. But there were other facts to be considered. The messenger, Ilsley, understood the notice to have been made out for the defendant, and accordingly left it for him with the keeper of the public house, where he boarded. Mr. Moorhead, with whom it was left, must have so understood it, for it appears that he did, on the same day, hand the notice to the defendant. Taking these facts in connection with the description of the instrument declared on in the notice, we are of opinion that they sustain the verdict found by the jury, and that it was a matter properly submitted to their consideration. But if it had rather belonged to the Court to decide this point, as it has been correctly decided, it furnishes no sufficient ground of exception.

Judgment on the verdict.

Marcia L. Hamblin *versus* President, Directors & Co. of the Bank of Cumberland.

Mem. — Emery J. and Shepley J. being interested, took no part in the hearing or decision of this cause.

Where two persons convey land by deed of warranty with covenants of seizin, the grantee and all claiming under him are estopped to deny the seizin of each grantor in a moiety of the premises thus conveyed.

The demandant in dower is entitled to recover according to her title, though in her demand on the tenant to have dower assigned, she claimed dower in the whole premises when she was by law entitled to dower of a moiety only.

Proof that two persons jointly and equally built two houses in a block — that they divided by parol — that each occupied, sold, and received the proceeds arising from the sale of the house to him belonging, is not sufficient to prove such sole seizin as to enable a widow to recover dower in the house assigned to her husband.

This was an action for dower in certain lands described in the demandant's writ, which was dated Feb. 4, 1840. The demandant proved her marriage with Eli Hamblin, and his death, and that she had duly made a demand for dower on the tenants, Dec. 4, 1839. She also introduced a contract, dated June 22, 1836, between James Smith and Eli Hamblin, reciting a purchase by Smith from Hamblin, the demandant's husband, of the estate in which dower was claimed — a deed acknowledged June 22, 1836, James Smith and wife to Eli Hamblin — a deed dated Dec. 10, 1836, from Eli Hamblin and Joseph G. Hamblin, conveying the premises to James Smith — a deed from James Smith to Roscoe G. Greene, in mortgage, and an assignment of the same from Smith to the tenants, who were admitted to be in possession of the premises whereof dower was demanded.

The tenants introduced, subject to all legal objections, a deed dated Aug. 3, 1835, from Alfred Dow and Betsey N. Dow, conveying the land in dispute to Joseph G. Hamblin.

Upon this evidence, it was insisted by the counsel for the tenants, that the legal seizin passed from Joseph G. Hamblin — and that there was no evidence that Eli Hamblin had ever been seized — but Weston C. J., who tried the cause, ruled that the

tenants, deriving their title under the deed executed by Eli and Joseph G. Hamblin, were estopped to deny that Eli Hamblin was seized of a moiety of the premises.

To establish the right of the demandant to be endowed of the entire premises, her counsel offered to prove that Eli and Joseph G. Hamblin built equally and jointly two houses in one block, the expenses of which were settled upon that basis between them — that they divided said houses by parol — Eli taking the house in controversy, and Joseph G. Hamblin taking the other — that Joseph G. sold his by deed to one Chadbourn and received exclusively the proceeds of such sale — that Eli sold the other house as his own to James Smith, pursuant to the agreement of June 22, before referred to, and his subsequent deed, and that he received exclusively the proceeds of such sale; and the signature of Joseph G. Hamblin to the deed to Smith, under which the tenants claim, was affixed only by way of greater caution on the part of the grantee.

The counsel for the demandant on this evidence contended, that upon the above evidence, in connection with the admissions of Smith in the contract of June 22, it was competent for the jury to find that Eli was sole seized, and that the demandant was entitled to be endowed of all she has demanded — but the presiding Judge, being of opinion that the evidence offered could not have the effect to prove sole seizin of the husband of the demandant in the whole, excluded it.

The counsel for the tenants objected to a recovery by the demandant of dower in a moiety, because the demand varied from the title, and because dower was not demandable of a moiety until after a division of the premises — but these objections were overruled, and the jury found the demandant entitled to dower in a moiety, subject to the opinion of the Court. If in their judgment any of the points taken by the tenants are decisive against the demandant's recovery, the verdict is to be set aside and the demandant is to become nonsuit. If the evidence offered by the demandant and rejected ought to have been received, or the evidence by her objected to and received ought to have been rejected, the verdict is to be set aside and

a new trial granted. But if the verdict is in conformity with the law of the case, judgment is to be rendered thereon.

Haines, for the tenant. The husband of the demandant was never seized of the premises in which she claims dower. The title was in Joseph G. Hamblin, and the tenant's title is perfect without any reference to that of Eli Hamblin. If the signature of Eli was affixed only by way of precaution, the intention of the parties should govern, and the deed given may be regarded as any species of assurance to carry out the intention of the parties. *Dolf* v. *Bassett*, 15 Johns. 21; *Marshall* v. *Fisk*, 6 Mass. R. 32.

A demand is indispensably requisite to enable the demandant to recover. Stearns on Real Actions, 313. Here the demand, exceeding the plaintiff's title, is bad — she having demanded more than her right.

F. O. J. Smith, contra. The demand was sufficient. In a demand for dower all that is required is, that the description of the land should be such as to give notice to the tenant to what land the demand refers. *Atwood* v. *Atwood*, 22 Pick. 286; *Baker* v. *Baker*, 4 Greenl. 69.

The tenants claiming under the husband of the demandant are estopped to deny his title. *Bancroft* v. *White*, 1 Caines, 185; *Hitchcock* v. *Carpenter*, 9 Johns. 344; *Collins* v. *Torry*, 7 Johns. 278; *Hitchcock* v. *Harrington*, 6 Johns. 290; *Kimball* v. *Kimball*, 2 Greenl. 227; *Hains* v. *Gardner*, 1 Fairf. 381; *Nason* v. *Allen*, 6 Greenl. 243; *Smith* v. *Ingalls*, 1 Shepl. 287; *Moore* v. *Esty*, 5 N. H. Rep. 489.

The demandant was entitled to dower in the premises, and the evidence rejected should have been received. *Dolf* v. *Bassett*, 15 Johns. 21.

The opinion of the Court was delivered by

Weston C. J. — It appears that the fee of the whole land, in which dower is demanded, had been in Joseph G. Hamblin. The evidence offered by the demandant is not sufficient to justify the jury in finding that Eli Hamblin, her husband, after-

wards became sole seized. By the subsequent occupancy of both, the fee would remain according to the legal title. Eli having built by the consent of Joseph, might have held or sold his house as personal property. The parol division of the two houses, if it was intended to embrace the land, could not have the effect to put Eli in the legal seizin of it. And in the judgment of the Court, sole seizin in Eli could not be legally made out by the evidence offered and rejected. The opposite doctrine cannot be sustained, in conformity with our law, from the case of *Dolf* v. *Bassett*, 15 Johns. 21, which is, as the court admit, obscure in its facts, and it does not appear to be very clear in its principles.

The resemblance is so strong between this case and that of *Hains* v. *Gardner & al.* 1 Fairf. 383, that in the opinion of the Court, the tenants, holding under the deed of Joseph G. and Eli Hamblin, ought not to be received to deny the seizin of Eli in a moiety. He might have held the house, as personal property. That constituted the principal value of the premises. By uniting in the deed, the house passed to the grantee, which being the personal property of Eli, would not have passed, if the deed had been executed by Joseph alone. *Russell* v. *Richards & al.* 1 Fairf. 429. The deed contains the usual covenant of seizin, which is the covenant of both the grantors. Thereby Joseph, who previously had the title, covenants that Eli is seized as well as himself. Looking at that deed alone, the legal effect of it undoubtedly is that a moiety passed from each; and nothing is perceived in the case, which can entitle the tenants to controvert this result.

If the demandant claimed of the tenants dower in the whole, when she was entitled only to dower in a moiety, as the premises were truly described in her written demand, she may recover a less share, according to the title she has been able to verify. *Atwood* v. *Atwood*, 22 Pick. 283.

Judgment on the verdict.

ZACHARIAH B. STEVENS *versus* PETER LUNT.

A debt due from the plaintiff to the firm of which the defendant was a member, cannot be made available by him in offset, by virtue of st. 1821, c. 59, § 19, without an express promise to pay.

Where a vessel was built by several individuals, and advances were made by two part owners, who were partners, out of the partnership funds, the liability of the other owners for such advances, is to the firm, and not to the several members of it.

ASSUMPSIT on an order dated June 12, 1833, drawn by Josiah W. Beals, in favor of the plaintiff, for two hundred and sixty dollars and interest on the same for one year and one month, on the defendant, and by him accepted — on which were two indorsements, the last of which was dated Jan. 9, 1834. The writ was dated Jan. 2, 1840.

The defendant pleaded the general issue, and for brief statement relied on the statute of limitations. Two accounts were filed in offset, one in the name of Lunt & Bradley, the other was as follows:

" Zachariah B. Stevens to Peter Lunt, Dr.

To expenses of building one fourth part of schooner Paragon in 1825, as per bills paid and receipted, rendered to Lunt & Bradley and paid by them, $710 37

To interest to 1840, 241 86

Cr.

By bill against the Paragon, $432 34"

It appeared in evidence that the firm of Lunt & Bradley was composed of the defendant and Wm. C. Bradley — that they formed a copartnership in April, 1825, which was dissolved in April, 1839 — that at the time of the dissolution, Lunt assumed all the debts of the firm, and that all the demands belonging to them were assigned to him, but it did not appear that the plaintiff knew of that assignment — that the plaintiff, Lunt & Bradley, and others, built the Paragon — that the plaintiff's interest was one fourth — that the amount filed in offset for building the Paragon was charged to Stevens individually, as his portion of indebtedness to the firm for building said schooner. It further appeared that the order in suit originated in other trans-

actions, and had no connexion with the dealings of the firm of Lunt & Bradley with the plaintiff.

The defendant offered to prove the accounts in set-off by the books of the firm and the testimony of Bradley — but Emery J., before whom the cause was tried, ruled that the accounts in the name of Lunt & Bradley could not be filed in offset — whereupon a verdict by consent was rendered in favor of the plaintiff, which verdict was to be set aside and a new trial granted if the accounts of Lunt & Bradley against the plaintiff could be legally filed in offset — otherwise judgment was to be rendered on the verdict.

Fessenden & Deblois, for the defendant, contended that the account of Lunt & Bradley should have been allowed in set-off, and cited *Lord* v. *Baldwin*, 6 Pick. 348; *George* v. *Clagett & al.*, 7 T. R. 359; *Lloyd* v. *Archbold*, 2 Taunt. 324; *Thompson* v. *Hale*, 6 Pick. 259; *Walker* v. *Leighton & al.*, 11 Mass. R. 140; Howe's Prac. 345.

The owners of the Paragon were tenants in common. Stevens owed Lunt for proportional share of the expenses of building the schooner. *Harding* v. *Foxcroft*, 6 Greenl. 76. Lunt could maintain a suit for that amount against the plaintiff — if so, it might be filed in offset. *Baker* v. *Jewell*, 6 Mass. R. 461.

F. O. J. Smith, contra. St. 1821, c. 59, § 19, allows only offsets between the same parties. *Grew* v. *Burditt*, 9 Pick. 265; *Holland* v. *Makepeace*, 8 Mass. R. 418.

The opinion of the Court was delivered by

Weston C. J. — It is assumed in argument, that the plaintiff knew of the assignment of the demands of Lunt and Bradley to Lunt, and that he promised to pay him either expressly or by implication. But there is nothing in the case, which proves that the plaintiff had notice of such assignment. It does not appear in the advertisement of the dissolution of the firm, and Bradley testifies that he gave him no such notice. It is insisted that the owners of the schooner Paragon, being tenants in common, the defendant, upon his account in offset, may be allowed for his part of the advances. But they were

made by Lunt and Bradley as a firm, and from their partnership funds, and the plaintiff, if liable at all, must be liable to them as partners. If, knowing of the assignment, he had promised to pay Lunt, he would have been answerable to him alone, and not otherwise. *Mowry* v. *Todd*, 12 Mass. R. 281.

The offset filed, being not in the name of the defendant alone, but of himself and another, cannot regularly be made available as an offset under the statute. If it had had any connection whatever with the demand in suit, so as to place them in the condition of mutual credits, its allowance might have been equitable. But it grew out of transactions altogether independent. Whether due or not, depends upon the adjustment and liquidation of other accounts between the parties. The account by which this offset may be balanced, is not before the court. It is quite apparent that the defendant never relied upon it as a matter entitling him to be discharged from the demand in suit. If he had, instead of giving his acceptance to the plaintiff, four years after the demand filed in offset had accrued, to be held as outstanding against him, he should only have given him a receipt for so much money on account; but he accepted to pay absolutely, and actually made partial payments. And it appears to us, that the offset, upon which the defendant insists, is neither sustained by the law or equity of the case.

Judgment on the verdict.

HENRY H. BOODY *versus* GEORGE W. LUNT.

Where the maker of a note procured it to be attested by a witness nearly six years after its date, *it was held*, that such attestation gave the paper the legal character of a witnessed note.

THIS was assumpsit on a promissory note. The facts in the case sufficiently appear from the opinion of the Court.

Fessenden & Deblois, for the plaintiffs, cited *Warren Acad-*

emy v. *Starrett*, 15 Maine R. 443; *Smith* v. *Dunham*, 8 Pick. 248.

F. O. J. Smith, for the defendant.

The opinion of the Court was delivered by

WESTON C. J. — The defendant caused the note in question to be attested by a witness, nearly six years after its date. This implies a recognition by him of the note, and of his signature, in the presence of the witness. A subsequent renewal of a note, attested by a witness, has been held to give the instrument the legal character of a witnessed note. *Warren Academy* v. *Starrett*, 15 Maine R. 443. The case under consideration does not appear to us to differ from that in principle. The objection to a subsequent attestation of a note, without the knowledge of the maker, is, that it deprives him of the protection of the statute of limitations, and gives an extended efficacy to his promise, without his assent. *Smith* v. *Dunham*, 8 Pick. 246. The attestation in this case was affixed by the procurement of the maker. This must have been done, with an intention to give the paper the validity of a witnessed note. We perceive nothing unlawful in the transaction, or which should prevent it from having the legal effect, which the parties manifestly intended.

Judgment for plaintiff.

JOHN W. APPLETON *versus* AMOS CHASE *et al.*

An agreement to sell is a sufficient consideration for an agreement to purchase.

Money paid in part fulfilment of a valid agreement cannot be recovered back unless that agreement has been rescinded by mutual consent — or the plaintiff has a right to rescind it from the failure of the defendant to perform on his part.

When a bond or deed was to be given by the vendor of the premises bargained for upon the first payment being made — and the purchaser was at the same time to give satisfactory security for the remaining payments — he must tender such security before he can charge the vendor as in fault for not giving such deed or bond.

Neither could charge the other as in fault without performance or a tender of performance.

When upon such payment a bond or deed was to be given, the alternative is with the vendor — and it affords no ground for a rescission of the contract that the land was subject to incumbrance — the bond providing for its removal.

ASSUMPSIT for money had and received by the defendants to the plaintiff's use. The writ was dated June 23, 1837.

The plaintiff, to support his claim, read in evidence a receipt of the following tenor. "Saco, March 10, 1835. Received of John W. Appleton, Esq. eight hundred and fifty dollars toward the first payment of lands we are to have of Ether Shepley as per his bond to us, which land we agreed to sell Mr. Appleton on the 15th of this month. "Amos Chase.

"John Spring."

Likewise another receipt for $650 "as part payment for one fifth part of a tract of land called the Austin Stream, on the Kennebec waters, purchased of myself and Amos Chase," dated March 14, 1835, and signed by J. Spring for himself and Chase.

Also another receipt for a note, for $766,67 payable in sixty days, which "when paid is in part of advance to Amos Chase and myself for Austin Stream, which we have agreed to sell on certain conditions," dated March 17, 1835, and signed by J. Spring.

To prove that the defendants had no title to the land bargained for till after the commencement of this suit, the plaintiff

read deeds from Henry Goddard to Ether Shepley, dated March 25, 1833, of four fifths of one half of the Austin Stream tract, and from Sumner Cummings and J. & J. Dow of the same date, conveying half of the same tract — and likewise a deed of one fifth of the Austin Stream tract from Ether Shepley to Amos Chase, dated Oct. 16, 1837 — and here rested his case.

The defendants then read a contract dated Feb. 15, 1835, signed by the plaintiff, by which he contracted and agreed to purchase of them one fifth part of the Austin Stream tract, and $2266,67 was to be paid by him on the 10th of March next, when a deed or bond for a deed was to be given, and the same amount was to be paid in one and two years, with interest annually, with good security. Also a contract with Ether Shepley, dated Nov. 20, 1834, by which he agreed to sell to them one undivided fifth part of Austin Stream tract, purchased of Messrs Goddard & Dow, upon their complying with certain conditions specified in that contract, and notifying him on or before the 15th day of February next, that they will so purchase — which contract, March 16, 1834, was assigned to Amos Chase. It appeared that due notice was given him of the intention of the defendants to purchase said tract.

The defendants further read in evidence a deed from Ether Shepley to Amos Chase, dated March 15, 1835, of one fifth of the Austin tract, — also the mortgage deed from him to Henry Goddard, dated March 25, 1833, which was discharged July 26, 1836 — and to J. & J. Dow of the same date, which was discharged Sept. 19, 1836, said mortgages being of the tracts, which the said mortgagees had conveyed him by their deeds of the same date.

Ether Shepley, called by the defendants, testified, that he executed the deed, dated March 15, 1835, in compliance with his contract of the date of November 20, 1834, the defendants having fully performed whatever was to be done and performed by them in relation thereto. He produced likewise a contract signed by himself, dated March 25, 1833, with Amos Chase, to convey one other fifth of the Austin Stream tract to him on

certain conditions therein mentioned — which being performed by said Chase, the deed dated October 16, 1837, was executed in compliance with the agreement on his part.

It appeared in evidence on the part of the plaintiff, that he had contracted to sell the land, but that as he was unable to give a deed, the bargain was not carried into effect.

It appeared on the part of the defendants, that the plaintiff recognized the defendants' right to sell, but refused to sign a memorandum to that effect, alleging as a reason that if he did, he, Chase, might sell at any price he pleased.

The trial was had before EMERY J., and on this evidence the plaintiff became nonsuit, with the agreement that the nonsuit should be set aside, and the defendants be defaulted, if in the opinion of the whole Court, the plaintiff had made out his case — with the right to be heard in damage.

Preble, for the plaintiff. The defendants never contracted to sell. The contract signed by the plaintiff of Feb. 15, 1835, was a mere *nudum pactum*. *Bean* v. *Burbank*, 16 Maine R. 458. The receipts are the only indications of a contract. If, which is denied, these constitute a contract to sell on the part of the defendants, then either a deed or a bond was to be given on the first payment being made. The plaintiff was not to give security without first having a deed. If a bond were given, then the defendants had sufficient security. They were not bound to give a deed as they had not the title. Security was not to be given unless the plaintiff first had a deed. Satisfactory security means reasonable security — and had the defendants conveyed the land, a mortgage back of the premises upon which a third had been paid would have been a compliance with the contract in that respect. The plaintiff has done all which was to be done on his part and the defendants having failed to comply with the terms on their part, the plaintiff has a right to rescind the contract, if one existed, and recover the money by him paid.

Fessenden & Deblois, for the defendants.

The receipts upon which the plaintiff relies, negative the

suggestion of a contract without consideration. They purport to be in part payment of a contract. The receipts and contract signed by the plaintiff relate to the same land and fully show the contract and its terms. The money paid cannot be recovered back, for the contract was not rescinded nor was there a right to rescind it. *Smith* v. *Haynes*, 9 Greenl. 128. The undertakings are dependant. *Bank of Columbia* v. *Hayner*, 1 Pet. 464; *Stone* v. *Fowle*, 22 Pick. 166; *Robb* v. *Montgomery*, 20 Johns. 15. To entitle the plaintiff to rescind the contract he must show the vendor in default. 2 Phil. 83, 65, n. a. If not in default the action is not maintainable. *Dowdle* v. *Camp*, 12 Johns. 451; *Ketchum* v. *Evertson*, 13 Johns. 359.

The security was to be first furnished, whether the defendants gave a bond or deed — this not being done, the plaintiff has no right to claim a performance of the contract on the part of the defendants — nor to rescind it because neither were offered.

The opinion of the Court was delivered by

Weston C. J. — The agreement entered into by the plaintiff, on the fifteenth of Feb. 1835, with the defendants, to purchase of them certain land, upon the terms and conditions specified in the instrument by him signed, is binding upon him if sustained by a legal consideration. An agreement on the part of the defendants, to sell or convey the land, would be sufficient to give binding efficacy to the agreement of the plaintiff. And this is to be found in the receipts, upon which he bases his action. The first contains express words of agreement, to sell the land they were to have of Ether Shepley, described by reference to his bond. The second refers to the same land, by the name which had been given to it and by which it was known, as a tract which had been purchased of them by the plaintiff. These were signed by both the defendants. The third, which is signed by Spring alone, acknowledges the payment of a sum of money by the plaintiff, advanced by him to Chase and himself towards the same land, which they had agreed to sell on certain conditions. These

conditions are to be found in the instrument signed by the plaintiff. Upon performance or upon an offer to perform by him the stipulations on his part, in our judgment he would have been entitled to an action at law against the defendants, or might have compelled specific performance, by bill in equity. It has been held, that an agreement to sell land, binds the party to execute a proper deed of conveyance. *Smith* v. *Haynes*, 9 Greenl. 129.

The sums, sought to be recovered in this action, having been paid in part fulfilment of a valid agreement, cannot be reclaimed, unless that agreement has been rescinded by mutual consent, or the plaintiff has a right to rescind it at his election. And this he cannot do, so long as the defendants are in no fault. *Rounds* v. *Baxter*, 4 Greenl. 454; *Hudson* v. *Swift et al.*, 20 Johns. 24.

It is insisted, that the defendants were in fault in not having given a deed, or a bond for a deed, upon the completion of the first payment, according to one of the conditions of the plaintiff's agreement. But by the fair meaning, as well as the legal effect of that agreement, the plaintiff was at the same time to give satisfactory security for the two remaining payments. The plaintiff should have tendered this security, before he can charge the defendants as in fault upon this ground. It may be said, that if they gave bond with condition to convey, upon these payments being made at the times stipulated, retaining the land, they would have sufficient security in their own hands, and nothing further was necessary. But this might not have been satisfactory. The land was valuable for its timber, upon which the owners were then operating, a part of which, as the same agreement shows, was for the benefit of the plaintiff. Hence the defendants might be well justified in insisting upon satisfactory security, which the plaintiff agreed affirmatively to give. Upon a just and legal construction, the deed or bond and the security were to be given concurrently. Neither could charge the other as in fault, without performance or a tender of performance. This has been repeatedly held to be the law, upon concurrent or dependent stipulations.

But it is further urged for the plaintiff, that he is excused from further performance, and has a right to rescind the contract, because the title was not in the defendants at the time, or was incumbered with a mortgage. But they had a bond, by the condition of which they were to have a title, and which provided for a removal of the incumbrance. This was held sufficient to sustain a similar agreement in the case of *Smith* v. *Haynes*, more especially as the plaintiff there, as well as here, was apprized of the actual state of the title. The defendants were to give a bond or a deed. This was all the plaintiff required, and the alternative was with them. If they had elected to give a bond, the title was acquired and the incumbrance removed before the time limited for the last payment. For ought appears, the defendants have been at all times ready to comply with their contract. Every thing was promptly fulfilled necessary to enable them to do so. The notes secured by mortgage were paid at maturity, and the lien upon the land thereupon discharged. And as late as March, 1836, the plaintiff claimed the benefit of the contract, and expressed his determination to make arrangements to meet the second payment. Upon the facts reported, the action cannot in our opinion be maintained.

Nonsuit confirmed.

JONATHAN SPARROW *versus* JOSEPH CHESLEY AND REBECCA CHESLEY, Trustee.

The title of a bona fide purchaser of property conveyed by a debtor in trust for his wife and family, by a conveyance void as against creditors — but which was sold *by the cestui que trust*, prior to any interference on their part — will be protected in a court of law.

The purchase money is a substitute for the property sold and is subject to the same trusts.

FROM the trustee's disclosure it appeared, that she purchased of Susan Chesley, certain bank shares, for which she paid by her negotiable note for the amount agreed upon, upon which she had made divers payments — that she was the daughter of Joseph

and Susan Chesley — that her father had more than twenty-five years before the death of her brother Albert, absconded and left her mother and family without making any provision for their maintenance — that he had resided in Massachusetts — where he had married another wife — that Albert Chesley, a brother, died, leaving property to which her father was sole heir — that in consideration of his past neglect, and of the expenses which her mother had been compelled to bear in supporting the family — he conveyed absolutely all his right and interest in his son Albert's estate to trustees in trust for the sole and separate use of his wife and subject to her disposal — that the bank shares were purchased from the proceeds of her brother's estate — and that in purchasing them of her mother, she had no reference to her father — neither she nor her mother ever expecting that her father would interfere with the property — and that at the time of such purchase she did not know of any creditor's claim against her father — nor was such purchase made to hinder, delay or defraud creditors.

Preble, for the plaintiff.

F. O. J. Smith, for the trustee, cited *Abbott* v. *Bailey*, 6 Pick. 89; *Bullard* v. *Briggs*, 7 Pick. 538; *Howe* v. *Ward*, 4 Greenl. 205; 2 Hovenden on Frauds, 103; *Green* v. *Thomas*, 2 Fairf. 321; *Allen* v. *Megguire & Tr.*, 15 Mass. R. 490; *Russell & al.* v. *Hook*, 4 Greenl. 372.

The opinion of the Court was delivered by

Weston C. J. — The conveyance made by the principal defendant, of property in trust for the benefit of his wife and children, which furnished the means of purchasing the stocks, now held by the supposed trustee, being voluntary, is void as against his creditors, but until they manifested themselves, or interfered, we are not aware that the sale or disposal of the trust property, in pursuance of the trust, can be defeated or vacated, as against a *bona fide* purchaser. The principal debtor was at liberty to purchase stocks with the property conveyed, and afterwards to sell them to his daughter, or any other person, for a valuable consideration, his indebtedness notwith-

standing, provided it was not done to defeat or defraud creditors. What he could lawfully do directly, he might do indirectly, through trustees and the authorized act of his wife. By an instrument under his hand and seal, executed to trustees he placed the property at her disposal. Property purchased with the trust fund, in virtue of this authority, she sold for a valuable, and for aught appears, adequate, consideration to her daughter. The notes and payment received from her was a substitute for the stocks, as they were a substitute for the trust moneys, with which they were purchased. The whole being done by a power from the husband is of equal validity, as if done by himself. From the disclosure, the transaction must be taken to have been fair and in good faith, on the part of the supposed trustee. It does not appear to us that the rights of the creditor, or the justice of the case require, that it should be unravelled and defeated as against her, and that she, against whom no fraud is imputable under the disclosure, should be subjected for his benefit to the loss of the consideration paid. Whatever may be our judgment, she may be holden to pay the notes, if negotiated. And she has, in our opinion, discharged herself upon the facts disclosed.

Daniel T. Richardson, Plaintiff in Error, *versus* Edward R. Bachelder.

Where the attorney affixed the signature of the magistrate, which was on a slip of paper, to the writ — it was held, that the writ was properly issued, the magistrate having recognized and adopted it.

The Brigadier General is a general officer, and as such authorized to administer the oath prescribed by the St. of 1834, c. 121, § 11, and being made a certifying officer, his certificate is to be received as genuine.

The discharge of the duties of the office of Brigadier General *de facto* is presumptive evidence, that the person so discharging them has taken and subscribed the oaths required by law.

When two companies are designated as the A and B company in the company rolls and orders — and in the assignment of limits by the selectmen as the first and second companies, parol evidence is properly admissible to show that the designation of A and B, on the company rolls and orders, is identical with first and second as used by the selectmen in their designation of the limits of the several companies.

The six months allowed by St. 1834, c. 121, § 33, to a person liable to do military duty, to provide himself with arms and equipments, are limited to the six months immediately succeeding his attaining the age of eighteen.

A student in college is liable to be enrolled and to do military duty wherever his domicil may be — and so far as St. 1837, c. 276, § 6, which requires the students to do military duty, where the college of which they are members, may be, conflicts with the law of the United States, it must yield to that as the paramount law.

Where the disability is temporary, an excuse must be made for neglect to the commanding officer within the time limited by law.

Whether St. 1837, c. 276, § 12, limits or restricts the general jurisdiction of a magistrate — *quære.*

If it does, the want of jurisdiction arising therefrom should be pleaded in abatement.

This was a writ of error to reverse a judgment — rendered by a justice of the peace in an action of debt, brought by the defendant in error, as clerk of a company of militia, against the plaintiff in error, to recover a fine for non-appearance at a regimental muster. The writ was returnable before a magistrate in the town of Standish.

At the trial it appeared, on production of the plaintiff's writ, that the justice before whom the cause was tried had never signed the same — but that his name, written by himself on a

slip of paper, had been thereto affixed by the attorney for the plaintiff without his knowledge — upon which the counsel for the original defendant moved, that the writ be quashed — but this motion the justice overruled on the ground that he had authorized said attorney so to affix his signature.

To prove the issue on his part, the plaintiff produced the commission of Albert Sanborn as captain of the B company of infantry, in the 4th Reg. 2d Brig. and 5th Division of Maine militia, having on the back of it a certificate purporting to be a certificate of the oath required by law to constitute said Sanborn a captain, and to have been administered by Wendall P. Smith, as Brigadier General of the 2d Brigade, 5th Division, but no proof was offered that Smith had been duly qualified as Brigadier General or that the signature was genuine. The appointment of the plaintiff as sergeant was made by the Colonel of the Regiment, and it appeared that he had been appointed and qualified as clerk by said Sanborn. To establish the residence of the defendant within the limits of the B company, a copy of the limits of two companies in Baldwin, denominated therein the first and second company as defined and established by the selectmen, was produced — and parol evidence was received to show the identity between the first and the B company — and that the defendant resided within the limits of the first or B company as thus established. The defendant's enrolment appeared on the column for additional enrolments under the date of Sept. 10, 1838, the time at which the regimental muster was had, being the 28th of the same September. The warning and absence of the defendant were not denied.

To maintain the defence, it was proved, that the defendant was twenty-three years of age — that at the time of his enrolment and from that time to the time of sueing out the writ in this case, that he was a student of Bowdoin College — and that at the time of such enrolment and when warned to attend he was at his father's residence during one of the college vacations — that he was unable to do military duty on said 28th of September. To prove that he was unable to do military duty

he offered the certificate of the Surgeon of the Regiment, which was written after the time for muster and by him ante dated — and called the surgeon by whom he proved, that in his opinion he was unable to do military duty, and that he had examined him the day the certificate bears date — but that he did not then make out any certificate. No excuse was offered to the commanding officer.

The defendant further offered a copy of the laws of Bowdoin College, by which it appeared, that the students were forbidden to keep fire arms in their rooms — and the catalogue of the students by which it appeared that the time appointed for said muster was during the term time of said college when by the laws of the college the defendant was required to be there — but the justice excluded the evidence, and on the whole testimony rendered judgment against him.

McArthur, for the plaintiff in error. The captain was not legally qualified, the oath having been administered to him by a Brigadier General, who was not proved to have taken the requisite oaths — and who not being a field or general officer — but only a brigade officer could not, if qualified, have administered them. The assignment of limits by the selectmen by virtue of St. 1836, c. 209, § 1, 2, 3, was erroneous and unauthorized. The return of the selectmen does not show whether the first or second is the B company, and that fact could not be shown by parol. *Avery* v. *Butters*, 2 Fairf. 404. The plaintiff was entitled to six months from the time of his first enrolment and this is to be considered as the first — no other enrolment being shown. *Com.* v. *Annis*, 9 Mass. R. 31; *Haynes* v. *Jenks*, 2 Pick. 172. The plaintiff was exempted from doing duty by being a student of Bowdoin College. By the charter of the college, authority is given to the corporation to make such regulations and by-laws as they deem proper. This charter is binding upon the state. *Allen* v. *McKeen*, 1 Sum. 277. The college term commenced the 26th of September, and the laws of the college require the presence of the student there. Col. Law, c. 6.

The sickness of the plaintiff was a good defence — and

should have been so regarded. *Com.* v. *Douglas*, 17 Mass. R. 49; *Com.* v. *Smith*, 11 Mass. R. 546; *Pitts* v. *Weston*, 2 Greenl. 349.

The writ was not signed and should have been quashed as having been improperly issued. The writ should have been made returnable before a magistrate in Baldwin where the defendant resided. St. 1837, c. 276.

Swasey, contra, insisted that the writ, the signature of the magistrate, having been adopted and recognized by him, was sufficient, and should not have been abated. The Brigadier General being a field officer, could administer the required oath to the captain and make the proper certificate of such fact by virtue of St. 1834, c. 121, § 11 — and the officer making such certificate is presumed to be qualified. The limits were properly assigned by virtue of St. 1836, c. 731. The evidence offered was not to prove the limits of the company — but simply the identity of a company designated in different modes — and for this purpose it was properly received. *Gould* v. *Hutchins*, 1 Fairf. 145; *Allen* v. *Bates*, 6 Pick. 460; *Richards* v. *Killam*, 10 Mass. R. 239; *Davenport* v. *Mason*, 15 Mass. R. 85; *Choate* v. *Burnham*, 7 Pick. 274; *McGregor* v. *Brown*, 5 Pick. 170. The enrolment was right — the residence of Richardson being at Baldwin — and his absence only temporary. *Com.* v. *Walker*, 4 Mass. R. 556. The evidence of the laws of Bowdoin College, and of time when the college terms commenced was properly excluded — those facts not being proved by competent testimony. The law presumes every one enrolled as legally liable to do duty and if the defence of physical inability or sickness be relied on it should be shown in the manner prescribed by the St. 1834, c. 121, § 34, 44. The certificate obtained was not regular, and therefore was of no effect. *Com.* v. *Smith*, 11 Mass. R. 456; *Com.* v. *Fitz*, 11 Mass. R. 540. The excuse was not offered to the captain and was not available before the magistrate. *Tribou* v. *Reynold*, 1 Greenl. 408; *Pitts* v. *Weston*, 2 Greenl. 349; *Hume* v. *Vance*, 7 Greenl. 118; *Cutter* v. *Tole*, 2 Greenl. 181; *Howe*

v. *Gregory*, 1 Mass. R. 81. The justice heard this proof and his judgment of its effect is conclusive.

The opinion of the Court was delivered by

WESTON C. J. — The justice having authorized the attorney to affix his signature to the writ, and having recognized and adopted it as his, it must be taken to be a writ duly signed by him.

We hold the *Brigadier General* to be a general officer, and as such authorized to administer the oath, prescribed by the St. of 1834, § 11, and that discharging the duties of that office *de facto* he must be presumed himself to have taken and subscribed the oaths required by law. He is made by law a certifying officer; and as such his certificate is to be received as genuine. Fraud or forgery is not to be presumed. It would greatly and unnecessarily increase the expense of these prosecutions, if the original plaintiff were required to go farther back in the chain of testimony. In our judgment the official authority both of the captain and clerk was legally proved.

The limits of the companies in the town of Baldwin were proved by the proper record evidence. Secondary proof on this point was not received. The residence of the plaintiff in error, within the limits of one of the companies so assigned, was proved by the best testimony, of which the fact was susceptible. That the designation of A and B is identical with first and second, the terms used by the selectmen in their assignment of limits, we think might be proved by parol. They were different names by which the same organized body was known and designated. It had no tendency to produce confusion or to change limits. The assignment by the selectmen was to distinguish the one company territorially from the other. If the companies, thus separated and assigned, afterwards received different names, the limits assigned were not thereby affected.

We are of opinion, that the Stat. of 1834, c. 121, § 33, limiting the six months allowed by law to a party liable to do military duty, to provide himself with arms and equipments to

the six months immediately succeeding his attaining the age of eighteen, is not inconsistent with the paramount law of the United States, but fairly carries out its true intent and meaning. And we are further of opinion that neither the rights or immunities granted to Bowdoin College, under the authority of Massachusetts or Maine, nor the by-laws of that institution, can legally have the effect to dispense with the military duty required by the laws of the United States.

The connection of the plaintiff in error with that institution was temporary, for the purposes of education. It did not change his domicil, which appears to have been at his father's house. The government of the United States has the general power, under the constitution to regulate the militia. All laws made under this power, are paramount to those of the individual states. The law of congress, of the eighth of May, 1792, § 1, provides that every citizen, liable to do military duty, shall be enrolled by the captain or commanding officer of the company, within whose bounds such citizen shall reside. This has been held, both in Massachusetts and Maine, to mean the domicil, and not the temporary residence, of such citizen. *Stone* v. *Osgood*, 16 Maine R. 238, and the cases there cited. So far as the St. of 1837, c. 276, § 6, may conflict with the act of congress, it must yield to the paramount law.

The Justice must be understood to have decided that the disability, proved by the plaintiff in error, was temporary, not permanent. And such is the conclusion, properly deducible from the testimony. In such case, in order to make the disability available in defence, the party must make his excuse to the commanding officer of the company, within the time limited by law. *Pitts* v. *Weston*, 2 Greenl. 349.

The action was within the general jurisdiction of a justice of the peace for the county, where the delinquency happened. Whether the St. of 1837, c. 276, § 12, limits or restricts that power, may be questionable. But if it does, we are of opinion, that it should have been pleaded in abatement.

In our judgment, none of the errors, relied upon by the plaintiff in error, are well assigned.

Judgment affirmed.

ABNER BAGLEY *versus* JOHN D. BUZZELL.

Where a note payable on demand, was transferred when over due by indorsement in these words, "accountable in eight months from the above date," being the date of the indorsement — and the indorsee at the same time gave back to the indorser a bond not to sue the maker in eight months; it was held, *that* the bond given was a collateral agreement to which the maker of the note was not a party, and that no extension of time was thereby given, and *that* the indorser was liable without demand or notice.

To sustain a valid agreement to give time to the maker of a note there must be an adequate consideration, otherwise the indorser is not discharged.

THIS was assumpsit against the defendant as indorser of a promissory note, dated August 14, 1837, for $1000, signed by Joseph Whitney, and payable to the defendant, or order, on demand, with interest.

The indorsement of the defendant was as follows: —

"November 27, 1837.

"Accountable in eight months from the above date.

"John D. Buzzell."

The plaintiff further proved by Sewall Waterhouse, that he took of Whitney, the maker of the note, on July 1, 1837, a conveyance of all his personal and a portion of his real estate, amounting in all to about $25,000, to secure a debt due from said Whitney to him and to the estate of the late Jabez Bradbury, and that soon after he took a conveyance of stocks to a large amount to secure him for what was due from said Whitney — that he informed plaintiff in June, 1839, that Whitney had no personal property, but that he had real estate by which the note could be secured and that the plaintiff offered to take a draft payable in Boston in three months — that witness told the plaintiff that Buzzell was discharged as indorser, to which he made no reply.

The defendant introduced a letter from the plaintiff to him, dated September 26, 1838, in which he advised him that he had written to Whitney more than five weeks since, urging the payment of his note, and had received no reply, and that he concluded he did not intend to pay it till compelled, and calling on the defendant as his indorser to pay the same — likewise a

bond from the plaintiff to the defendant, dated Nov. 27, 1837, the condition of which was as follows: — "that whereas, the above named John D. Buzzell, for a valuable consideration, has transferred by his indorsement to me, a certain note of hand," — here follows a description of the note declared on — "I, the said bound Abner Bagley bind myself, my heirs, executors," &c. &c. —"that I will not sue nor suffer to be sued, the above described note within eight months from the date of this obligation, and I, the said Abner Bagley, also agree and bind myself, my heirs," &c. &c., "to give up and deliver unto the said Buzzell, or his lawful attorney, the above described note, at any time within six months from this date, whenever the said Buzzell or his lawful attorney may or choose to procure and deliver unto the said Bagley, his heirs," &c., "a good negotiable note or notes, security or securities of the above named Whitney, for the sum of one thousand dollars, made payable to the said Bagley in eight months from this date, with interest, and by the said Buzzell, or his lawful attorney, also paying the full amount of interest that may accrue on one thousand dollars from the present time up to such time as he, the said Buzzell, or his lawful attorney may elect or choose to make such exchange of said notes as aforesaid. Now, if the said Bagley, does not sue nor suffer to be sued the said Whitney's note as herein described within eight months from the date of this obligation, and shall deliver unto the said Buzzell, or his lawful attorney, the same note aforesaid at any such time within six months as the said Buzzell or his lawful attorney may procure, and deliver unto the said Bagley, his heirs, &c., such other note or notes, security or securities of the said Whitney as before mentioned, then this obligation to be null and void — otherwise to remain in full force and virtue," &c.

There was likewise evidence introduced, tending to show, that after the liability of the defendant had become fixed, delay had been given to Whitney, but not by virtue of any binding contract to that effect.

There was other testimony offered and received subject to the objection on the part of the defendant's counsel, but as this

was considered by the Court immaterial, it has not been reported.

On the whole evidence, SHEPLEY J. who presided at the trial, intending to reserve the case for the full Court, directed a verdict for the plaintiff, upon which judgment is to be rendered, or the verdict is to be set aside and the plaintiff become nonsuit, by consent of parties, as the Court shall determine.

Howard & Osgood, for defendants. The defendant was an indorser and he is discharged because there was no demand on Whitney and notice to him at the expiration of the eight months. The letters and bond, which describes the note as transferred by indorsement," show that to have been his relation to the note — unless he in some way assumed new and different liabilities. Bayley on Bills, 411; *Copp* v. *McDugall*, 9 Mass. R. 1; *Hopkins* v. *Liswell*, 12 Mass. R. 52; *Josselyn* v. *Ames*, 3 Mass. R. 274; *Fuller* v. *McDonald*, 8 Greenl. 213.

The bond and writings connected with it, are to be construed as part of the contract. *Davlin* v. *Hill*, 2 Fairf. 434; *Eaton* v. *Emerson*, 2 Shepl. 335; *Phelps* v. *Foot*, 1 Conn. R. 387.

By the bond as connected with the indorsement, it is to be considered as a note due in eight months — and as a note not due till then, Buzzell was entiled to notice when it became due. The case of *Bean* v. *Arnold*, 16 Maine R. 251, was an assumption of immediate liability. Here the accountability was prospective and contingent — prospective as to time — contingent upon due demand on the maker, and notice to the indorser. Demand and notice are not waived, but only the time defined when the one is to be made and the other given — and to prevent an immediate demand and notice, which the holder would have a right to make and give.

Buzzell was not guarantee — and parol evidence was inadmissible to prove that fact. 2 Fairf. 434; 2 Shepl. 335, before cited. *Hunt* v. *Adams*, 6 Mass. R. 519; Bayley on Bills, 150.

The bond proves no guaranty. The insolvency of Whitney

furnishes no excuse for want of demand. Bankruptcy is no excuse. Bayley on Bills, 240.

Longfellow, contra. The note was indorsed when due, and the defendant by his indorsement was liable, unless paid by the time stipulated. *Cobb* v. *Little*, 2 Greenl. 261; *Upham* v. *Prince*, 12 Mass. R. 14; *Read* v. *Cutts*, 7 Greenl. 186; *Bean* v. *Arnold*, 16 Maine R. 251, settles the only question here raised in favor of the plaintiff. The bond given does not control or alter the indorsement — nor vary the responsibility originally assumed — which was in its terms absolute.

The opinion of the Court was delivered by

WESTON C. J. — Certain parts of the testimony adduced by the plaintiff, are objected to by the counsel for the defendant. We have not deemed it necessary to decide this point, being of opinion that whether in or out of the case, this testimony cannot affect our decision.

The liability of the defendant depends upon the terms of his indorsment. Had he prefixed to his name, on the back of the note, the word accountable only, it must have been regarded as a waiver of demand and notice. It could not have been distinguished in principle from the case of *Bean* v. *Arnold*, 16 Maine R. 251. The extension of the time when his liability was to attach, was the stipulation of a new quality or condition, which did not affect the waiver. The plain meaning as well as the legal effect of the language was, that the indorser held himself absolutely accountable to pay the note at the end of eight months. It has been insisted, that it was virtually a new note, and that the plaintiff was under a legal obligation to demand payment of the maker at the termination of the enlarged period. But nowithstanding the terms of the indorsement, the maker remained liable to pay on demand, according to his promise. There was nothing on the instrument to prevent the plaintiff from calling forthwith on the maker. The bond given by the plaintiff to the defendant, was a col-

lateral independent agreement, to which the maker was not a party.

It is urged, that the defendant is discharged, upon the ground that the plaintiff has given time to the maker. If this was done, it was long after the liability of the defendant had become fixed. There is no evidence of any binding agreement to this effect, on the part of the plaintiff, or of any legal consideration to sustain it. His correspondence with the maker shows, that he was very pressing from time to time for payment, but indicating a willingness to practice forbearance, upon the strong assurance of the maker, that he would pay within a limited time. Nothing more is deducible from the plaintiff's letter of the twelfth of Aug. 1839, upon which his counsel relies. *Judgment on the verdict.*

JOSHUA GOWER, JR. *versus* Z. B. STEVENS.

The lien which an officer acquires by virtue of an attachment of personal property is lost, unless he remains in possession of it either personally or by a keeper appointed by himself.

Where the lien acquired by an attachment is dissolved by a delivery of the property attached to the debtor, such lien does not revive upon his regaining possession of it by delivery from such debtor — though it be delivered to him with the intent that it may be appropriated towards the payment of the debt on which it had been attached.

Where goods attached are left in possession and under the control of the debtor by the officer making the attachment, they may be a second time attached by another officer — and such attachment will be valid though the second attaching officer had notice of the prior attachment.

THIS was replevin for one yoke of oxen, one horse and wagon and buffalo skin.

The plaintiff was a deputy Sheriff and as such on the first day of June, 1837, attached the oxen on a writ in favor of *Henry Hall* v. *Joseph H. Lambert.* On the fifth day of April, 1837, he attached the horse, wagon and skin on a writ in favor of *Dominicus Harmon* v. *Same.* These suits were prosecuted to final judgment.

Joseph H. Lambert was called as a witness and testified that when the plaintiff attached the oxen he left them in his possession, upon his verbal agreement to keep and return them to the plaintiff to be applied to the purposes of the attachment when called for — and that under this arrangement he kept and used the oxen till they were attached by the defendant — that when the plaintiff attached the horse and wagon and skin he left them in his possession under the same verbal agreement as was made in regard to the oxen, and that they remained in his possession until the fore part of the day on which defendant attached them — and that he then informed the plaintiff that the defendant had a writ against him and had attached the oxen, and he delivered up the horse, wagon and skin to the plaintiff to prevent his losing them on the writ on which he had attached them — that soon after he had so delivered them to the plaintiff — the defendant came and attached them while so being in the possession of the plaintiff though forbidden by him.

The plaintiff offered to prove that the oxen were left in his possession by consent of the plaintiff, in the suit *Hall* v. *Lambert*, but this testimony was excluded.

The plaintiff claimed to hold the property to be applied in payment of the demands on which it had been attached.

It appeared that the defendant was deputy Sheriff and having a writ in his hands in favor of *F. O. J. Smith* v. *said Lambert*, on the 23d of June, 1837, attached the same oxen as the property of Lambert, finding them in his possession and on the next day attached the horse, wagon and buffalo, finding them in the possession of the plaintiff, to whom they had been delivered within a few hours by Lambert.

Shepley J. before whom the cause was tried, being of opinion that upon these facts, the plaintiff could not recover, he submitted to a nonsuit which is to be set aside and a new trial granted if this opinion be erroneous.

Codman & Fox, for the plaintiffs, cited St. 1821, c. 60, § 34, *Woodman* v. *Trafton*, 7 Greenl. 178; *Bruce* v. *Holden*, 21 Pick. 187, and insisted, that the attachment of the oxen continued, they being left in possession of the judgment debtor by

the consent of the creditor — and that the rest of the property having been found in the hands of the officer who had first attached — the defendant, with notice of such previous attachment, could not legally attach it again.

F. O. J. Smith, contra — argued, that the case was not within the authority of *Woodman* v. *Trafton*, 7 Greenl. 178, no security having been given to the officer for the re-delivery of the oxen attached. As to the other articles the plaintiff did not hold them under or by virtue of his previous attachment.

The opinion of the Court was delivered by

WESTON C. J. — To constitute and preserve an attachment of personal property, by process of law, the officer serving such process must take the property and continue in possession of it either by himself, or by a keeper by him appointed for this purpose. It has never been understood that he could, consistently with the preservation of the lien constitute the debtor his agent to keep the chattels attached. Except so far as authorized by special statute provision, he cannot leave such property with the debtor, without dissolving the attachment. *Woodman* v. *Trafton & al.* 7 Greenl. 178. Nor are we aware, that it can be preserved against persons having notice of the facts, although an implication to this effect may be found in the case cited and in *Bruce* v. *Holden*, 21 Pick. 187. Both those cases are strong authorities to show, that an attachment is dissolved, by leaving the property in the hands of the debtor; and if once dissolved, we are not satisfied that it can be revived by notice.

If an officer attaches goods in a store or warehouse, and leaves them in the possession and under the control of the debtor, it does not appear to us that a second attaching creditor and his officer can be repelled, by mere notice from the debtor, or from any other person who may happen to have had knowledge of the first attachment. Both might well reply, that such attachment had been relinquished, or had been lost by a want of care and vigilance on the part of the first officer The statute of 1821, *c.* 60, § 34, cited

for the plaintiff, is based upon the assumption, that but for the provision there made, the first attachment would be dissolved by suffering the property to remain in the possession of the debtor.

The counsel for the plaintiff has attempted to bring the attachment of the oxen within the statute cited. But it cannot be held availiable for his benefit, unless upon taking security, as is therein provided, which was not done. The law of attachment cannot be varied by the consent of the creditor. He can do nothing to impair the rights of third persons.

It is insisted, that the plaintiff may hold the horse, wagon and buffalo robe, as he had once attached them, and being in his possession, when taken by the defendant. It is a sufficient answer to this position, that the attachment made by the plaintiff had been dissolved for nearly three months, and that when he took the property a second time, the return day of the writ, from which he derived his authority was passed.

Nonsuit confirmed.

ISAAC STEVENS, in Equity, *versus* RUFUS LEGROW.

The estate, right, title and interest which any person has by virtue of a bond, or contract in writing, to a conveyance of real estate upon conditions by him to be performed — which by St. 1829, c. 431, is to be sold on execution like an equity of redemption, must be truly described in the return and deed of the officer selling on execution — else nothing will pass.

Where such right, title and interest, was described as an equity of redemption by the officer, the proceedings were held fatally defective.

THIS was a bill in equity, and was heard on bill and demurrer.

The decision having reference only to the plaintiff's title, the facts in the bill relating thereto are alone reported.

On the 3d day of May, 1837, one Nehemiah Varney owed the defendant, and Asa and William Legrow, the sum of two hundred and thirty-seven dollars. Varney at this time wished the defendant to sign a note with him as security, to the town of Windham, for the sum of two hundred dollars —

and proposed, that Timothy Varney, who held the estate in dispute in trust for him, should convey the same to the defendant in mortgage to secure him for what was due from Nehemiah Varney, and for his liabilities as surety for the note before referred to. The defendant refused to take a mortgage, but proposed instead thereof, to take an absolute deed, and give back a written agreement which should not operate as a defeasance, to convey said land back, if said Nehemiah should pay him the amount of $237 in one year, and save him harmless from the $200 note — to which Nehemiah agreed, and Timothy Varney conveyed the premises to the defendant, who discharged said Nehemiah from the $237 then due, and at the same time signed the note for $200 as surety, giving back to Nehemiah a writing in the following words: —

"Windham, May 3, 1837.

"I, Rufus Legrow, agree with Nehemiah Varney to give him one year to pay $237, which is part of a consideration of a deed in which I paid to Timothy Varney this day, and in case the above named Nehemiah Varney pays the above named sum in one year, and clear me and Asa Legrow, from a certain note of hand in which we signed with him to the Inhabitants of Windham, for the sum of $200 on demand, in one year, then I further agree to give the said Nehemiah a deed of the premises on which he now lives. Rufus Legrow."

Said Nehemiah Varney being indebted to the plaintiff, he, on the 9th of April, 1839, sued out a writ against him, returnable to the District Court, June Term, 1839, on which was attached all the said Nehemiah's "right, title, interest, estate, claims and demand of every name and nature," &c.

Said writ was duly entered, and judgment rendered at said June Term, for the plaintiff, for the sum of $1020,34 debt, and $4,91 cost, and the execution thereon issued, was placed in the hands of a deputy sheriff who, on July 24, 1839, made return, that by virtue of said execution, he had seized "all the right in equity which the within named Varney had of redeeming" the premises in dispute, describing them fully in his return, and having pursued the requirements of law in selling equities of

redemption that he sold to the plaintiff in this action the right in equity of said Nehemiah to redeem, and had made, executed, acknowledged, and delivered a good and sufficient deed of said right in equity to redeem.

S. Fessenden, for the defendant, referred the Court to St. 1829, ch. 431, and insisted that this statute related only to rights by virtue of a contract — and those rights were totally different from a right in equity of redemption — that they must be seized, advertised and sold as such right — and that they could not be sold under the name of an equity in redemption, which they were not — and the seizure and proceedings subsequently thereto being erroneous — no title passed to the plaintiff. To the point that the statute confirming equity powers had not enlarged the power of the Court over mortgages, he referred to *French* v. *Sturtivant*, 8 Greenl. 246.

W. P. Fessenden, for the plaintiff, to the point that the party interested is the person in whose name the bill should be brought, cited *Jameson* v. *Head*, 14 Maine R. 34; Story on Equity Pleading, 147.

N. Varney had an attachable interest by virtue of St. 1829, c. 431, § 1. That interest was attached. When sold on execution, the statute directs it to be sold like an equity of redemption. It is an equitable interest and to be sold like an equity. It was sold as an equity because, if an equity had existed and it had been advertised as a right &c., under a contract, nothing would pass — But advertising and selling it as an equity — as every greater includes the less — the lesser estate — if such were the interest actually existing, passes. By calling it an equity the real interest of the party is not thereby forfeited or lost.

The opinion of the Court was delivered by

Weston C. J. — Nehemiah Varney, at the time of the plaintiff's attachment, had no equity of redemption in the premises in controversy, Varney and the defendant not standing in the relation of mortgagor and mortgagee; and this

is conceded by the counsel for the plaintiff. If Varney had any tangible attachable interest, it must have arisen under the contract of the defendant to convey to him, upon certain conditions. This has been held to be a mere personal right, and not a vested interest or seizin in the land. *Shaw* v. *Wise*, 1 Fairf. 113.

The plaintiff having caused to be attached every claim or demand, which Varney had in the county of Cumberland, these terms are broad enough to embrace his right under the contract, in virtue of the st. of 1829, c. 431. But in order to make the attachment effectual, this right must have been seized and sold upon the execution, which issued on the plaintiff's judgment. Upon such a seizure and sale, the statute requires, that the same notice shall be given, and the same proceedings had, as are provided by law, upon sale on execution of an equity of redemption. But it does not prescribe, that the right sold should be described as a right in equity to redeem. This would be to deceive and mislead the debtor and such persons as might desire to become purchasers. No such right in fact existing, either upon the record or otherwise, few would be induced to purchase, and the chance of obtaining the fair and just value of the right intended to be sold would necessarily be impaired. And, in our opinion, in order to render such seizure and sale legally effectual, the nature of the right taken, should be truly described in the notifications and advertisement, and the deed, executed by the officer. This not having been done, but a different interest described, the plaintiff has failed to show a title in his bill, which is adjudged insufficient upon the demurrer thereto, and the defendant is allowed his costs.

THE PRESIDENT, DIRECTORS & CO. OF THE PORTLAND BANK *versus* CHARLES FOX.

It is no defence to a note secured by mortgage, that the mortgagee has entered for the purposes of foreclosure, and that the premises are of more value than the debt for which they are security — unless the time of redemption has expired.

The mortgagee is not bound to account for rents and profits, unless the premises are redeemed.

Mem. — Emery J. being interested did not sit in the hearing or decision of this case.

THIS was assumpsit upon a note of hand signed by the defendant, which was secured by mortgage. The plaintiff had entered to foreclose, but the three years had not expired from the time of his entry. The defence was that the mortgaged premises were of more value than the debt — and that if the note was not to be considered as paid, that the plaintiff should account for the rents and profits of the premises in part satisfaction of it.

Longfellow, for plaintiff, cited *West* v. *Chamberlain*, 8 Pick. 336.

Fox, for defendant, cited *Amory* v. *Fairbanks*, 3 Mass. R. 562.

Per Curiam. The mortgagee in this case has entered to foreclose, but his title has not yet become perfected by lapse of time. The defendant, relying upon the case of *Amory* v. *Fairbanks*, 3 Mass. R. 562, insists that by taking possession of the premises mortgaged, the debt for which they stood as security, is satisfied. But the law has been settled otherwise in *West* v. *Chamberlain*, 8 Pick. 336. The property mortgaged constitutes no payment, till the title becomes absolute. The rights of the parties require such a conclusion. It is absurd to say that a debt is satisfied, when the party has a right to redeem — for if the debt be satisfied, then there is nothing to pay.

Neither can the rents and profits be allowed in reduction of damages. If there should be a redemption, the mortgagee is

to account for them. If not, they belong to the mortgagee. They are to be considered as necessary for the payment of the debt due him. If it were otherwise, the presumption is that the premises would be redeemed.

GEORGE W. LUNT *versus* CYRUS WORMELL.

In trespass de bonis asportatis, where the defendant pleaded the general issue, and filed a brief statement justifying as a collector of taxes, the plaintiff was held entitled to the opening and closing argument to the jury.

Where the tax act prescribes an essential difference in the mode of assessing resident and non-resident taxes — and the real estate of a resident has been assessed as non-resident, the collector must pursue the mode pointed out by statute for the collection of non-resident taxes, and is not justified in seizing and selling personal property.

EXCEPTIONS from the District Court, WHITMAN J. presiding.

This was an action of trespass for taking and carrying away the plaintiff's cow. The defendant pleaded the general issue, and filed a brief statement justifying as collector of the town of Peru for the years 1837 and 1838. It was admitted that the cow was taken and sold by him and that the balance of the price exceeding the plaintiff's tax, was tendered him.

It was proved that the plaintiff was a resident in Peru during the years 1837 and 1838.

The tax bills and warrants for collection were offered and read and from their inspection it was contended, that the tax for the non-payment of which the cow was sold, was assessed on non-resident lands — whether they were or not so assessed was at the instance of the plaintiff's counsel, and without objection on the part of the defendant's counsel, submitted to the jury — who were instructed by the presiding Judge that if such was the fact, to find for the plaintiff.

The defendant's counsel claimed the right to open and close, but the Court ruled that it belonged to the plaintiff.

A verdict was rendered for the plaintiff and exceptions to the several rulings of the Court tendered and allowed.

Fessenden & Deblois, for the defendants, contended as the affirmative of the issue was on them, that they had the right to open and close. *Davis* v. *Mason* 4 Pick. 156; *Brooks* v. *Barrett*, 7 Pick. 94; *Goodtitle* v. *Braham*, 4 T. R. 497; *Jackson* v. *Heskett*, 2 Stark. R. 454.

The st. 1831, c. 514, requires the general issue in all cases to be pleaded. The general issue and a brief statement are equivalent to a plea in bar. *Hodsdon* v. *Foster*, 9 Greenl. 113; *Fillebrown* v. *Webber*, 14 Maine R. 441; 1 Stark. Ev. 384.

Whether the tax was or not assessed on non-resident lands was a matter of law, to be determined by inspection — and should not have been submitted to the jury. *Davis* v. *Boardman*, 12 Mass. R. 80; *Revere* v. *Leonard & al.* 1 Mass. R. 91; *Howe* v. *Bass*, 2 Mass. R. 380; *Thompson* v. *Ketcham*, 8 Johns. 190; *Miller* v. *Lord*, 11 Pick. 11; *Howe* v. *Huntington*, 15 Maine R. 350; 3 Wheeler's Abr. 379; *Morton* v. *Fairbanks*, 11 Pick. 368.

F. O. J. Smith, for the plaintiff. It is too late for the counsel to object to the ruling of the court, they having at the time acquiesced in it. 1 Stark. Ev. 437; *Robinson* v. *Cook*, 6 Taunt. 336; *Winter* v. *Muir*, 3 Taunt. 531; *Ritchie* v. *Bonsfield*, 7 Taunt. 309; *Spalding* v. *Alfred*, 1 Pick. 37; *Colley* v. *Merrill*, 6 Greenl. 50; *Holbrook* v. *Bruce*, 552.

The plaintiff had the right to open and close. *Ayer* v. *Austin*, 6 Pick. 225.

Per Curiam. If the tax, for the non-payment of which the property in dispute was seized, can be regarded as a taxation of his property as a resident, the defendant has made out his justification; otherwise not. The general law in relation to taxes, st. 1821, c. 116, § 15, provides, that taxes shall be assessed and apportioned according to the then last tax act of the legislature. The tax acts which should have governed in the assessment of these taxes, makes an essential difference, both in form and substance, in the modes of assessing resident and non-resident taxes.

The tax bills show the plaintiff to have been a resident in

Peru, and assessed as such, during the years 1837 and 1838, and that the lands were taxed as non-resident. The tax cannot be supported as a tax on the property of a resident, because the regulations prescribed for the assessment of such property were not pursued. They must then be regarded as a tax on non-resident property — and being so, the justification set up has failed.

Whether this question was or not properly submitted to the jury, has become immaterial, inasmuch as their decision was correct.

As in this case, the plaintiff is in no event entitled to recover, the right to open and close becomes immaterial. We have, however, examined the case of *Ayer* v. *Austin*, 6 Pick. 225, and are satisfied that in this respect the ruling of the Court below was correct. It is true, st. 1831, c. 514, requires the general issue in all cases to be pleaded. The Court cannot know that the general issue would not have been pleaded without the statute requisition, and that it is pleaded compulsorily. There is no record made by which that fact can be known. We think the practice in this respect is not to be changed.

William Hascall and Roland H. Gerry *versus* Joel Whitmore.

The purchaser of a note voidable for want of consideration as against the maker, from an innocent indorser without notice, is entitled to recover, though he purchased with a full knowledge of such want of consideration.

Purchasing from one who had no notice, he must be considered to be in the same situation and as entitled to the same protection as his vendor.

Assumpsit on a note of hand dated June 30th, 1835, for $400, signed by the defendant and payable to one Sumner Stone or order, on or before the 30th of June, 1839, and endorsed by said Stone in blank.

The plaintiffs were not partners, but each separately and at different times purchased one half of the note declared on.

It appeared in evidence in the defence, that Daniel Brown, Sumner Stone and one Springer had verbally agreed to purchase a tract of timber land and mills in the town of Livermore, of one Brittun, for thirty thousand dollars, and were to complete the bargain on the 30th June, 1835; that the defendant and they verbally agreed that he, the defendant, might have one quarter part of the purchase upon his paying Brown $500 and the said Stone $400; which sums were to be paid only in case a profit should be made upon the purchase, out of which they were to be paid — and the defendant was to give them a written contract to that effect — that on the 30th June, 1835, they did complete the purchase and took a deed of said Brittun — the defendant a deed of his quarter and paying his proportion of the cash payment and securing the remainder — that no written agreement was then made to pay the sums of $500, and of $400, before stated, that subsequently, Brown, Stone, and the defendant were together, and it was proposed that instead of reducing to writing the agreement before mentioned relating to those several sums, that the defendant should give said Brown a note for $500, and said Stone a note for $400, to which the defendant consented upon their severally agreeing that they would not part with the notes until it should be ascertained that a profit had been made on the purchase — and the note in suit was one of the notes so given — and that no profit whatever had been made, but on the contrary that they had sustained a great loss. To all this evidence the counsel for the plaintiff objected.

It further appeared that before Gerry, one of the plaintiffs, purchased his interest in the note, he was informed of these facts.

David Andrews, called by the plaintiffs, testified that he purchased the note, the last of Dec, 1835, or the 1st Jan. 1836, of Stone, and paid for the same, after deducting a discount of $17,00, and that at the time of the purchase, he knew nothing of the circumstances under or the consideration for which it was given. In June, 1836, the defendant, upon his informing him that he held the note, stated to him all the circumstances

under which the note was given — and informed him that he should not pay the note, as no profit was made — that he subsequently to this sold half of this note to the plaintiff, Hascall, and at a discount of twelve per cent., and the other half to Libbeus Carswell in part payment of a farm purchased of him — that he did not inform Hascall or Carswell of the facts relating to the note, which had been communicated to him by the defendant — and that the notes were not indorsed by him nor was he in any way to be accountable for their payment. This testimony was all received subject to objection.

The part of the note owned by Carswell was sold to one Burnham, from whom it passed to the plaintiff, Gerry, in payment of a debt due from Burnham to Gerry.

These facts having been proved on the trial before SHEPLEY J. the case was then taken by consent of parties from the jury and submitted to the Court. If the plaintiffs, on this testimony or on so much of it as may be legally admissible, are entitled to recover the whole or half of the note, the defendant is to be defaulted and judgment to be rendered for such sum as they are entitled to recover — if they are not so entitled to recover the plaintiffs are to become nonsuit. If the testimony of Andrews is to be excluded, because interested, the plaintiffs are to have a new trial, if entitled to recover on the same facts when legally proved. If the plaintiffs are not entitled to recover, but Hascall could recover, but one half of the note in a suit in his own name only, judgment is to be rendered in this suit for such half without costs and without impairing defendant's title to costs.

W. P. Fessenden, for the plaintiff, argued that the testimony offered by the defendant, was of a contract made previously to the giving of this note and that it was inadmissible. *Woodbridge* v. *Spooner*, 1 Chitty, 661 ; *Mosely* v. *Hanford*, 10 B. & C. 729. The written agreement or note is the consummation of the contract — and no evidence is received to vary or affect it by proof of previous and different stipulations or agreements. The contract ultimately signed, is either a variation from or a consummation of the original bargain ; if it is the bargain originally made, no proof is needed ; if it varies

from such original bargain, then the reason of the rule particularly applies to such a case — that a written contract shall not be varied by parol evidence — and whether such evidence be of facts anterior to the giving of the note or not is immaterial.

But if the evidence were admissible, it would form no defence in the hands of the present holders of the note. Andrews was an innocent indorser, and as such entitled to recover. The moment Andrews received the note without notice, the equities of the maker, as against the original payee, ceased. *Trull* v. *Bigelow*, 16 Mass. R. 406. Once ceasing, they can never after be revived. Andrews, having a perfect title, could transfer one — if it were not so, his rights would be restricted. *Smith* v. *Hiscock*, 14 Maine R. 449; *Brown* v. *Mott*, 7 Johns. 361. If the defendant shows there was no consideration for the note, the plaintiff can recover if he or some previous indorser gave value for it. *Thomas* v. *Newton*, 2 C. & P. 606; *Wheeler* v. *Guild*, 20 Pick. 552. Here a full consideration was paid by Andrews.

Fox, for the defendant, contended, that testimony was legally admissible to show the original consideration of the note. When one note is substituted for another, or for a previous contract, the new note shares the same fate as the original, for which it was substituted. *Hill* v. *Buckminster*, 5 Pick. 391. The note is void, because given for non-existent profits, or as a substitute for a verbal agreement relating to real estate, which is void by the statute of Frauds. Gerry took the note with notice, and notice to one is notice to both plaintiffs. Chitty on Bills, 8th ed. 82. The note is not negotiable as to all taking it with notice. Chitty, 79; *Aldrich* v. *Warren*, 16 Maine R. 465.

The plaintiffs, to recover, must show affirmatively that they took the note *bona fide*. *Reed* v. *Hutchinson*, 3 Camp. 352.

The opinion of the Court was delivered by

Shepley J. — The plaintiffs are joint owners of a negotiable promissory note purchased before it became payable. One of

them is a holder for value without notice; the other with notice, but deriving his title through others who were *bona fide* holders without notice. As between the original parties the note may be regarded as made without consideration. Andrews, who was the first and an innocent indorsee for value, did not endorse it, when he disposed of it, and he was properly admitted as a witness. *Whitaker* v. *Brown*, 8 Wend. 490. He could have collected it, for the want of consideration could not be set up against him. A knowledge of the facts acquired afterward would not affect his rights. He had not only a legal right to hold and collect it, but to negotiate it. And the maker could not impair that right by giving notice, that it was made without consideration. Nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before.

Bayley states, that the want of consideration cannot be insisted upon "if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valuable consideration." Bayley, 550, ed. by Phillips & Sewall.

The case of *Thomas* v. *Newton*, 2. C. & P. 606, was assumpsit on a bill drawn by Wilson on the defendant and accepted, and by him endorsed to Dandridge and by him to the plaintiff. The defence was a want of consideration. Lord Tenterden says, "if the defendant shews, that there was originally no consideration for the bill, that throws it on the plaintiff to shew that he gave value for it, or that value was given for it by Dandridge; for if either the plaintiff or Dandridge gave value for it, the plaintiff may recover; otherwise the defendant is entitled to recover."

In *Solomons* v. *The Bank of England*, 13 East, 135, note (b), it appeared, that the bank note had been obtained fraudulently from Batson & Co., who informed the bank of it. The plaintiff as holder claimed payment of the bank, and it was refused. He had received the bill of Hendricks & Co.; and it did not appear, that he paid value for it before notice. Lord Kenyon says, "upon this evidence I think Solomons must be considered to be in the same situation as Hendricks

& Co." But as it did not appear, that they were holders for value without notice, the plaintiff did not recover.

In *Smith* v. *Hiscock*, 14 Maine R. 449, where a negotiable promissory note had been indorsed *bona fide* and for value before it was payable, the C. J. says, "the want of consideration is not an available defence against a subsequent holder, to whom it may have been passed after it was due. The promise is good to the first indorsee free from that objection; and the power of transferring it to others with the same immunity is incident to the legal right which he had acquired in the instrument. By the first negotiation the want of consideration between the original parties ceases as a valid ground of defence."

If the relations between the maker and holder only were to be considered, the want of consideration would be a good defence against one, who did not purchase for value, or who did so after it was once due. And yet it has been decided, that one so situated may avoid that defence by shewing, that it could not have been interposed against a prior holder. The same principle appears to be equally applicable to a holder who has purchased with notice. If the relations between himself and the maker only were to be considered he could not recover. But purchasing of one who had no notice he must be considered to be in the same situation and as entitled to the same protection.

Defendant defaulted and judgment for amount due on the note.

JOHN HOLMES, Petitioner for Review, *versus* DANIEL FOX *& al.*

Where a resident of this State is temporarily absent, leaving an agent here, no valid service in a suit against him can be made by leaving a summons at the last and usual place of abode of his agent.

These facts appearing upon demurrer to a petition for a review, and it further appearing that the plaintiff had had no hearing, a review was granted.

THIS was a petition for a review, to which a demurrer was filed.

The facts sufficiently appear in the opinion of the Court.

Fox, in support of the demurrer, insisted that the officer's return was conclusive, and that the plaintiff's remedy was against him for a false return, and cited *Bruce* v. *Holden*, 21 Pick. 189; *Stinson* v. *Snow*, 1 Fairf. 263; *Agry* v. *Betts*, 3 Fairf. 415.

A. Haines, contra, referred to st. 1821, c. 57, § 1, 2; st. 59, § 1, 2.

Per Curiam. It appears from the plaintiff's petition, that he is a resident in this State, and that while temporarily absent at New Orleans, a writ was served by leaving a summons with his agent at his residence at Portland. These facts are admitted by the demurrer.

The question then arises whether or not, upon these facts, the plaintiff is entitled to his writ of review. It is objected, that the officer has returned that he did make service of the original writ by leaving a summons at the last and usual place of abode of the agent of the plaintiff, and that his return is conclusive; and if false, that the plaintiff's remedy is against such officer for a false return. But there are difficulties in arriving at this conclusion. The service upon the agent of the plaintiff, if the plaintiff was a resident and had his domicil in this State — and those facts the demurrer admits — was illegal, it being unauthorized by statute, save in two cases,— one when the individual, upon whose agent service was made, was never an inhabitant of this State — the other, when having been an inhabitant, he has removed and changed his domicil.

The service made was not then good by statute. Besides, though the return of an officer be conclusive, the statute regulating reviews gives the Court great discretionary powers in relation to granting them or not. They are not limited by technical rules, but whenever it is satisfactorily made to appear that injustice has been done, the power is given them to remedy that injustice by granting the party injured his writ of review. It appears in this case that there has been no service, and that the plaintiff has had no hearing.

Review granted.

DAVID MORTON, in Equity, *versus* CHARLES E. BARRETT & *al.*

The certificate of a consul of the death of an individual abroad, is not sufficient proof of that fact.

THIS was a bill in equity. A preliminary question arose as to the sufficiency of the proof establishing the death of Charles D. Morton, which was submitted to the Court.

To prove that fact the counsel for the complainant read a letter purporting to be from said Charles to his father, by mistake dated June 7, 1837, but which in fact was of the date of January 7, 1837, in which he described him as sick — that his hands and feet had been frozen — and that he was then in want, at the house of one Nolens, at No. 8, Little George street, minories, London — likewise, the certificate of the sexton of the parish, of the death and burial of Charles Morton — likewise, that of the American consul at London, from which it appeared that he had applied to and received assistance from him as a sick American sailor, and in which the time of death was stated. His death was asserted in the bill to have taken place on the 3d Feb. 1837, and was not denied by the answer.

F. O. J. Smith, referred the Court to st. of U. S. 1792, c. 24, § 2, 7, 9, which prescribes the duties of consuls. Wharton's Dig. 231. The certificate of the register of the burial ground is sufficient. 1 Stark. Ev. 174; *Sawyer* v. *Baldwin*, 20 Pick.

J. Adams, for Barrett. This defendant holds the property in trust, and he requires either indemnity or protection. If indemnified, he is willing to surrender the property intrusted to him. But the evidence adduced is not sufficient to establish the fact of death. The American consul is not a certifying officer. *Levy* v. *Bailey*, 2 Sum. 355; 1 Story's Conf. of Laws, 103.

W. P. Preble, for Hanson. The death of Morton is not denied in the answer. That states that it is so reported, but that the trustee does not know it. Death may be proved by reputation. The evidence offered is sufficient to establish that fact.

Per Curiam. The consular certificate is not evidence of the facts therein contained. The certificate of the sexton would probably be received in England. There is no proof that the person signing as a sexton, was so in fact. Reputation is evidence of death, but only so after a lapse of time. The Court have no doubt of the death of Morton, but the safest course for the trustee is that there should be further proof of that fact.

STEPHEN DENNET *& ux. versus* NEAL DOW.

Where a will approved by the Judge of Probate, was reversed upon appeal in this Court, the appellant is not entitled to costs by virtue of st. 1821, c. 51, § 64.

Costs were refused the appellee as a matter of judicial discretion, under the circumstances of the case.

THIS was an appeal from the decree of the Judge of Probate approving the will of Stephen Neal. The decree was reversed in this Court, and both parties moved for costs.

Fessenden & Deblois & W. P. Fessenden, for the appellant.

Preble, for the appellee.

Per Curiam. Costs are claimed in this case by both parties. The appellants claim cost by virtue of St. 1821, c. 51, § 64, by which in case of a failure to prosecute the appeal taken from the Judge of Probate, the Supreme Court are authorized to assess reasonable costs against the party so failing — and they infer that if he succeeds, he is entitled as a matter of right to have costs taxed in his favor. But we think this was not the intention of the legislature. The claim for costs is not to be extended by construction. In the one case, the statute makes positive provisions. In relation to the other, it is silent. The appellants as a matter of right are not entitled to costs.

Costs not being allowable to the appellant as a matter of right, still less are they allowable by virtue of sec. 67, of the same statute. The defendants were trustees under the will.

The appellant was by law bound to file the will, whether he accepted the trust or not, — it was approved by the Judge of Probate — and an appeal entered. It was the duty of the appellant to attend to the prosecution of defence in that case. He was bound to resist the appeal. He was then acting in the discharge of his official duty. The approval of the Judge of Probate was a sufficient justification for his endeavors to sustain the will. In our opinion he ought not to be held to pay costs.

Perhaps upon a fair construction of the statute, costs might be allowed to the appellee. But the jury have found the will to be the will of a person of non sane memory. They have sustained the appellant in his appeal. In the exercise of the discretion allowed us, we think the appellee is not to be allowed costs.

No costs allowed to either party.

GARDINER COLBY & *al. versus* CHARLES MOODY & *al.*

The certificate of two justices of the peace and quorum that the creditor has been duly notified of the time and place of his debtor's disclosure, is conclusive evidence of that fact.

All records may be amended in furtherance of justice, according to the truth; and it is no objection that a suit duly commenced before such amendment will thereby be defeated.

THIS was an action of debt on a bond, conditioned to cite the creditor and make a disclosure. The defendants read in evidence, though objected to, the certificate of two magistrates, showing that he had notified the creditor, and had taken the poor debtor's oath. It was admitted, if it was competent for the plaintiff to prove it, that the certificate as originally made out, stated that the debtor took the oath prescribed by the statute of 1835; and that it was, after this suit was commenced, altered by the magistrates in conformity to the truth, and made to state that he took the oath prescribed by the statute of 1836, which was in fact administered to him, and was produced as by him originally signed. The certificate lodged with the jailer,

originally stated as the other did, and was altered in like manner, and for like cause. It was admitted that the plaintiff's attorneys attended the examination and disclosure, stating that they waived no legal objections, and that no special damage could be proved.

SHEPLEY J., before whom the cause was tried, being of opinion that the action could not be maintained, the plaintiffs submitted to a nonsuit, which is to be taken off and judgment rendered in their favor, if entitled to it.

The cause was submitted without argument, by *Codman & Fox*, for the plaintiff, and *A. Haines & Kinsman*, for the defendants.

The opinion of the Court was delivered by

WHITMAN C. J. — A nonsuit was entered in this case, subject to the opinion of the court upon the facts as reported by the judge, who presided at the trial.

It appears that Charles Moody, one of the defendants, was arrested at the suit of the plaintiffs, and gave the bond here in suit, as by law provided, to disclose, &c. and that certain magistrates, within the time named in said bond, took the disclosure of said Moody, and thereupon gave him a certificate, directed to the jailer, as by law in such cases is required, to entitle him to be liberated from imprisonment. This certificate the defendants produced on trial. The plaintiffs contend that this certificate is not conclusive, and that they ought to be permitted to prove the certificate untrue, in stating that they were duly notified; and that therefore the proceeding was *coram non judice* and void. To this the authorities seem to be opposed.

In the case of *Agry* v. *Betts & al.* 3 Fairf. 415, WESTON C. J., in delivering the opinion of the Court in reference to the doings of magistrates in such cases, says, "it is specially made a part of their jurisdiction to examine and pass upon the sufficiency of the return. It is an act of judicial discretion, entrusted to them by law for their definitive determination." And further, that "what has been once determined, by a court of

competent jurisdiction, is no longer an open question." And in *Black* v. *Ballard & al.*, 13 Maine R. 239, in delivering the opinion of the Court, the same learned judge says, "We are of opinion, that the certificate of the justices of the quorum, that the execution creditor was notified according to law, must be received as conclusive evidence of that fact." It would seem, therefore, that the question ought not any longer to be involved in doubt.

The plaintiffs, however, object that the certificate, as first made out and delivered to the jailer, and which remained with him till after the institution of this suit, was wholly erroneous, inasmuch as it set forth, that the oath administered to the debtor, although in fact the one required by law to be taken by him, was certified to be the one, which had been prescribed in a statute which, as to the form of the oath, had been repealed; and that this certificate, and the records of the doings of the magistrates preparatory to the issuing of it, had since been by them amended. But this was an amendment made by them in conformity to the truth; and as the proper oath, eventually taken by the debtor, and subscribed by him, was before them, they would seem to have had something to amend by. In such cases it is no uncommon procedure for courts to allow amendments after verdict and judgment, and even after execution has been levied, to be made, when manifestly in conformity to the truth, and furtherance of justice; not only by their own clerks, but also by other officers entrusted with the execution of the processes of the court. *Clark* v. *Lamb*, 6 Pick. 512. Where a judicial tribunal proceeds without a clerk, and makes record of its own proceedings, the exercise of the same power must be allowed it.

But it is objected that this amendment should not have been allowed after action brought, as was done in this case, by the plaintiffs, upon the faith of the certificate as at first issued; or if allowed, that it cannot affect the right of the plaintiffs to proceed as if no such amendment had been made; and that the right of the plaintiffs to maintin the action had vested, and cannot be divested by an after amendment. It may be admitted

that there is a show of speciousness in this objection. But it is believed, upon examination it will be found destitute of any substantial basis.

When the rights of strangers to the record come in question, the court might well hesitate in affording its sanction to such amendments at least, so far as they might be liable to be affected by them. But when no one can be affected, except it be a party to the original record, it is otherwise. *Close* v. *Gillespey*, 3 Johns. 526; *Chamberlain* v. *Crane*, 4 N. H. R. 115; *Little* v. *Larrabee*, 2 Greenl. 37; *Means & al.* v. *Osgood*, 7 Greenl. 146; *Sawyer* v. *Baker*, 3 Greenl. 29; *Buck* v. *Hardy*, 6 Greenl. 162; *Wright* v. *Wright*, ib. 415; *Berry* v. *Spear*, 13 Maine R. 187; 15 Maine R. 73; 16 ib. 124; 17 ib. 444; *Castor* v. *Phenix*, 7 Cowen, 524. The last case is very similar in principle to the one at bar. The debtor had been committed. Finding the judgment against him to be erroneous he brought a writ of error, and committed an escape, thinking probably, that, as the judgment was clearly erroneous, his bail could not be harmed. He and his bail were sued for the escape. After the assignment of errors, in the process in error, the court permitted the original judgment to be amended, whereby the process in error was defeated, and the bail were rendered liable for the escape.

In this case the plaintiffs are no strangers to the record. They were present, by their counsel, at the time the disclosure was made and the oath administered. They knew that the right oath was administered. It cannot therefore be considered that their rights were unduly affected by the amendment.

Nonsuit confirmed and judgment accordingly.

ALEXANDER PRIDE *& al. versus* JAMES LUNT.

The like rules of construction must be applied to levies as other conveyances.

The intention of the parties, if possible, must be carried into effect.

Where a conveyance declares a fact, as that the land adjoins a river or a street, parol evidence cannot be received to prove that it does not; unless the description contains a latent ambiguity, or be found false, and therefore to be rejected.

Where the commencement of a levy is described to be at a stake, at "the westerly corner of land set off to William Cobb," and that corner can be ascertained, parol evidence is inadmissible to prove that in fact the stake referred to, stood at a different place.

THIS was an action of ejectment, wherein the plaintiff demands seizin and possession of a certain strip of land adjacent to a tract set off on execution to one William Cobb, Feb. 4, 1828, as the property of Daniel Lunt, deceased. The defendant pleaded the general issue. To sustain the action, the plaintiff introduced a copy of the Cobb levy, in which the same was described as follows:

"Beginning at a stump standing in the north-easterly corner, near a brook, on the north-easterly side of the road leading from Pride's Bridge, so called, to Windham, and lying between Zachariah B. Bracket's house and Bartholomew Lunt's house, thence from said stump south 70 degrees west, 48 rods, to a stake in the north-easterly side of said road, thence by said road north twenty-nine degrees west, 20 rods, thence on said road north 22½ degrees west, twenty-four rods, to a stake and stone — thence north 70 degrees east, 60 rods, to a stake and stone and a brush fence — thence by said brush fence south, 12 degrees east, 45½ rods, to the first bounds mentioned — containing fourteen acres, more or less."

The plaintiffs then introduced a copy of the levy of an execution in favor of *John P. Boyd, Adm'r.* v. *Daniel Lunt*, by which the following described premises were set off to the plaintiff in that suit.

"Beginning on the easterly side of the County road leading from Portland to Windham, *at a stake at the westerly corner of land set off to William Cobb*, Feb. 4, 1828, thence north

70 degrees east, 59½ rods, to a brush fence — thence by said fence N. 11 degrees W., by land of Z. B. Bracket and Benj. Walker, 41 rods, 22 links, to underwitted road, thence south-westerly by underwitted road, 49 rods, to a stone by the corner of the fence near the barn, thence south 31 degrees E., six rods, to a stake and stone, thence south 59 degrees W., 15 rods, 10 links, to a stake — thence north 31 degrees W., 6 rods, to underwitted road, thence south-westerly by said road, 9 rods, to the county road leading from Windham to Portland, thence by said road south 27 degrees E., 15 rods, 2 links, to the stake first mentioned, containing 10¾ acres and twelve rods, more or less."

Also the deeds of the grantees under the levy, bringing the estate acquired by the levy in to the plaintiffs.

The plaintiffs then called Benjamin Larrabee, who testified that when the Cobb levy was made, he was one of the appraisers, and surveyed the land set off — that he run it, unless some mistake occurred in the manner described in the levy — that the appraisers intended to be governed by fixed monuments — that during the present month he had re-surveyed the land — and also the land set off by the Boyd levy — that he was unable to find any of the monuments, which governed him in making the Cobb levy in 1828, except the stump in the exterior corner first begun at, and the stake on the road which formed the second corner — that he did not find either of the two next side boundaries of stake and stone in said road, described in said levy, and the latter of which formed the corner of the levy — that he also at the same time, surveyed the land set off under the Boyd levy, but could not find any of the monuments described by the appraisements except upon the end line formed by the underwitted road, one of which was the corner monument upon said road at its junction with the county road — that according to his re-survey, by following from the two known corner monuments of the Cobb levy, the courses and distances described in said Cobb levy, in the absence of all other original monuments — and then following in like manner from the two known corner monuments on the

underwitted road, of the Boyd levy, in the absence of all other original monuments, and going by the length of line only and not regarding any expression in the levies signifying that they adjoined, a gore of land would be left between the two levies of about six rods wide, in length on the county road, and extending across the width of the two levies to the brush fence, terminating there in nearly a point.

There was also other evidence, tending to show that the stake and stone supposed and taken by the surveyor and appraisers in making the Boyd levy as the stake and stone that formed the corner boundary of the said Cobb levy, were not the true corner of the Cobb levy, but were another and different boundary, six rods distant from the true corner boundary of the Cobb levy.

The defendant, on his part, introduced deeds vesting in himself the whole title derived from the Cobb levy — also the title of all that portion of the debtor's estate within said exterior boundaries, if any existed, not covered by the two levies.

Upon this evidence, the counsel for the defendant moved the Court to direct the jury, that if they were, from the evidence in the case, satisfied that the surveyor and appraisers, in making the Boyd levy, by mistake run from some other boundary than the true boundary of the Cobb levy, and in consequence thereof the Boyd levy did not in fact adjoin the land actually set off under the Cobb levy, but left a gore or strip of land between the two levies, it would be competent for them to find that fact by their verdict, and negative the plaintiff's title to such gore, notwithstanding the description of the Boyd levy as commencing "at a stake at the westerly corner" of said Cobb land — and that in the absence of known monuments, the length of line must govern — and that it was as competent for the jury to find a mistake to have been made in the surveyor's description of the actual monuments by which he run his lines, as in his description of the lines actually run by him — and to find where the actual monuments run by him were located, if satisfied that a mistake had been made in the description of them by the levy.

But SHEPLEY J., who presided at the trial, overruled this motion, and instructed the jury that the language of the Boyd levy, describing the stake and stone for its first corner boundary as being at the corner of the Cobb levy, together with the fact that the courses in both levies were on the same line, was conclusive, and it was not competent for them to find that the two levies, as actually run out, did not join — that they were bound to find the Boyd levy to commence at the point where they should be satisfied was the true corner of the Cobb levy, if that could, from any monument or line laid down at the time on the face of the earth, be ascertained — that if not so ascertained, the distance of the lines named in the levies, would, as a rule of law, determine their extent — that such rule was not so absolutely binding, if it was clearly proved that there was a mistake made in measuring the last line of the Boyd levy, as to preclude them from extending that line to the point where the Cobb levy terminated: that if no such mistake were proved, the lines must be made to adjoin by a division of the surplus, giving to each a proportion of the intervening land, according to his length of line.

The jury returned a verdict for the plaintiff.

F. O. J. Smith, for the defendant.

The instruction requested should have been given. The jury should have been permitted to find where the true boundary of the Boyd levy was — and that the stake and stone from whence they commenced were not in the corner of the Cobb levy. *Heaton* v. *Hodges*, 14 Maine R. 70; *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Greenl. 225; *Brown* v. *Gay*, 3 Greenl. 129. The mere intent that the two levies should adjoin, is not sufficient. They must join in fact.

The monuments on the inside lines having perished, it is as though none existed. Courses and distances from such monuments as can be found, are all that the jury could be governed by. *Pernam* v. *Wead*, 6 Mass. R. 131; *Gerrish* v. *Bearce*, 11 Mass. R. 193; *Howe* v. *Bass*, 2 Mass. R. 380; *Aiken* v. *Sanford*, 5 Mass. R. 494; *Loring* v. *Norton*, 8 Greenl. 68; *Call* v. *Barker*, 3 Fairf. 325. This rule governs, although it

leaves a gore between the lots. 1 Greenl. 225; 14 Maine R. 71, before cited.

The instruction given shifted the issue from the location of the Boyd levy to that of the Cobb. But the location of the Cobb levy threw no light on that question, the inside line being gone. The whole error lies in assuming that the line of the Cobb levy is a known monument. Allow the plaintiff to have his certain monuments, and neglect those of the defendant, and the cause is his — and not otherwise.

Longfellow & *Deblois*, for the plaintiff. The Cobb levy was first to be located. Two monuments were known, and from those, by course and distance, the inside lines could be ascertained. The defendant adjoins upon those inside lines, so that no gore exists. Known monuments should govern, rather than course or distance. *Howe* v. *Bass*, 2 Mass. R. 380; *Aiken* v. *Sanford*, 5 Mass. R. 494; *Pernam* v. *Wead*, 6 Mass. R. 131; *Gerrish* v. *Bearce*, 11 Mass. R. 193; *Davis* v. *Rainsford*, 17 Mass. R. 207.

The opinion of the Court was delivered by

Shepley J. — The levy of an execution upon the lands of the debtor operating in this State as a statute conveyance, the like rules of construction are to be applied to it as to other conveyances. *Waterhouse* v. *Gibson*, 4 Greenl. 230. The first of these requires, that the intentions of the parties should, if possible be carried into effect. It is admitted in the argument to have been the intention, that the land set off to Boyd should adjoin that set off to Cobb; but it is contended, that this should not prevent the introduction of proof by parol evidence, that such intention was not carried into affect, and that the stake referred to in the levy as standing at the corner of land set off to Cobb did not in fact stand there. The general rule, that the monuments referred to in a deed may be established by parol evidence, is not questioned. This case affords an example of its application. Parol evidence must be received to prove the location of the road and of the lands set off to Cobb. Such testimony does not contradict or vary the lan-

guage used in the conveyance; it only applies it. There may be two or more streams, trees, stakes, or other monuments, each conforming to the description in the deed. A latent ambiguity is there disclosed, and parol evidence may be received to explain it. If in attempting in this case to designate upon the earth the bounds named in the conveyance, it had been ascertained, that no land had been set off to Cobb, so much of the description though apparently clear, would have been found to be false; and it must have been rejected as in the case of *Wing* v. *Burgis*, 13 Maine R. 111. And parol proof might then have been admitted to prove the position of the stake. It would not have contradicted any thing, which could be regarded as a part of the deed. When a conveyance declares a fact, as that the land conveyed adjoins a river, or a street; parol evidence cannot be admitted to prove, that it does not, unless a latent ambiguity be found, or the allegation be found to be false and therefore rejected. When the monuments named in the conveyance, as in this case the road and the land set off to Cobb, are found to exist as decribed, to allow the land conveyed to be separated from either of them by parol evidence would be to give a preference to that, which is uncertain, dependent on memory, and subject to change, over that which is clearly declared in writing and is of certain designation. "The westerly corner of land set off to William Cobb," was a monument named in the conveyance as the place where the stake stood, and it appears to have been named for the purpose of defining with certainty its position. Parol evidence might as properly be admitted to prove, that the tract of land set off to Boyd was not bounded in running the southwesterly line on the road as to separate the stake from the corner of the land set off to Cobb. In both cases the language used in the conveyance would be contradicted, and the conveyance itself be so far defeated. Should there be two monuments equally certain and permanent and alleged to be found at the same point, and it should appear in proof, that both existed, but not at the same point, a false description would be disclosed and it would become necessary to determine from other parts of the convey-

ance, which allegation was false and to be rejected. But where two monuments, one of certain, and one of uncertain location are stated to adjoin each other, the one of certain location must be regarded for the purpose of making the position of the other certain.

The conveyance in this case having declared, that the land set off to Boyd does adjoin that set off to Cobb, the parol evidence cannot be received to prove, that it does not.

Judgment on the verdict.

INHABITANTS OF POLAND *versus* JOSEPH STROUT.

Where the proprietors of Bakerstown, which was incorporated by the name of Poland, made a reservation of certain lots of land for the use of schools, and subsequently, the town of Minot was incorporated by taking off a portion from the town of Poland — with the provision in the act of incorporation "that the public lands appropriated for the support of schools, and the town's stock of military stores, shall be estimated and divided in the same proportion that each town paid at the purchase thereof," it was held, that the lots so reserved for the support of schools were not within the meaning of this provision, they not having been paid for by the town.

An action of trespass *quare clausum*, for an injury to these lots, in the name of the inhabitants of Poland, was sustained.

THIS was an action of trespass *quare clausum*. For the purpose of settling a preliminary question, the plaintiffs and defendant agreed that the *locus in quo* was a school lot situated in Poland, being lot No. 116 — that this lot, and one other, were originally laid out and reserved by the proprietors of Bakerstown for the use of schools, and that those two lots are the only school lots, or land ever owned by Poland and Minot, or either of them, or that were ever held for the use of schools in said towns or either of them. Bakerstown was incorporated into a town by the name of Poland, which was divided subsequently, and a part set off by the name of Minot. The acts of incorporation of Minot and Poland, which make part of the case, are referred to so far as may be material, in the opinion of the Court.

If in the opinion of the Court the town of Minot ought to have been joined in the action, the plaintiffs are to become nonsuit, otherwise the action is to stand for trial.

The cause was argued in writing, by

Dunn, for the plaintiffs, who contended that the lot in dispute was not within the provision of the special law incorporating Minot — Mass. Spec. Laws, vol. 2, p. 477, § 2, which provides that the public lands appropriated for the support of schools, &c. &c. shall be estimated in the same proportion each town paid at the purchase thereof, because the lot in dispute was private property when reserved — and not purchased by the plaintiffs and not within the intention of the legislature.

J. C. Woodman, for defendant, referred to act of incorporation of Minot, passed Feb. 17, 1795, Mass. Spec. Laws, vol. 2, 478, by virtue of which he insisted that the town of Minot became jointly interested in the school lands with the town of Poland. The custody of the lands should be in the original proprietors until trustees should be appointed. *Shapleigh* v. *Pilsbury*, 1 Greenl. 280. The use being for the towns, they should join. If tenants in common, the suit should have been brought by both jointly. *Gilmore* v. *Wilbur*, 12 Pick. 124; *Daniels* v. *Daniels*, 7 Mass R. 135; *Austin & al.* v. *Hall*, 13 Johns. 286.

The opinion of the Court was delivered by

Whitman C. J. — From what appears in this case we gather, that the proprietors of Bakerstown, who formerly claimed the tract of land, comprised within the limits of the towns of Poland and Minot, made a reservation of the lot in question for the use of schools, which was intended, undoubtedly, for the benefit of those who might thereafter become settlers on the land of the proprietary grant. The State of Massachusetts, after the incorporation of Poland, the boundaries of which coincided with those claimed as the boundaries of Bakerstown, instituted an inquest of office, and ousted

the proprietors of the larger portion of what was afterwards set off and incorporated by the name of Minot, the same being adjudged to have been erroneously claimed by them. After this the lot in question might be deemed to have enured to the benefit of the settlers on the land of the proprietary.

Whenever such reserved lots have been situated within a township, incorporated with limits conforming to those of the proprietary grant, out of which they were reserved, it has been customary for the inhabitants of such town to consider themselves as the beneficiary, or *cestui que trust*, and to assume the management, control and possession of them. It is upon this ground, it may be presumed that the inhabitants of Poland have considered themselves, since 1795, when their incorporation took place, as having a right to exercise acts of ownership over the lot in question. And it does not appear that the inhabitants of Minot, since the incorporation of that town, in 1802, have ever claimed to exercise any act of ownership over it, or otherwise to interfere with the superintendence over it, by the inhabitants of Poland.

It is nevertheless urged, on the part of the defendant, that the inhabitants of Minot, in their corporate capacity, were, at the time of the commencement of this suit, tenants in common of the lot with the inhabitants of Poland, in their corporate capacity; and that the writ of the plaintiffs ought therefore to be abated. In support of this pretension, the terms in a certain provision in the act of incorporation of Minot, are relied upon. This provision is as follows, viz. "the public lands, appropriated for the support of schools, and the town's stock of military stores, shall be estimated and divided in the same proportion, that each town paid at the purchase thereof." Nothing appears ever to have transpired between the two towns, in reference to the lands alluded to, since the incorporation of Minot took place. Now can the two towns be considered, by virtue of the said provision, standing as it does, alone, without any further doings in reference to it, as creating a tenancy in common between them? We think not. Neither town paid any thing for the purchase of this lot. It could not

therefore be divided on any such terms as the said provision has prescribed. And if it were competent for the legislature to divert the use of this lot, or any portion of it, to the use of those who might not have settled upon the proprietary grant, it does not seem, that they have done so. We are therefore of opinion, that, by reason of any thing appearing in the statement of facts, the writ in this case cannot be abated.

ALEXANDER CHALMERS, in Equity, *versus* JOHN HACK *& al.*

It is the duty of the Court, when a want of jurisdiction is apparent on inspection, or is suggested by an *amicus curiæ*, at once to stay all further proceedings.

Where a resident in another State, having no property in this, is a plaintiff at law in a suit against the plaintiff in equity, it seems, that he is so far amenable to the jurisdiction of this Court that a bill of injunction may be entertained against him and that service of subpœna on his attorney in the suit at law, would be a good substituted service to subject him to the jurisdiction of this Court.

Independent o such an object, no bill could be sustained.

When the plaintiff in equity was defaulted in a suit at law against him and others, and filed his bill for an injunction to stay proceedings, alleging that the default was obtained by fraud, and that he had been unable to prepare for trial, the bill was dismissed — the plaintiff having an adequate remedy at law — as whatever would induce the Court to grant an injunction would be equally efficacious in inducing them to grant a new trial.

BILL in equity for an injunction to stay proceedings at law, and for a discovery and relief. None of the parties to the bill were residents of this State, at the time it was filed. The only service was by leaving a subpœna with Wm. P. Haines, who was the attorney of the defendant, Hack, in the action — the further proceeding in which this bill is brought to enjoin.

The facts upon which the complainant claimed to sustain his bill, are set forth in the opinion of the Court.

To this bill, W. P. Haines, denying that he appeared as the attorney to or by the authority of the defendants, and asserting that he appeared only in obedience to the summons of the Court, demurred in his own name for the causes following:—

Because both the parties to the bill were residents of other States, and had no property here — because the subject matter of this bill was pending before this Court as a court of law — because this is an attempt to try in equity, what has already been tried at law — and because the complainant has an adequate remedy at law.

The case was submitted to the Court upon written arguments.

W. P. Haines, in support of the demurrer. This Court has no jurisdiction, because the parties reside in other States, and have no property here. *Bissell* v. *Briggs*, 9 Mass. R. 462; *Hall* v. *Williams*, 6 Pick. 232; Story's Conflict of Laws, 459; Story's Eq. § 81. Because the powers of this Court, as a court of law, are sufficient for the purposes of justice, and the subject matter of this bill is now pending before the Court. Story's Eq. Pl. § 473, § 481, § 482; *Smeed* v. *Coyle*, 4 Litt. 163; 2 Barb. & Har. Dig. 13; *McCarty* v. *Burrows*, 2 Ham. 21; *Morrison, Ex'r*, v. *Hart*, 2 Bibb, 4; Story's Eq. Pl. § 481. This Court will not interfere, because it has been already settled at law. *Simpson* v. *Hart*, 1 Johns. Ch. 91; *McVicar* v. *Wolcott*, 4 Johns. 510.

Deblois, contra. The service on Haines, as the attorney of record, is good. Smith's Ch. Prac. 116; 1 Hoff. Ch. Prac. 109; *Smith* v. *Hibernian Mining Co.* 1 Sch. & Lef. 238; *Love* v. *Baker*, 1 Ch. Ca. 67; *Jones* v. *Boston Mill Cor.* 4 Pick. 507; *Pratt* v. *Bacon*, 10 Pick. 126. The attorney, as such, cannot demur. A demurrer can only be made by a defendant. Story's Eq. Pl. 346, 363. As a plea to the jurisdiction it is bad. It should point out where the matter ought to be determined. *Lord Derby* v. *Duke of Athol*, 1 Dick. 129; *Nabob of Carnatic v. East Ind. Co.*, 1 Ves. 373. If bad in part, it is bad for the whole. *Baker* v. *Pritchard*, 2 Atk. 388; 2 Mad. Chan. 286; *Higginbotham* v. *Burnett*, 5 Johns. Ch. 186; Hoff. Ch. Prac. 27; Story's Eq. Pl. 350. If neither of the defendants appear, the attorney cannot appear as such — and then there is no demurrer, which the Court can consider.

The courts of common law cannot give an adequate remedy. An injunction is prayed for. 2 Story's Eq. § 891. Fraud is charged. A demurrer to a bill praying for relief and charging fraud, should be overruled. *Manningham* v. *Bolingbroke*, Dick. 533. The demurrer admits the facts charged, as true. *Atterson* v. *Mair*, 2 Ves. 95; 4 Brown C. Cases, 270; *Brooke* v. *Hewitt*, 3 Ves. 253. A judgment fraudulently obtained, will be enjoined. *Marine Ins. Co.* v. *Hodgdon*, 7 Cranch, 336. A bill lies where the relief at law is inadequate. *Charles River Bridge* v. *Warren Bridge*, 6 Pick. 376; *Fay* v. *Valentine*, 12 Pick. 40; *Weymouth* v. *Boyer*, 1 Ves. 416; *Graham* v. *Stamper*, 2 Vern. 146; *Burroughs* v. *Jemino*, 2 Ste. 733; *Bemis* v. *Upham*, 13 Pick. 169; Mitford's Plead. 166.

The opinion of the Court was delivered by

WHITMAN C. J. — The bill in this case states, that a suit at law is pending in this Court, in another county, in this State, wherein the plaintiff, Chalmers, a citizen of New York, and two other persons, now resident in this State, who were formerly his copartners in trade, were sued in assumpsit by said Hack; and that after the suit had been sometime pending, he, the plaintiff, received a notification in New York of its pendency, and that he might appear and show cause why judgment should not be rendered against him. That he employed counsel, who moved for a continuance of the action, to enable him to make preparation for his defence, which motion was overruled; whereupon his counsel submitted to a default, under an agreement that he should be heard on inquiry as to the damages; and that said Chase was confederate with said Hack, and had become interested in said suit, by purchase, and had conspired with him to defraud the plaintiff; and had taken undue means, in aid of said Hack, to procure testimony, of which the plaintiff was ignorant, until after the default, as agreed upon, had been entered. Thereupon the plaintiff prays for an injunction to stay proceedings at law, and for a discovery and relief.

Said Hack, being a citizen of Maryland, without the jurisdiction of this Court, and having no estate which could be

reached by its process, the plaintiff has caused Wm. P. Haines, the counsel of said Hack in the suit at law, to be summoned to defend in this suit. And the said Haines, in obedience to the said summons, appears; and, protesting that he does not appear for the said Hack, but in obedience merely to said summons, demurs to the said bill, for want of jurisdiction in the Court.

It becomes the Court, in all cases, to stay proceedings, whenever it is made manifest that it has not jurisdiction in the case. Whenever this knowledge is obtained, it matters not whether it be by an inspection of its proceedings, or is suggested by an *amicus curiæ.*

In this case, it seems that Hack, one of the defendants, has not, at any time, been a citizen of or resident in this State; nor is it pretended that he has any estate within the same, subject to a distringas. He is not therefore ordinarily subject to the jurisdiction of its courts. If however he be a plaintiff at law here, against the plaintiff in equity, it may be that he is so far amenable to the equitable jurisdiction of this Court, as that a bill of injunction may be entertained against him, and that serving his attorney at law with a subpœna would be a good substituted service to subject him to the jurisdiction of this Court; so far at least as to authorise it, a proper case being made out, to grant an injunction against proceeding in the action at law. But independent of such an object no bill could be sustained. There would be no mode of enforcing any decree against him, as an attachment would not reach him, and as no distringas could reach his estate. 1 Atkyns, 19.

Whether this Court, then, has jurisdiction in the present case must depend on the remedy, which the plaintiff in equity has at law. At present no judgment has been rendered against him. Although a default has been entered by his consent. The damages have not been assessed in the case. The default may be removed, and the action may be reinstated for trial; provided the default has been entered upon consent through fraud or covin, in any wise practised upon the defendant therein; or even if it has been consented to and entered by mistake,

without fault on his part. And it would seem, that, whatever would be adapted to induce the court to grant an injunction, would be equally efficacious, by way of inducing the court to afford him an opportunity to avail himself of his defence at law.

This seems to be an appeal, by way of a bill in equity, from the exercise of the discretion of this Court, sitting as a court of law, to its discretion sitting as a court of equity. In the former case, it has all the powers of a court of equity, and in the latter its powers are merely co-extensive.

The plaintiff in equity complains that he was unable to obtain a continuance, in the action at law, to enable him to prepare for trial. This was a question, addressed to this court at law, in regard to which it was bound to exercise a sound discretion; and we must presume that it did so. Sitting as a court of equity, then, it affords no ground for issuing an injunction. On the whole, it does not appear but that the plaintiff in equity has had, or may have, a plain and adequate remedy at law; and accordingly the decree is, that the bill, as to the said Hack, be dismissed.

JAMES MAKIN *versus* THE INSTITUTION FOR SAVINGS.

Money deposited with a Saving institution, to be repaid at certain times prescribed by the institution, may on demand in pursuance with the by-laws, be sued for in assumpsit — and it affords no defence that the institution, having in accordance with its by-laws invested its funds in stocks which have depreciated, is unable to repay the whole amount received.

Whether a Court of Equity on a bill brought by the institution against the several depositors, would not apportion the loss among them in proportion to their deposits — *quære.*

EXCEPTIONS from the District Court, WHITMAN J. presiding.

This was an action of assumpsit on an account annexed, with the usual money counts. The writ was dated July 26, 1839.

The plaintiff offered the act of incorporation of the defendants, passed June 11, 1819, by which they were made a body corporate with power to sue and be sued, make by-laws, &c. — likewise the by-laws of the institution adopted agreeably to the act of incorporation; also the deposit or memorandum books in which were duly entered the various sums of money deposited by him or for his use at different times, for the recovery of which this action was brought, and by which, it appeared, that the sums so deposited were to be repaid upon demand made according to the by-laws.

By the by-laws of the institution, the money received was to be invested in stocks, or in loans well secured.

The plaintiff then offered to prove that on the 17th day of June, 1839, he notified Charles E. Barrett, Treasurer of said institution, that he intended to call for and draw out the money by him deposited on the third Wednesday of July then next following — that on the 17th day of July, 1839, being the third Wednesday of said month, he presented said memorandum or deposite book to the Treasurer, at the office of the institution, and demanded the money due thereon, which the treasurer refused to pay. The demand was in accordance with the by-laws of the institution.

Upon this evidence and statement of the plaintiff's claim Whitman J. who presided at the trial, directed a nonsuit, to which opinion and direction exceptions were filed.

Codman & Fox, in support of the exceptions, contended, that by making the deposit the relation of debtor and creditor was created — and that the rights of the depositor did not depend upon the successful investment of the money loaned to the institution — and that whether or not the trustees had faithfully executed their trust, was not to be considered in this suit. By the terms of the deposit, the plaintiff had a right to withdraw by giving notice — and having done that, this action will lie. *Moses* v. *Mc Farlane*, 2 Burr. 1012. This is his only remedy. *Ashley* v. *Arms*, 4 Pick. 93; *Wright* v. *Butler*, 3 Penn. 398. No equity powers existed at the time of the in-

corporation of this institution — this was then the remedy and is now. *Given* v. *Simpson*, 5 Greenl. 306.

Longfellow & Daveis, for the defendants, argued that the corporators are only trustees. The relation of trustee and *cestui que trust* exists between the parties. By the by-laws of the institution the money was to be invested in stocks. The trustees did so invest, and it was their duty so to do. The stocks belonged to the *cestui que trust*, not to the trustee — and if, by depreciation or otherwise, a loss had been made, that loss must be borne equally by those interested. If this action were to be sustained, the plaintiff will receive full payment — while those who have delayed making their claim, will receive nothing.

The proper remedy is in a Court of Equity, where alone the several rights of all will be protected. The court has jurisdiction by St. 1830, ch. 462; 1 Story on Eq. 534; Collier on Partnership, 24, 143, 626.

The opinion of the Court was delivered by

Shepley J. — This corporation was designed to afford assistance to those willing to preserve and invest small gains until needed, or until their accumulation would authorize a more permanent investment. Its purpose was a charitable one. It did not propose to enrich itself by any favorable result of its operations. In the administration of this charity it undertook to invest the money deposited, in public or private stocks, or to loan it on a pledge of them in preference to other loans. The case finds, that it was so invested. It is said, that serious losses have happened by a fall in the price of the stocks purchased, so that the corporation has become unable to pay the several depositors the money received of them. It is insisted, that the corporation has discharged its duty faithfully; has invested the money in the manner it engaged to do; that a depositor cannot therefore maintain an action at law to recover his money; that he must take his share of the stocks, or resort to equity for relief. The institution is regarded in the argument as sustaining the relation of a trustee to the depositor

and it is urged, that it should be dealt with as such. This argument overlooks the consideration, that the corporation not only undertook to receive and to invest the money in stocks, but also to repay it at certain times prescribed by itself. It assumed, that it would have the ability to do this; expecting, doubtless, that the losses would be made up from the excess of interest beyond that, which it promised absolutely to pay. In this it may have been disappointed; and may find itself, like individuals, assuming responsibilities from a confidence reposed in the value of stocks or other property, unable to perform what it has promised. Its erroneous judgment of what it would accomplish for the benefit of the depositors, and the unexpected losses suffered, cannot in law excuse it from the performance of promises made to them. It assumed other and greater liabilities than those properly appertaining to a trustee. A trustee undertakes to act with faithfulness and prudence in preserving and investing property, and to deliver it over, or the proceeds of it, as required. He does not assume to bear the risk of losses. This corporation did, in effect, assume the risk of loss. For it undertook at all events to pay a stipulated interest, and to repay the principal. It may be very true, that it would be more equitable to apportion the losses among all the depositors, instead of allowing one to obtain his money without loss, and thereby subject another to an additional or a total loss. Whether such a result could or not be avoided by some proceeding on the part of the corporation, is not now presented for consideration.

Our law allows the vigilant creditor to interpose by attachment, and to obtain, if he can, his whole debt; leaving, it may be, those less vigilant or fortunate, to an entire loss. The case as presented does not exhibit any sufficient ground of defence.

Exceptions sustained, and new trial granted.

SOLOMON WOLCOTT, Treasurer, *versus* NEHEMIAH STROUT, JR.

Where the agent of the town, in May, 1835, without authority, agreed to give A. B., C. D., and E. F., a good and sufficient deed of a school lot, "providing the town get liberty from the legislature to sell the same," if not, to give back certain notes given by the consideration for said land, or to pay four hundred dollars as damage for non-performance — and the town without taking any measures to procure authority from the legislature to sell — in Aug. 1839, voted that the doings of their agent in relation to the school lot, with the defendant, be ratified and confirmed, so far as the said doings relate to taking and continuing possession by the purchaser and the giving of the note to the Treasurer and no further — and that the agent give a good and sufficient deed pursuant to the contract made in May, 1835, — and said agent did tender a deed, which was refused — it was held; —

That the agent having no authority to make the contract, the purchaser could neither compel the town to perform it or pay damages for non-performance; —

That the votes of the town were no sufficient ratification of the contract of the agent; —

That if the town would ratify the contract — it was their duty within a reasonable time to obtain authority from the legislature to sell; —

That having neither confirmed the contract nor obtained such authority, the note was without consideration and void.

ASSUMPSIT on a note of hand signed by the defendant for $200, dated May 28, 1835, and payable in one, two, and three years, to Daniel Herring, Treasurer of Poland, or his successor — with interest annually.

The facts in the case are fully stated in the opinion of the Court.

The cause was argued in writing, by *Dunn*, for the plaintiff, and by *Woodman*, for the defendant.

For the plaintiff, it was insisted that the lot belonged to the town of Poland — and that the contract made had been performed on their part and was binding on the defendant — and that the promises in the note and contract are mutual and *independent* — and that therefore the plaintiff was entitled to recover. *Saco Man. Co.* v. *Whitney*, 7 Greenl. 256; *Brinley* v. *Tibbetts*, 7 Greenl. 70; *How* v. *Mitchel & als.*

For the defendant, it was contended — that no deed was to be given by the town, unless liberty to sell was obtained from

the legislature, and that that was a condition precedent. *Brinley* v. *Tibbets*, 7 Greenl. 72; *Attwood* v. *Clark*, 2 Greenl. 249. That the condition was to be performed in a reasonable time. *Eveleth* v. *Scribner*, 3 Fairf. 26. That a reasonable time had elapsed and the authority had not been procured. *Kingsley* v. *Wallis*, 14 Maine R. 57; *Howe* v. *Huntington*, 15 Maine R. 350. When a promise is made by one party in consideration of some act to be done, which is the consideration of the promise, and the thing stipulated to be done is not done, the promise founded on such consideration, may be avoided. *Griggs* v. *Austin*, 3 Pick. 20; *Savage*, v. *Whitaker*, 15 Maine R. 24; *Rounds* v. *Baxter*, 4 Greenl. 458; *Couch* v. *Ingersol*, 2 Pick. 301; *Willington* v. *West Boylston*, 4 *Pick.* 101; *Hunt* v. *Livermore*, 5 Pick. 395. The town of Poland was to procure authority. The deed tendered, without procuring such authority, was void. Spec. Laws, 478, § 2. There has been an entire failure of consideration. *Rice* v. *Goddard*, 14 Pick. 295; *Dickinson* v. *Hall*, 14 Pick. 217; *Winter* v. *Livingston*, 13 Johns. 54; *Phelps* v. *Decker*, 10 Mass. R. 279. Had the defendant paid any money towards this contract, it might have been recovered back. *Junkins* v. *Simpson*, 14 Maine R. 364; *Shearer* v. *Fowler*, 7 Mass. R. 31; *Peters* v. *Ballister*, 3 Pick. 495; *Spring* v. *Coffin*, 10 Mass. R. 31; *Davis* v. *Marston*, 5 Mass. R. 199.

Dunn did not bind himself, and the contract not binding him, furnished no consideration for the note. The agent is not bound unless he use apt words for that purpose. *Stetson* v. *Patten*, 2 Greenl. 358; *Harper* v. *Little*, 2 Greenl. 14. The principal was bound, if the agent had authority; if not, the agent is liable in an action of the case. *Long* v. *Colburn*, 11 Mass. R. 99; *Emerson* v. *Providence Hat Man. Co.* 12 Mass. R. 237. But such liability affords no consideration for the note.

The opinion of the Court was delivered by

WHITMAN C. J. — By the statement of facts, agreed upon between the parties in this case, it appears that the suit is

upon a note of hand, bearing date May 28, 1835, given by the defendant to a former treasurer of the town of Poland, promising to pay him or his successor in office the sum of two hundred dollars, in one, two, and three years from its date, with interest annually. At the time this note was given it appears, that a contract was entered into in the following terms, viz. "I James Dunn, as agent for the town of Poland, agree to give Nehemiah Strout, jr. Joseph Strout and Oliver Marble a good and sufficient deed of a school lot of land, presumed to be numbered 116, lying near William Dunn's plains-field, and the lot the said Dunn and the said Joseph Strout have recently cleared on, providing the said town get liberty from the Legislature to sell the same, and, if not, to give back certain notes given by them to them again, or pay them four hundred dollars as damage for non-performance. May 28, 1835, James Dunn, agent for Poland."

From the statement of facts we understand, that the above note was given in part consideration for the above contract. All the authority, which the said Dunn had for entering into the contract, was derived from a vote passed at the annual meeting of the inhabitants of Poland in 1835, which is in the words following; "Voted to choose an agent to sell the school lots in town — chose James Dunn the above agent." In the warrant calling the meeting, there were the usual articles for the choice of town officers; but no article alluding to the school lands or the sale thereof. No further doings took place by the inhabitants of Poland till April, 1839, after the commencement of this suit, in reference to the execution of the contract, when a meeting was held in pursuance of articles on the subject, at which it was voted, "that James Dunn's doings with Nehemiah Strout, Jr., about the school lot 116, in May, 1835, be hereby ratified and confirmed, so far as the said doings relate to the taking and continuing possession, by the said Strout, and the giving of the note to the treasurer of the town, and no further." At an adjournment of the same meeting a further vote was passed, in the following words, "to choose an agent to give and execute a good and sufficient warrantee

deed of the school lot No. 116, to Nehemiah Strout, jr. Joseph Strout and Oliver Marble, in pursuance of the agreement made with them in May, 1835, by James Dunn, Esq. — chose Tillson Waterman the said agent." It is agreed that no measures had ever been taken to procure the authority of the Legislature for the sale of said lot.

It appears that this, and one other lot of land, were reserved by the proprietors of Bakerstown, so called, for the use of schools; and that Bakerstown was incorporated in 1795, by the name of Poland, including what was afterwards incorporated by the name of Minot; and that the lot in question lies within the present limits of Poland, which town has had the superintendence of it ever since the incorporation took place. Soon after the date of said note and agreement, it is agreed, that the defendant took possession of the lot, and exercised acts of ownership thereon, by "making openings, cutting, clearing and taking the crops therefrom," for the three succeeding seasons. It is agreed, that, after the commencement of this action, a deed was prepared by Tillson Waterman, professedly in pursuance of the last named vote, in which he, as agent, under his hand and seal, purports to convey the said lot to said Nehemiah, Joseph and Oliver; and which he tendered to them; and which they refused to receive.

Upon this state of the facts in this case, it is agreed, that such judgment, on default or nonsuit, shall be entered as may be in conformity to law. The defendant contends, that the note was given either without consideration, or for a consideration which has wholly failed. At the time the contract was signed by Dunn it is very clear that he had not sufficient authority for the purpose. There being no article in the warrant concerning school lands, any vote passed concerning them must be regarded as wholly inoperative. The individuals contracted with by Dunn, therefore, could never have compelled the inhabitants of Poland to comply with the terms of the contract, or have recovered damages of them for the breach of it. And the inhabitants, to this day, have studiously refused, as may be seen in their votes of 1839, to ratify and confirm the

contract according to its terms. They have never obtained or attempted to obtain from the Legislature, authority to sell the lot, although it would seem, that a reasonable time had elapsed therefor, long before the institution of this suit. That it was a part of the agreement, as understood by the parties, that this should be done is undeniable. The defendant, and those associated with him, therefore, could not be expected to accept a deed of the lot till this prerequisite had been complied with.

The plaintiff, in behalf of the inhabitants of Poland, contends that they have a good right to convey the lot in fee simple, without any authority from the Legislature for the purpose. How this may be, it is not necessary for us to decide. We know, however, that it has been usual, and indeed we know of no exception to the contrary, where lands have been similarly situated, for towns to obtain legislative enactments to authorize the sale of such lands, and to cause the proceeds to be secured according to the terms of the reservation by the original proprietors. This consideration, doubtless, induced the defendant and those associated with him, to entertain a doubt, to say the least of it, as to the capacity of the inhabitants of Poland to make a good title to the purchasers without such legislative aid. At any rate, it was a part of the contract, as they understood it, and as is clearly imported by its terms, that such aid should be obtained. That not having been done, and James Dunn not having had any authority to make such a contract, and the inhabitants of Poland having neglected or refused to adopt or ratify it according to its terms, it would be unreasonable that they should be allowed, now, to avail themselves of the consideration stipulated to be paid for it. The note therefore may be considered as having been given without consideration, and a nonsuit must be entered.

GEORGE HIGHT *versus* WILLIAM D. RIPLEY *& al.*

The statute of frauds does not apply to verbal contracts for the manufacture and delivery of articles.

If the article exist at the time in the condition in which it is to be delivered, it should be regarded as a contract of sale — but if labor and skill are to be applied to existing materials — it is a contract for the manufacture of those articles to which such labor and skill are to be applied — and such contract is not within the statute of frauds.

A contract on the part of the defendants "to furnish as soon as practicable" 1000 or 1200lbs. of malleable hoe shanks, agreeable to patterns left with them — and to furnish a larger amount if required at a diminished price, must be considered as a contract for the manufacture of the articles referred to.

EXCEPTIONS from the District Court, Western District.

This was an action on the case for the recovery of damages for the non-performance of a contract made between the parties, for the delivery of a stipulated quantity of hoe shanks.

To prove the contract, the plaintiff introduced the following memorandum, dated Oct. 31, 1838: —

"This day contracted with Messrs. Ripley & Spaulding of Norwich, Conn., to furnish me as soon as practicable, from 1000 to 1200lbs. malleable hoe shanks, agreeable to patterns left with them on terms as follows:" There was a further provision, that "if they should immediately receive orders for a larger amount, say 2000lbs. more than heretofore stated, that the whole amount furnished should be charged" at a diminished price. Then follows the place of delivery, price, and time, and mode of payment.

This paper was signed by E. Hayes, as agent for the plaintiff, but the name of the defendants was not affixed thereto.

The plaintiff then read a letter from the defendants to him, dated Dec. 13, 1838, in which they regret that the plaintiff's order was not then ready, and assign as a reason for their delay in executing it, the difficulty they met with in making the pattern, and announce that they have succeeded in overcoming that difficulty, and hope to forward in compliance with his order by the first or second week of January then next; likewise a bill

of an amount of malleable hoe shanks, dated Jan. 10, 1839, for the amount of $164,33 which they, by letter of that date, advised the plaintiffs they have forwarded and for a portion of which they had drawn on him, payable at the Suffolk Bank, "according to our contract" — and requesting the balance to be paid in hoes as soon as convenient.

The plaintiff likewise offered a draft drawn by the defendants on him dated Jan. 17, 1839, for $100 and a letter of that date in which they advise him of the shipment of hoe shanks and request the acceptance of their draft. The plaintiff refused to accept this draft or to receive the hoe shanks — or to pay any thing on account of them, because they were not made according to the contract.

Upon this evidence Whitman J. before whom the cause was tried, ordered a nonsuit — to which ruling the plaintiff excepted.

J. Adams, for the plaintiff. The statute of frauds relates only to contracts for existing articles — not to contracts for the manufacture of goods. 1 Dane's Abr. 652; 1 Dane, 238. A contract for the manufacture of goods is not within this statute. 2 Kent Com. 505; *Mixer* v. *Howarth*, 21 Pick. 205; *Mucklow* v. *Mangles*, 1 Taunt. R. 318. If the contract were required to be in writing, the letters, draft, and bill of parcels, all signed by the defendants, are fully sufficient to bring the case within the statute. *Barstow* v. *Gray*, 3 Greenl. 409; 1 Dane, 237. Letters are a sufficient memorandum to bring a case within this statute, 1 Dane, 240 — 5; *Penniman* v. *Hartshorn*, 13 Mass. R. 87. 1 Com. on Con. 93, 112, 413; *Knight* v. *Crockford*, 1 Esp. R. 189.

W. P. Fessenden, for the defendants. The contract is signed only by the plaintiff. The letters of the defendants show no contract whatever. The plaintiff in his declaration shows a contract binding himself alone. St. 1821, c. 53, § 3. Hight refused to accept the hoe shanks sent, and is not therefore within the exception in § 3, "when the purchaser shall accept part of the goods sold," &c. The cases cited in support of the plaintiff's claim are where the workman sues for his labor. Here

the claim is reversed. The purchaser sues the laborer who has signed no contract. *Cabot* v. *Haskins*, 3 Pick. 95.

The opinion of the Court was delivered by

SHEPLEY J. — It may be considered as now settled, that the statute of frauds embraces executory as well as executed contracts for the sale of goods. But it does not prevent persons from contracting verbally for the manufacture and delivery of articles. The only difficulty now remaining is, to decide whether the contract be one for the sale, or for the manufacture and delivery of the article. It may provide for the application of labor to materials already existing partially or wholly in the form designed, and that the article improved by the labor shall be transferred from one party to the other. In such cases there may be difficulty in ascertaining the intentions; and the distinction may be nice, whether it be a contract for sale or for manufacture. The decision in the case of *Towers* v. *Osborne*, 2 Stra. 506, is esteemed to have been correct, while the reasons for it are rejected as erroneous. The chariot bespoken does not appear to have existed at the time, but to have been manufactured to order. In *Garbutt* v. *Watson*, 5 B. & A. 613; the contract was "for the sale of 100 sacks of flour at 50*s*. per sack, to be got ready by the plaintiff to ship to the defendant's order, free on board, at Hull, within three weeks." There was an attempt to exclude it from the statute because the plaintiffs were millers and had not the flour then ground and prepared for delivery. But the contract did not provide, that they should manufacture the flour, they might have purchased it from others, and have fulfilled all its terms. It was decided to be a contract for sale of the flour and within the statute. If the contract be one of sale, it cannot be material, whether the article be then in the possession of the seller, or whether he afterward procure or make it. A contract for the manufacture of an article, differs from a contract of sale in this; the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made

for him. It is the peculiar skill and labor of the other party combined with the materials for which he contracted, and to which he is entitled. Hence it has been said, that if the article exist at the time in the condition in which it is to be delivered, it should be regarded as a contract for sale. In *Crookshank* v. *Bussell*, 18 Johns. 58, the contract was, that the defendant should make the wood work of a wagon for the plaintiff by a certain time; and it was decided not to be a contract for sale. In the case of *Mixer* v. *Howarth*, 21 Pick. 205, the contract was, that the plaintiff should finish for the defendant a buggy, then partly made; and it was decided not to be a contract for sale. The contract in this case provides, that the defendants should "furnish as soon as practicable 1000 or 1200lbs. of malleable hoe shanks agreeable to patterns left with them." They were to be "delivered at their furnace."

There is a provision, that the defendants may "immediately receive orders for a larger amount, say 2000 lbs. more than heretofore stated," and that "the whole amount is (in such case) to be charged at" a diminished price. Taking into consideration all the provisions of the contract, there can be little doubt, that it was the intention of the parties, that the defendants should manufacture the shanks at their furnace agreeably to certain patterns, which had been left with them. There is no evidence in the case tending to prove, that the articles were then existing in the form of the pattern. It may be fairly inferred, that they were not, but were to be made "as soon as practicable." The testimony presented does not then prove a contract for the sale of goods, but rather one for the manufacture of certain articles of a prescribed pattern by order of the plaintiff.

Nonsuit set aside and new trial granted.

MARIA L. HAMLIN *versus* JOSEPH G. HAMLIN.

Where the tenant, having contracted to build a block of houses, for which he was to receive a farm in payment, agreed with the husband of the demandant, that he should build one of the houses for a specified price, and the value of his interest should be applied to pay for a part of those lands to be conveyed by the tenant to him; and said farm having been conveyed to the tenant, the tenant, in fulfilment of his agreement, designated a portion of the farm by metes and bounds for the demandant's husband, into the possession of which he entered, and upon which he built a house, having paid for such portion in full, and continued to reside there a few months till his death,—*it was held*,— there being no written contract for a conveyance, that he had no seizin in the farm to entitle his widow to dower.

The widow of the *cestui que trust*, is not dowable of an estate in which the husband had but an equitable title.

No estoppel in relation to real estate is created by verbal contracts or admissions.

THIS was an action of dower. The marriage of the demandant with Eli Hamlin, and his death, were admitted. It was proved that dower was duly demanded.

To prove the seizin of the husband in the estate in which dower was demanded, the demandant called Elisha Hight, who testified, that Eli Hamlin, for nine or ten months before his death, occupied a part of the estate formerly owned by Asa Clapp, in Scarborough, which had been set off to him by parol partition, as his share, and in which dower was claimed — that the tenant occupied a portion of the same farm, and Nathaniel Hamlin another portion — that Eli built a house on the part he occupied, that he built fences about the house, and on the line between him and Nathaniel, and that he occupied that portion exclusively — and that he heard the tenant say that Eli owned the third of the farm he occupied clear, and he pointed out the bounds of the part by him occupied — that subsequently he said he had offered the widow the house she occupied in Portland, and $200, for her share in the farm — that the tenant said that he would give Maria a deed, but it would not be safe for her, as she owed Mitchell, and might lose it — he said the farm was paid for, and that he was ready to give a deed at any time, but it was not safe to put the deed on record.

William Ross testified that he was present and witnessed a bargain between the demandant, the tenant, and Nathaniel Hamlin, by which they were to give the demandant the house she occupied in Portland, and $200 for the farm in Scarborough — and that at this time, the tenant said that Eli owned the farm where he lived, and that he had not a deed of it because he owed Mr. Mitchell.

Tristram Mitchell testified, that in the fall of 1839, he went with Jacob Mills, the administrator of Eli's estate, to see the farm — that the tenant shew him the bounds of it, and it was proposed to sell a part — that Mills asked his consent, as a principal creditor — that the tenant shew the bounds and lines of the farm — that the tenant knew the object he had in view in examining the farm — and proposed his purchasing the farm, to which he replied that he was not able. He further testified, that in another conversation, in March, 1840, the tenant said the farm was not all paid for — that he and Eli built together two houses on State-street, which were exchanged for the farm in Scarborough, and the difference paid in money.

Jacob Mills testified, that the tenant said Eli was to build one of the two houses on State-street, to be valued at $2500, and that whatever he did on it was to be charged him — and that what Eli did on the house was to be in part pay of the farm — that there was a balance on the books of Eli against him, on account of building the house, to the amount of $1139, and that no charge appeared on the books of Eli relating to the farm.

It further appeared, that Mr. Clapp gave the farm in Scarborough and six hundred dollars for the two houses on State-street.

There were other witnesses called, but their testimony did not change at all the above facts.

Upon this testimony, SHEPLEY J., who presided, ordered a nonsuit, which is to be taken off and a new trial granted, if that opinion was erroneous.

F. O. J. Smith, for the demandant. It is sufficient for the wife, to entitle her to dower, to produce such evidence as will

raise a presumption of the seizin of the husband. *Griggs* v. *Smith*, 7 Hals. 22. She is not bound to produce the title deeds of her husband. *Bancroft* v. *White*, 1 Caines, 190; *Jackson* v. *Waltermire*, 5 Cow. 299; ib. 7 Cow. 353; *Knight* v. *Mains*, 3 Fairf. 42. It is sufficient for her to show her husband to have been in possession during the coverture, and then it is incumbent on the tenant to show a paramount title. Dower follows such a seizin. 2 Bl. Com. 134. The evidence in the case, that the husband was seized, claiming and exercising ownership, having paid for the land, and that the tenant recognized his rights, was sufficient to authorize the jury to pass upon the fact of his seizin. *Hall* v. *Leonard*, 1 Pick. 27.

The common law regards the widow's dower as a right to be favored above that of all claimants, and even of *bona fide* creditors. *Meigs* v. *Dimmock*, 6 Conn. 462; *Griggs* v. *Smith*, 7 Hals. 22; *Shoemaker* v. *Walker*, 2 S. & R. 554; *Combs* v. *Young*, 4 Yerg. 218; *Ramsey* v. *Dozier*, 1 S. Car. R. 112.

The tenant proved no title in himself. The demandant proved that her husband had paid for the farm, and that the tenant had acknowledged his ownership. Parol evidence is admissible to show a party's interest in real estate. 3 Dane's Abr. 365; *Foote* v. *Colvin*, 3 Johns. 216; *Jackson* v. *Matsdorf*, 11 Johns. 96. The tenant is estopped by his admissions and by purchasing the demandant's interest in the farm.

The jury might have found from the evidence, the farm possessed by the husband of the demandant and by the tenant, had been purchased jointly by them, and the title taken by the tenant — in which case, she would have been entitled to dower. *Dolf* v. *Bassett*, 15 Johns. 21. Partnership purchases, in the name of one, confer a right of dower. *Smith* v. *Smith*, 5 Ves. 189.

The widow of an alien is entitled to dower against one claiming through her husband, though at the time he took the conveyance he was not entitled to hold real estate. *Davis* v. *Darrow*, 12 Wend. 65.

Howard & Osgood, for the tenant. The demandant proves no seizin in the husband. Dower relates only to an estate in

fee. St. c. 40, § 1. There must be a seizin in deed. 1 Hilliard's Abr. 24. Tenant for years is not seized in fee. 1 Hill. Abr. 120; Stearns on Real Actions, 279. There must be a seizin of such an estate of inheritance as the wife's issue might inherit. Park on Dower, 47, 79; 4 Kent's Com. 48.

The opinion of the Court was delivered by

SHEPLEY J. — The demandant claims dower as the widow of Eli Hamlin deceased, and her rights are to be considered in the most favorable light in which they could be regarded by a jury. The declaration claims the dower in lands conveyed by Asa Clapp to the tenant; and the demand of dower describes the land as thus conveyed. The testimony was received from witnesses introduced by the demandant. Elisha Hight states that the tenant "said he would give Maria a deed, but it would not be safe for her, as she owed Mitchell and might lose it. He said the farm was paid for, and he was ready to give a deed at any time, but it was not safe to put the deed on record." William Ross heard the tenant say "that Eli owned the farm, where he lived, but had no deed of it, because he was owing Mr. Mitchell." From the testimony of Mr. Mitchell, and from that of Jacob Mills, jr. the administrator on the estate of the husband, it appears, that the tenant consented, that the administrator should sell the farm to pay the tenant about four hundred and fifty dollars, which the administrator stated was due. The administrator further states, that the tenant stated to him, that "Eli was to build one of the two houses on State street to be valued at two thousand five hundred dollars; was to do what he could on it, and what he could not do, the defendant was to do and charge Eli for it." And from other testimony it appears, that Mr. Clapp was to convey the lands in Scarborough, of which this farm was a part, and pay six hundred dollars for the two houses on State street. From this and the other testimony the only conclusions, to which a jury could properly come, are, that the tenant bargained with Mr. Clapp to build two houses on State street and to receive payment for them in part by the lands in Scar-

borough; and that he agreed with Eli, that he should build one of the houses to be valued at $2500, and that the value of his interest in that house should be applied to pay for a part of those lands to be conveyed to him by the tenant; that in fulfilment of this agreement a part of the lands had been designated for him; that he had entered into the occupation of that part; had continued to improve it for nine or ten months, and had built a house upon it, having paid for it in full. There is no testimony to prove, that there was any written contract for a conveyance. And a jury would not be authorised to find, that a conveyance had been made, for the testimony rebuts any such presumption, and shews that none had been made. The tenant, had, in conversations with the demandant, admitted her rights, and had, as Ross states, agreed "to give her the house on Gray street and two hundred dollars for her farm in Scarborough." It will be perceived that this agreement must have been made under a misapprehension of their legal rights, as the widow could neither discharge the tenant from any liability to account for the amount received in payment for the farm, nor convey it to him.

The inquiry arises, whether under these circumstances the demandant is entitled to dower in that farm. The legal seizin is according to the title, unless the owner has been disseized. Eli was in possession under a verbal contract to receive a title from the tenant and of course in submission to that title. And a jury would not be authorized to find, that the husband was seized of any legal estate in the premises. And if the tenant should be considered as holding the estate in trust for the benefit of Eli, the demandant would not be entitled to dower. For the widow of the *cestui que trust* is not dowable of an estate in which the husband had an equitable, but not a legal title. *D'Arcy* v. *Blake*, 2 *Sch. & Lef.* 387; *Ray* v. *Pung*, 5 B. & A. 561.

It is contended that the tenant, having admitted the title of the demandant and offered to purchase under it, is estopped to deny it. And it is true, as contended, that the books speak of estoppels by matter *in pais;* the cases put, however, do not

apply to mere declarations touching an estate, but to acts, such as an acceptance of an estate, or of a rent, or a holding under a demise. *Co. Litt.* 252, *a*; *Binney* v. *Chapman*, 5 Pick. 124. The tenant does not hold under any title derived from the husband of the demandant, and is not therefore precluded from denying his seizin. It has been held, "that where an estoppel works on the lands, it runs with the land into whose hands soever the land comes." *Trevinian* v. *Lawrence*, 1 Salk. 276. And if the verbal agreements of a party respecting the title to real estate might operate as an estoppel the effect would be to create an interest in the estate without any written evidence of it contrary to the statute of frauds. In the case of *Whitney* v. *Holmes*, 15 Mass. R. 152, it was decided that a written agreement to settle a disputed line agreeably to a survey to be made, could not affect the title either as a conveyance or by way of estoppel, "for no estate," says the C. J. "can pass according to our statutes but by deed, or it must have amounted to an estoppel, which has not been insisted upon; no man being barred of his right by way of estoppel but by record or deed." The demandant fails in the proof of a seizin in the husband, and the nonsuit is confirmed.

LYDIA ROWE *versus* EPHRAIM JOHNSON *& al.*

Where the demandant in dower deceased during the pendency of her suit, the court refused to permit judgment to be rendered, as of a term anterior to her decease.

Where from the death of the demandant, it is impossible to assign dower, damages cannot be rendered for its detention.

The assignee of a widow's right to dower, cannot be placed in a better situation than his assignor.

An action to recover dower is abated by the death of the demandant.

THIS was an action to recover dower. The facts upon which the decision was made, sufficiently appear in the opinion of the Court.

The cause was submitted without argument, by *S. Longfellow*, for the demandant, and *A. Haines*, for the tenant.

The opinion of the Court was delivered by

WHITMAN C. J. — It is suggested that the plaintiff has deceased; and a motion is made, that judgment should be entered as of a term anterior to her decease. This, we think, cannot be done. This is an action of dower, in which it is claimed that dower should be assigned, and that damages should be recovered for the detention of it. No dower can be now assigned; but it is contended that damages for the detention of it may, still, be recovered by entering judgment *nunc pro tunc.* The recovery of damages in an action of dower, without the recovery of dower itself, it is apprehended, would be an anomaly in legal proceedings, not provided for by our statute. It is, besides, laid down in the books, that the damages, to be awarded in such case, are for a tort; and, that, if the demandant die before they are ascertained, the executor shall not have them. Stearns on Real Actions, 289; Park on Dower, 313.

Although the damages are claimed, in this case, by one who as assignee instituted the suit, in the name of the plaintiff, for his own benefit, yet he cannot be placed in a situation better than would be that of the executor. The action therefore must abate.

SAVAGE MANUFACTURING COMPANY *versus* ALVIN ARMSTRONG.

Where the plaintiffs made a special contract to furnish certain machines according to a model to be furnished by the defendant, but no model was furnished, the plaintiffs are not bound to furnish one, and have no right to proceed to execute the contract without its being furnished.

Where by the terms of the contract the machines were to be delivered at a particular place, the plaintiffs, before they can recover their pay, are bound to prove a delivery at the place agreed upon.

THIS was an action of assumpsit, wherein the plaintiffs declare on a special agreement of the defendant to pay for certain threshing machines manufactured by plaintiffs for him. There

were likewise counts for labor and materials furnished, money paid, and on an account annexed.

The contract declared on was as follows:—

"Memorandum of an agreement entered into this 4th day of September, 1833, between Thomas Lansdale, of the Savage Manufacturing Co. on the one part, and Alvin Armstrong of the other part:—

"Witnesseth, that for and in consideration of the sum of one hundred and fifty dollars cash, to be paid on delivery, on the part of the latter, the former hereby agrees to build of good materials and in a workmanlike manner and deliver at the relay house next to the city of Baltimore, on the Baltimore and Ohio Rail Road, ten threshing machines with horse power complete, according to a model or pattern machine to be furnished by said Armstrong, which is called Lane's endless chain horse power and threshing machine — five of the aforesaid threshing machines to be delivered at the aforesaid place on or before the first day of November of this year, and the remainder of the said machines as soon after as may be mutually convenient.

"Alvin Armstrong,

"Thomas Lansdale, Agent."

The evidence in this case was very voluminous, but the material facts are stated in the opinion of the Court.

The jury found a verdict for the defendant, which the plaintiffs moved to set aside as against evidence and against the instructions of the Court.

The cause was submitted without argument by *F. O. J. Smith* and *W. P. Fessenden*, for the plaintiffs, and *Codman & Fox*, for the defendant.

The opinion of the Court was delivered by

WHITMAN C. J. — The plaintiffs move for a new trial, alleging, that the verdict in this case is against evidence, and against the instructions and direction of the Court in matter of law. The declaration in the writ is on a special agreement, and also for goods sold and delivered, labor done and performed, and money laid out, &c. The special agreement is in

writing. The defendant agreed to take and pay for certain machines to be made according to a model to be by him furnished. The plaintiffs agreed to have them done and ready to be delivered at a certain place, on a certain day. The defendant never furnished any model. The plaintiffs, some months after the machines were to have been delivered, purchased a model, such as they supposed the defendant should have furnished, and proceeded to make the machines, and had them prepared to be put together. This they accomplished in the course of six or eight months after the time when, according to the contract, they were to have been delivered; but never tendered them at the place at which they where, according to the contract, to have been delivered. They contend now, that, inasmuch as the defendant did not furnish a model, they had a right to procure one, and charge him with the cost of it; and to recover of him the price agreed upon for the machines, under some of the counts contained in their declaration. But it seems to us that the verdict is right, and ought not to be disturbed. If the defendant did not furnish a model the plaintiffs had no right to proceed without it. And if the defendant had furnished his model, the plaintiffs could not recover for the price of the machines without delivering them at the place agreed upon, unless the defendant had consented to receive them elswhere, which it is not pretended that he ever did. We cannot therefore consider the verdict as against evidence or the weight of evidence.

But the plaintiffs aver that the verdict was against the instruction and direction of the court in matter of law. The case does not exhibit any instruction or direction of the Court to the jury. We therefore cannot know what the instruction and direction were. If they were, that, upon the foregoing state of the case, the plaintiffs were entitled to recover, we cannot but regard them as having been erroneously given.

The motion for a new trial is therefore overruled, and judgment must be entered on the verdict.

WILLIAM MARR *versus* STEPHEN BOOTHBY, *& als.*

An administrator's deed made after more than one year had elapsed since the license to sell was granted by the Judge of Probate, is void.

A deed of release and quit-claim without proof of actual or constructive possession of the premises by the grantor, or of any entry by the grantee, is not sufficient proof of title to enable the grantee to maintain trespass *quare clausum.*

THIS was an action of trespass *quare clausum.* The general issue was pleaded. The trespass alleged was for breaking and entering lot 69, third division, in Standish, and for cutting down and carrying away a number of pine trees.

The plaintiff offered in evidence a deed of said lot from Mehitable Pierce, administratrix of William Pierce, to himself. The deed purported on its face to have been given by said administratrix after more than one year had elapsed from the date of her license to sell real estate. He also read a deed of quit-claim of said lot to himself, from John Sands, dated July 5, 1832 — also a collector's deed from the collector of Standish, to said Sands, on which was the following indorsement: —

"Standish, March 2, 1833. Received of Stephen C. Watson, for William Pierce, the amount which I have paid for the within deed, and interest. I therefore give up all the claims which I have on the within named lot. JOHN SANDS."

Upon this evidence, SHEPLEY J. directed a nonsuit, which is to be confirmed or set aside, and a new trial granted, as the Court shall determine, upon consideration of the case.

Howard and *Osgood*, for the plaintiff.

Deblois and *Swasey*, cited *Willard* v. *Nason*, 5 Mass. R. 240; *Wellman* v. *Lawrence*, 15 Mass. R. 326; *Bott* v. *Burnell*, 9 Mass. R. 96; *Macy* v. *Raymond*, 9 Pick. 285.

The opinion of the Court was delivered by

WHITMAN C. J. — This being an action of trespass *quare clausum*, it was incumbent on the plaintiff to give some evidence of title. For this purpose he produced a deed of the

premises, purporting to have been made by an administratrix, pursuant to a license for that purpose. But at the time of making it more than one year had elapsed since the license was granted. The deed therefore was inoperative. *Macy* v. *Raymond*, 9 Pick. 285.

The plaintiff then produced a deed of release and quit-claim from a person, who seems to have claimed to have purchased the premises, or *locus in quo*, at a sale by a collector of taxes. Under such a deed the plaintiff should have given evidence of his possession at the time of the execution of it, either actual or constructive ; or that he had since entered and become possessed of the premises; neither of which appearing in the case a nonsuit was properly ordered, and must be confirmed, and judgment be entered accordingly.

JEREMIAH WINSLOW *versus* DANIEL MOSHER.

St. 1821, c. 85, requiring depositions taken *in perpetuam* to be recorded in the registry of deeds, applies to depositions taken by a Notary Public by virtue of st. 1821, c. 101, § 4, and unless so recorded, they are not admissible in evidence on the trial of civil causes.

It is not enough that they are recorded upon the books of the Notary Public.

ASSUMPSIT for use and occupation.

At the trial before EMERY J. the defendant offered the deposition of Abraham Anderson, who was proved to be unable to attend court, taken *in perpetuam* at the defendant's request by C. B. Smith, Notary Public. Notice of the taking of said deposition, and that the deposition was to be used in the present suit, was duly served on the counsel for the adverse party. It appeared by the Notary's certificate, that the deposition was duly recorded upon his own records. The deposition had never been recorded in the Registry of Deeds. The counsel for the plaintiff objected to the introduction of the deposition, but it was admitted — and exceptions were filed on that account.

There were exceptions to other rulings of the presiding judge, but as the cause was decided upon the question presented by the preceding facts, they are not reported.

Fox, for the plaintiff. The deposition of Anderson was inadmissible, because not recorded in the Registry of Deeds. St. c. 101, § 4, which authorizes a Notary to take a deposition *in perpetuam*, neither makes it evidence in any suit, nor prescribes what notice should be given, nor the form of the caption. The general law in relation to those depositions, is to be found in st. 1821, c. 85, which requires them to be recorded in the Registry of Deeds. Were that act abolished, there would be no act authorizing their use as evidence. *Goodwin* v. *Mussey*, 4 Greenl. 90. Policy requires them equally to be recorded, whether taken by a Notary, or by two justices.

F. O. J. Smith, for the defendant. At common law *viva voce* testimony only was admissible. *Amory* v. *Fellowes*, 5 Mass. R. 221. The right to take depositions is derived wholly from statute provisions, and if they are not complied with, the deposition cannot be used. *Bradstreet* v. *Baldwin*, 11 Mass. R. 233.

The inquiry then arises, what does the statute require to be done in relation to depositions taken *in perpetuam* by a Notary Public? The act of March, 1821, c. 101, authorizes a Notary Public to take deposition *in perpetuam*. Section 5, of this statute, provides that the Notary shall note and record at length in a book of records to be kept for that purpose, all acts, protests, *depositions*, &c. These requisitions are all complied with in this case.

There is no statute requiring more. St. 1821, c. 85, relates only to depositions taken in perpetual remembrance, &c. by two justices — and those depositions alone are required to be recorded in the registry of deeds. This statute was a substitute for a bill in chancery to perpetuate testimony. *Welles* v. *Fish & al.* 3 Pick. 77. Justices of the peace were by no statute required to extend upon a record kept by them, any depositions which they may take. But Notaries, being required to keep a record of depositions by them taken, there is

no necessity of their being again recorded — nor was such the intention of the legislature in regard to those depositions.

The deposition being properly taken and recorded, the adverse party being duly notified, it was properly admitted by virtue of St. 1823, c. 211.

The opinion of the Court was delivered by

WHITMAN C. J. — This action was tried at the Nov. Term of this Court, 1840. The plaintiff offered in evidence a deposition taken *in perpetuam*, by a notary public, and duly recorded in his office, but not elsewhere. The Court admitted it, though objected to by the defendant, who thereupon tendered a bill of exceptions, on account of this and other supposed errors in the ruling of the Court, which was duly allowed and signed. The question first in order to be decided is — was this deposition admissible? If not, the other exceptions need not be noticed.

The statute concerning notaries public, passed in 1821, authorises them to take depositions *in perpetuam*, and requires them to record all their notarial acts, and depositions, by them taken, in books to be by them kept for the purpose. The statute is silent as to the further recording of depositions so taken, in the registry of deeds, and also as to their being admissible in evidence, when so taken, under any circumstances.

The other enactments, concerning the taking of depositions *in perpetuam*, before other magistrates, required, that they should be recorded in the registry of deeds, within a specified time; upon which they, or copies of them from the registry, under certain circumstances, were to be admissible in evidence, in trials at law. This species of testimony is never so admissible, unless by special enactment for the purpose. There being none such, in reference to depositions taken and recorded as this was, we cannot consider it as having been correctly admitted at the trial.

The exceptions are therefore sustained, and a new trial granted.

ROBERT LEIGHTON *versus* Z. B. STEVENS.

Where property is sold upon condition, to one who is allowed to assume possession, and the apparent ownership, third persons have a right to consider it as his; and it is incumbent on the vendor, who would claim the ownership adversely to the rights of such third persons, to prove that the condition has not been performed.

Possession of property is legal *prima facie* evidence of ownership.

REPLEVIN against the defendant, who justified the taking by virtue of a precept in favor of F. O. J. Smith, against one Joseph A. Lambert. On the trial, before SHEPLEY J. a verdict was rendered in favor of the plaintiff, which the defendant moved to set aside, as against law and against evidence. The facts sufficiently appear in the opinion of the Court.

The case was submitted without argument.

F. O. J. Smith, for the defendant.

Codman & Fox, for the plaintiff.

The opinion of the Court was delivered by

WHITMAN C. J. — The motion in this case is at common law, for a new trial, on the ground that the verdict is against evidence and against law. The action is replevin for a yoke of oxen, with their yoke, ring, and staple. The defendant justifies the taking as an officer, &c. as the property of one Lambert. The plaintiff proved that he bought the oxen of one Allen; and afterwards made a bargain with Lambert to sell them to him; but stipulated that the oxen should remain his property till paid for by Lambert. No evidence was offered of the time when the oxen were to be paid for; nor whether they had been paid for or not; nor was there any evidence of what took place at the delivery of the oxen to Lambert; and the only evidence of any delivery to him was his subsequently being seen to be in possession of the cattle, using them as his own. The verdict was for the plaintiff, as well for the bows, ring and staple, as for the oxen.

The plaintiff offered no evidence whatever of his title to the bows, ring and staple. And we think there should have

been further evidence of his right to claim the cattle. He had suffered them to go out of his possession, into the possession of Lambert, and had allowed Lambert to use them as his own. Under such circumstances the legal *prima facie* presumption is, that Lambert had become the owner of them. This presumption the plaintiff, to entitle him to recover, should have rebutted by proof of an actual ownership, consistent with the apparent ownership of Lambert. With a view to do this he proved a bargain with Lambert as before stated. But gave no evidence whether Lambert had paid for the oxen or not. If property be put into the hands of an individual, who is allowed to use it as his own, and to assume the apparent ownership of it, third persons, and especially creditors, have a right to consider it as his; and, when their interest intervenes, it is incumbent on him, who would claim to be the real owner, adversely to such individual and third persons or creditors, whose rights have come in conflict with his, to give satisfactory proof of his being the real owner; and, in a case like the present, where a sale is set up by the plaintiff as having been made upon condition, to prove that the condition had not been complied with. We think the burden of proof was upon him, in a case circumstanced like the present, to show this. Not having done this, and there being no evidence that the yoke, ring and staple were his property, a new trial must be granted.

STATE *versus* CHIPMAN HODGSKINS.

It is not sufficient evidence of marriage, in a criminal prosecution, to prove that the ceremony was performed — and that cohabitation for a long period followed — without showing that the person by whom it was so performed was clothed with the requisite authority for that purpose.

In criminal prosecutions a marriage in fact, as distinguishable from one inferable from circumstances must be proved.

THIS was an indictment for adultery with one Deborah Hodgskins. To prove the marriage of the defendant, the Attorney General called Priscilla Tripp, who testified that Chip-

man Hodgskins was her brother — that she was present when he was married to Abigail Thurlow at the house of her father, Richard Thurlow. She could not state how long ago they were married, but should think it was about twenty-five years ago. She could not state by whom they were married. Hodgskins continued to live with the aforenamed Abigail, until about eight years ago, and had nine children by her, before they separated.

There was evidence tending to prove the commission of the offence charged.

Upon this evidence, SHEPLEY J. who presided at the trial, instructed the jury, that they had evidence of the reputed marriage of the defendant; a sister of the defendant had testified that about twenty-five years ago she was present at the ceremony of marriage between the defendant and one Abigail Thurlow, with whom the defendant had lived from that time until within about eight years, and had children by her, — who married them the witness did not know. That being the evidence of the marriage, the jury must judge of it — that twenty-five years ago, before the separation of Maine from Massachusetts, ordained ministers of the gospel, and justices of the peace, having been authorized by law to solemnize marriages, they were to judge upon the evidence, whether a person authorized to solemnize marriages, performed the ceremony. If satisfied of that fact, the jury were then to judge from the evidence, whether at any time within six years before the finding of this indictment the defendant had had carnal knowledge of Deborah Hodgskins at any place within the county, &c.

The jury returned a verdict of guilty, and the defendant filed exceptions to the rulings and instructions of the judge.

A. Haines, for the defendant.

Attorney General, contra.

The opinion of the Court was delivered by

WHITMAN C. J. — The indictment against the prisoner contains a charge of the crime of adultery. Two exceptions are taken to the proof in support of it. The first is, that the

evidence of the marriage of Hodgskins was insufficient. A witness testified that she saw the ceremony performed; but cannot tell by whom, and gave no description of the person performing it, whereby his official character could be indicated. This evidence was accompanied by proof of cohabitation, between the parties, immediately following the performance of the ceremony, till they had nine children. Was this sufficient to authorize the finding of the fact of marriage? It is indispensable that this fact should be proved; and the proof of it must be such as the law, in the particular case requires. Different cases, in which the proof of a marriage is made requisite, require different evidence. In settlement cases, and some others, reputation and cohabitation, in some instances, have been deemed sufficient. But in civil actions, for criminal conversation, and an indictment for bigamy, it has been held in England, that a marriage in fact must be proved. 4 Burrow, 2059. In that country the common law courts have not cognizance of the crime of adultery. We have from thence therefore no adjudged cases on this point, in reference to that particular crime. But the crime of bigamy is an offence of the same grade; and the rule as to the proof of marriage must be the same in both. The proof of a marriage in fact is in contra-distinction to proof inferable from circumstances.

This rule, as to proof of marriage in fact, is considered as having been somewhat modified by the decision in a case cited in 1st of East's P. C. 470. That was an indictment for bigamy. In addition to the proof of reputation and cohabitation, till after the birth of a number of children, it was proved, that, in a judicial proceeding in Scotland, the prisoner had signed a a paper, containing a full acknowledgement of his marriage, a copy of which was produced. Upon this evidence the court are stated to have adjudged the proof sufficient; and some of the judges were of opinion, that the confession so made would have been alone sufficient. It is a well settled principle of law that confessions, if made deliberately and understandingly, and against the interest of the party making them, are the best evidence that can be expected. But there are numerous excep-

tions to this rule, arising from policy or other considerations. If there be a subscribing witness to a simple note of hand the confession of the maker, that he signed it cannot be proved till it shall be made apparent that the subscribing witness cannot be produced; and this rule is still more pertinaciously adhered to in reference to instruments of a higher nature.

But the supreme court in this state has so far yielded to the modification of the ancient rule, in conformity to the opinion of some of the judges in the case last cited, as to determine, in cases of adultery, that the confession of the adulterer, deliberately and understandingly made, of his marriage, shall be admissible, and be considered *prima facie* evidence of the fact. 7 Greenl. 57, *Cayford's* case, and 2 Fairf. 391, *Harris'* case. Before arriving at this result chief justice Mellen went into an elaborate course of reasoning to establish the reasonableness of it. Thus far, and no further, have the courts gone in dispensing with direct proof of the fact of marriage in such cases.

The question now is, can we consider the proof of the marriage, in the case at bar, as proof of a marriage in fact; for the case does not contain any evidence of a confession of it. It should be with great caution that innovation should be resorted to in reference to the rules of evidence, as well as in relation to all other rules of law. It is not unfrequently the case, that it would be better to leave, undisturbed, a rule, which has been long in use, so as to become familiarly known, and to which our habits have become adapted, and in some measure fixed, even if, abstractly considered, it should be demonstrable, that, in lieu of it, some other rule would have been preferable.

If, in cases like the present, the rule formerly was, that a marriage in fact should be proved, by which, it is to be understood, that it should be by some person present at the performance of the ceremony, or by the production of the record of the marriage, and the only modification of that rule, as yet recognized, is the admission of proof of the confession of the fact by the prisoner, deliberately and understandingly made, we

must look to the evidence, and see whether it comes fairly within either of those rules.

The proof here is by a person, who was present at the performance of a marriage ceremony, between the prisoner and his supposed wife at her father's house. But the witness cannot tell who performed that ceremony; nor whether it was by a clergyman or magistrate or any other person. The object of requiring the testimony of a person present at the marriage is not merely to prove the performance of the ceremony by some one; but to prove that all the circumstances attending it were such as to constitute it a legal marriage. There should be something disclosed, by which it may satisfactorily appear, that the person performing the ceremony was legally clothed with authority for the purpose. In the case of the indictment against *Norcross*, 9 Mass. R. 492, it was proved, that the ceremony was performed by Doctor Morse, of Charlestown, a person well known as being an ordained clergyman, in that town, and as such having authority to solemnize marriages. No question was made but that he was so authorized. No objection therefore was made to the proof in this particular; but it was insisted, that it should have been by the record of the marriage, but this the court overruled.

In a settlement case in England, *Rex* v. *the Inhabitants of Frampton*, 10 East, 282, the proof of the marriage of the pauper was strenuously contested upon the ground, that it did not appear to have been solemnized by a person having authority for the purpose. There was evidence of his cohabitation with his supposed wife for eleven years, and of the birth of children during that time. This alone seems not to have been regarded, in that case, as sufficient; possibly because there was the want of evidence of reputation in regard to it. However this may be, it seems to have been deemed necessary to produce further evidence of the fact of a marriage. Accordingly a witness was produced, who testified, that the husband of the pauper was a soldier in the British army, at St. Domingo, and that while so there, he saw him married in a chapel there, by a person there officiating as a priest, and in the habiliments

of one; that the ceremony was in French but was interpreted to the parties in English; and appeared to be in conformity to the marriage service in England. Lord Ellenborough, and the other Judges of the King's Bench, in that case, considered, that there was evidence of a marriage by a person so described, that it was reasonable to believe, that he had authority for the purpose, and that the marriage was valid; it having been followed by cohabitation and the birth of children between the parties.

If such proof could be deemed essential in a settlement case, *a fortiori*, something, at least equivalent would seem to be requisite in a criminal prosecution for a heinous offence. In the case at bar the proof is much short of what seems to have been supposed to be necessary in that case. There then is not the slightest indication in the testimony, of any authority for the purpose, on the part of the person, who performs the ceremony. 5 Wendell, 231; *Green & al.* v. *Gridley*, 10 Wend. 254; Greenl. on Evidence, § 83, 92; *Damon's case*, 6 Greenl. 148. A marriage in fact therefore, as contra-distinguished from one inferable from circumstances, is not proved. And there being no evidence of a confession of the fact, by the prisoner, we think the exceptions must be sustained, and a new trial granted. It is unnecessary, therefore, to consider the other exceptions taken by the prisoner.

CHARLES MUSSEY *versus* THOMAS MCLELLAN.

The satisfaction of an execution recovered against one of the indorsers of a promissory note by a levy on the real estate, and by the sale of the equities of redemption of the judgment debtor — when such debtor subsequently to the attachment, but prior to such levy and sale — had conveyed his interest in the estates embraced by such levy and sale, does not furnish the foundation for a suit for contribution against another indorser, who by agreement was bound with him to contribute equally to the payment of the note.

Such satisfaction was from the property of the grantee of the judgment debtor, and cannot be considered as a payment by the debtor.

THIS was an action of assumpsit, which was submitted to the Court for decision on the following facts.

The defendant and the plaintiff were prior and subsequent indorsers on a promissory note, dated Nov. 21, 1836, for $5000, signed by Henry Ilsley and Henry J. Ilsley, and payable to Henry J. Ilsley in one year, and by him indorsed. A demand on the makers was seasonably made, and due notice of such demand and non-payment was given the indorsers.

On the third of Nov. 1836, the plaintiff and defendant mutually agreed to hold themselves accountable to each other on the above note for one half of the same, provided the promissors should neglect to pay the same at its maturity.

The President, Directors & Co. of the Exchange Bank, on the 24th of Nov. 1837, sued out a writ against the plaintiff as indorser of the above note, and procured upon the same an attachment of all his interest in real estate. Upon this suit judgment was rendered against him at the Nov. Term, 1839, of this Court. This judgment was rendered Dec. 30, 1839, and execution issued thereon, and was levied on store No. 9, on Union Street in Portland, and the wharf and flats adjoining, by which the same was satisfied, for the sum of $1470,96. On the 29th of January, 1840, the plaintiff's right to redeem a former levy made by the Bank of Cumberland on his real estate in Federal, Gray, and Fore streets, and several other lots levied upon, was seized on the execution in favor of the Exchange Bank against the plaintiff, and the same was sold on the 29th of the fol-

lowing February to Eben McLellan, a son of the defendant, for the further sum of $1806,62.

It appeared from proof introduced by the defendant that the judgment, *Exchange Bank* v. *Mussey*, was assigned to Eben McLellan, Jan. 20, 1840, pursuant to a vote of the Directors of that institution.

It further appeared, that the plaintiff, by deed duly acknowledged and recorded, dated Oct. 18, 1838, conveyed to Eben McLellan store No. 9, on Union wharf and the flats, and that by deed dated July 22, 1839, he released to John Rand all his right in the three lots on Federal, Gray, and Fore streets, and in the other estates levied upon; that Mr. Rand forbade the sale of those equities upon the execution referred to, and that Eben McLellan was notified by the officer that the Bank of Cumberland would not permit him to redeem the levies, unless he redeemed the whole of the lots levied on at the same time, and that in fact said McLellan paid no money for said equities by him purchased, save the fees due the officer, by whom they were sold.

The attachment in the suit, *Bank of Cumberland* v. *Charles Mussey*, by virtue of which these levies were made, was dated Oct. 31, 1837, and their levy was made on the 22d of July, 1839, on the estates of said Mussey before named.

At a meeting of the directors of the Bank of Cumberland it was voted not to permit a redemption of the property of said Mussey, levied upon, unless the whole was redeemed.

Rand, for the plaintiff. The rights of the parties, as prior and subsequent indorsers, have been varied by contract. The plaintiff, having paid more than half of the note, seeks to recover the balance over such half of the defendant. The return of the officer on the execution, *Exchange Bank v. Mussey*, shows a satisfaction of the execution to the amount of $1470,96 by a levy on the plaintiff's store and wharf, and to the amount of $1806,62 by a sale of his equities of redemption — both sums exceeding half of the execution — and for this excess, this suit is brought. The title acquired by the levy is perfect in the Exchange Bank — and when Eben McLellan purchased the store levied upon, he purchased subject to the contingency of

its being so levied upon. If no title passed by the deed, *Mussey to McLellan*, the plaintiff would be liable on his covenants to McLellan. The liability of the plaintiff to E. McLellan, would make it none the less a payment of so much of this execution by the plaintiff. So much went to the benefit of the defendant. The levy made on the right of redeeming certain lands previously levied upon, was sold, and paid another portion of the debt for which the defendant was liable. The right to redeem all the lots levied upon was seized, but all were not sold. But the defendant is not to gain by that omission. It is immaterial to him, whether Eben McLellan redeems or not. The right to redeem was taken from Mussey or his grantee — and satisfied, when sold, a given portion of the execution. Whether that was a good or bad purchase — whether any redemption followed such purchase — is a matter which in no way concerns the defendant, or lessens his obligation. He has been discharged — the property of the plaintiff has been sold to discharge him from this debt, and he is entitled therefore to remuneration.

Preble, for the defendant. No action can be maintained upon the note, because the plaintiff is neither the owner nor the holder of it. Nor can any action be maintained in consequence of the levy of the store No. 9, on Union wharf. This was conveyed, subsequent to the attachment in the writ in favor of the Exchange Bank, to E. McLellan, and was his at the time of the levy. The execution was satisfied, not by the property of the plaintiff, but by that of McLellan.

In regard to the sale of the equities of redemption, the debt of the Cumberland Bank was satisfied by a levy on several lots of land. After this levy, the plaintiff released to Rand the right to redeem from the levy. This right not being in existence at the time of the commencement of the suit, *Exchange Bank* v. *Mussey*, passed to Rand. If so, then nothing was sold, and the Exchange Bank have a right, upon *scire facias*, to a judgment for the amount of this supposed satisfaction.

If not, yet as the officer selling, sells only the right to re-

deem a portion of the lots levied upon, and as such sale would be ineffectual, the law requiring the right to redeem all the lots to be sold, the satisfaction by virtue of the sale of the right of redeeming certain lots levied upon by the Bank of Cumberland, was purely nominal. This sale interfered with no rights of the plaintiff. Whatever was sold, belonged to Rand.

None of the property of Mussey has been sold or levied upon. The plaintiff has paid nothing on account of the defendant, and without such payment, is not entitled to maintain this suit.

The opinion of the Court was delivered by

TENNEY J. — This action is upon a negotiable promissory note against a prior by a subsequent indorser. The proper demand and notice had been made and given, in order to render the parties to the note liable, according to mercantile usage. The writ contained also the money counts. It may well be doubted, whether the parties stand in such a relation to each other, as to entitle the plaintiff to recover of the defendant on this note as negotiable paper, even if the former were really the holder. By the contract of Nov. 26, 1836, they mutually agreed to hold themselves accountable to each other for the one half of said note, should the promissors neglect to pay the same, when at maturity. But the plaintiff is not the holder of the note; he has not paid and taken it up; it is now the property of the Exchange Bank, or its assignee, and no other party can maintain an action thereon as it stands before us; and the plaintiff relies upon the contract with the defendant, and contends that he is entitled to recover because he has paid more than one half of the note, and for that excess. Has more than half the note been paid? If so, has it been paid by the plaintiff? More than one half of the execution arising from this note, appears by the indorsements thereon to have been paid; this has been done by a set-off of store No. 9, on Union wharf and flats adjoining, and by the sale of the right of redeeming certain parcels of land previously set off upon an execution against the plaintiff in favor of the Cumberland

Bank. After the first levy was made upon the execution recovered upon this note, the Bank assigned to E. McLellan all right, title, claim and demand in and to the balance due on the execution, and the judgment whereon the same issued, and to the original debt on which the same was recovered. This assignment could not change the mutual relation of the parties to this suit, they being strangers to that transaction. It is said by the defendant's counsel, that the last levy and indorsement upon the execution is a nullity, and that the latter, by a proper process, may be cancelled. It may be true, that, as only the right of redeeming a portion of the several parcels of land set off on the execution in favor of the Cumberland Bank was sold, the purchaser had no right to redeem that portion alone, without the consent of the Cumberland Bank, which it seems was denied; and notice was given at the sale to the officer and the purchaser that it would be so denied, and no redemption has taken place. Yet, as the assignee of the judgment made the purchase, when apprised of his situation, and when he could have stopped the proceedings, and caused the indorsement to be made, we do not think we are authorized to say, that the indorsement is no satisfaction of the execution. The Cumberland Bank may yet receive the money for the several parcels of land set off, the right of redeeming which was supposed to be sold on the execution in favor of the Exchange Bank.

But has the plaintiff paid the sums indorsed upon the execution? It is not pretended that he has paid, otherwise than by the levies. Before the interests attached upon the original writ were seized on the execution, the plaintiff had given deeds of the whole to different individuals. He was so possessed, that the estate passed by his conveyances, liable to be taken away or diminished by the inchoate right of the attaching creditors. If their attachments had expired, the interest owned by him would have been perfect in his grantees. As the attachments were succeeded by levies, the rights of redeeming only were available to them. But in no event were the deeds to be treated as void — the levies would not make them so,

although they impair the value. The property of the grantees has been taken, in consequence of the attachments, to discharge a portion of the plaintiff's debt, and a recovery in this action would give him a twofold consideration for his land. If his deeds contained covenants, which fact does not appear, he could not prevail on the ground that he is liable thereon; the grantees do not appear to have been dispossessed, and before more than nominal damages could be recovered by them, they must remove the incumbrances. But such a liability would be insufficient, to entitle the plaintiff to the excess over one half of the execution against him, recovered upon the judgment on the note in question.

The plaintiff must become nonsuit.

Samuel H. Sawyer *versus* Henry Pennell.

A schedule referred to in a mortgage of personal property, as a part of the same, must, equally with the mortgage, be recorded in the town clerk's office, to give effectual notice to the public.

If the mortgage be recorded, and the schedule thus referred to is not, this is not a sufficient compliance with the provisions of st. 1839, c. 390.

Notice to the creditor, prior to the attachment of a mortgage of personal property, supersedes, as to such creditor, the necessity of recording the mortgage.

But such notice, to be effectual, should be a notice of all which the statute requires to be recorded.

Where there was a schedule referred to, and made part of the mortgage, notice to the creditor that the goods were claimed by the mortgagee under the mortgage, they being part of the goods conveyed by such mortgage, is not sufficient, without clear notice of such schedule — and the mortgage and schedule being treated as distinct, notice of the existence of the schedule is not therefore to be inferred.

The object of recording is, that creditors may know the situation and the value of the property pledged, and the sum thereby secured — so that if they should think proper, they might discharge the debt thus secured, and attach the property mortgaged.

If the mortgage and schedule are left with the clerk, while they remain unrecorded, they are sufficient notice to the public — but after the clerk has made his record, that is the only record the law recognizes.

Exceptions from the District Court.

This was an action of trespass *de bonis asportatis*, to recover damages for certain goods taken by the defendant on the 4th of Feb. 1840.

The general issue was pleaded. The defendant likewise filed a brief statement, in which he justified as a deputy sheriff, and alleged, that as such deputy sheriff, he took the goods on a writ sued out by one Daniel Ham, against one Thorndike Sawyer, as the property of said Thorndike.

To prove his property in the goods, the plaintiff read to the jury a mortgage of personal property, conveying the articles in the plaintiff's declaration, dated Aug. 15, 1839, and proved the due execution of the same, and the delivery of the goods by virtue thereof on the 16th of the same August. He also proved that the defendant and said Ham were notified prior to

the taking alleged in the plaintiff's writ, that said goods were claimed by him under the mortgage aforesaid, the same being parcel of the goods conveyed by said mortgage.

The mortgage was of "all the articles, stock, and merchandize, of every nature and description, in the store now occupied by me, the said Thorndike, which are set forth and specified, and particularly enumerated in the schedule hereunto annexed, which said schedule constitutes a part of this mortgage bill of sale," and was given to secure a note of even date with the mortgage, for five hundred and seventy-five dollars, payable in six months from date, with interest.

It appeared, from the records of the town of Gray, where the mortgagee resided, that the schedule annexed to the mortgage, containing the description of the articles, and which was referred to as making part of said mortgage, was not recorded in the town clerk's office of Gray, but only the body of said mortgage. This mortgage was received into the office of the town clerk on the 16th day of August, as appears from the certificate of the clerk on the back of said mortgage.

Upon this evidence, WHITMAN J. who presided at the trial, being of opinion that the evidence produced was not sufficient to maintain the issue on the part of the plaintiff, ordered a nonsuit, to which order the plaintiff filed exceptions.

Deblois, for the plaintiff. The notice of the existence of the mortgage, which was given to the defendant and the creditor, prior to the attachment, in this case was sufficient. Recording the mortgage is required only to give notice to all the world that the mortgagee claims to hold the property by virtue of the mortgage. The same principles apply here, as in the case of mortgages or other conveyances of real estate.

The object of the statute of enrolments is to give notoriety to conveyances — and if that object be completely attained without a registry, the purpose of the law is fully answered, though the terms of the statute be not complied with. *Marshall* v. *Fisk*, 6 Mass. R. 30; *Farnsworth* v. *Child*, 4 Mass. R. 639; *Davis* v. *Blunt*, 6 Mass. R. 487; *Brown* v. *Maine*

Bank, 11 Mass. R. 158; *Priest* v. *Rice*, 1 Pick. 164; *State of Connecticut* v. *Bradish*, 14 Mass. R. 296.

Now the reasoning, by which notice in the case of conveyances of real estate has been held to supersede the necessity of recording, applies equally to mortgages of personal property. Notice was the object in each case, and when that is shown it is enough. *Bullock* v. *Williams*, 16 Pick. 35.

The presiding judge erred in ruling that the mortgage was inoperative because the schedule was not recorded. The statute no where requires that to be recorded — the statute is to be construed strictly. *Melody* v. *Reab*, 4 Mass R. 473; *Gibson* v. *Denny*, 15 Mass. R. 205. All that is necessary is that the property be so described that it can be identified. That can be sufficiently done by the mortgage without the schedule — and as notice is all that the statute requires, that is sufficiently given by recording the mortgage — all the property in the store was conveyed, and recording the mortgage would be merely a work of supererogation. *Forbes* v. *Parker*, 16 Pick. 462.

The schedule and mortgage were both left in the town clerk's office. St. 1839, c. 390, § 3 provides that any such mortgage shall be considered as recorded at the time when it is left for such purpose in the clerk's office. *Dudley* v. *Sumner*, 5 Mass. R. 439.

W. Goodenow, for the defendant.

The opinion of the Court was delivered by

Tenney J. — This being an action of trespass against the officer who attached upon a writ the property in question, which had been previously mortgaged and delivered to the plaintiff, and there being no fraud alleged on either side to have existed, it is a dispute between two *bona fide* creditors of the same debtor, each asserting a right to hold the property.

The defendant, representing one creditor, contends that the debtor had not so divested himself of the property by his mortgage to the plaintiff as to allow him to maintain this action, inasmuch as the entire mortgage had not been recorded before

the attachment. The plaintiff on the other hand contends that the mortgage was recorded notwithstanding the schedule referred to therein was not. The language in the mortgage from Thorndike to Samuel Sawyer is, "all the articles, stock and merchandise of every nature and description in the store now occupied by me, the said Thorndike, which are set forth and specified and particularly enumerated in the schedule, hereunto annexed, which said schedule constitutes a part of this mortgage bill of sale." This schedule not being recorded, was the requirement of the statute satisfied? We may well suppose one design of the statute in requiring that mortgages of personal property should be recorded to be that creditors of the mortgagor may have full opportunity to know the kind, the situation and value thereof, as well as the debt intended to be secured, when the goods are suffered to remain with the mortgagor and to be treated as his own. To protect such an object, the description should be so specific, as to enable all interested to identify the property, aided by the inquiries, which itself would direct. This mortgage is of "all the articles, stock and merchandise of every nature and description in the store occupied by the mortgagor." This is a very general description, and one which would give the person holding under such an instrument no little trouble in tracing the property, if it should be removed from the store; for the means might not exist, to show that such articles were those which were in the store at the date of the mortgage and the delivery of the goods; and they being left in the custody of the mortgagor, it would seem reasonable, that the mortgagee should insist upon a more specific and certain description. And if such would be essential to the preservation of his rights, by taking such security, when he had full opportunity of seeing, knowing, and taking delivery of the goods, it is not easy to perceive, why it may not at least be equally important to those whose interests are to be protected by the recording such instrument, when that record may be the only means of knowledge of the debtor's ability to pay. We do not mean to say, that the description in this mortgage is so general that it would

not be a valid mortgage, if there had been no other more particular; but if it had contained in itself a more specific enumation of the articles, with their value, we think the mortgage would not have been recorded, within the meaning of the statute, if the latter part had been omitted. If the mortgagee protects himself by such a description as this schedule contains, it is not for him to exclude other creditors from the means of equal knowledge. When the parties to the mortgage, one of whom is the plaintiff, have annexed the schedule, describing the kind and the value of each item, and say in the mortgage, that *this shall constitute a part of the mortgage*, it is not for us to deny that they intended, what this language clearly imports; we must regard it essential in their opinion, and we are to carry out their meaning, so expressed, especially when the rights of others are involved. We think the mortgage was not recorded, as required by the statute, previous to the attachment.

Did then the notice given to the defendant and the attaching creditor, before the attachment, supersede the necessity of recording the whole mortgage and schedule? It is urged that decisions in analogous cases, put at rest this question in favor of the plaintiff. It is the settled law of the land, that notice to a party of a conveyance of real estate, made before he claims to have derived rights by a second deed or an attachment, is tantamount to an acknowledgement and registry. So if a purchaser enter under his deed not recorded, and while he is in the actual and open possession, it is such presumptive evidence of the conveyance, that he shall hold against the second purchaser, although the deed of the latter shall be first recorded — for the conveyance to the second purchaser is fraudulent. *Marshall* v. *Fisk*, 6 Mass. R. 30; *Worsely & al.* v. *Mattos & al.* 1 Bur. 474.

The language of the statute requiring the acknowledgement and registry of deeds of real estate, is equally strong and full with that which requires the recording of mortgages of personal property; and this requirement in the former case is not dispensed with by the courts. When the legislature have declared what

shall be the proof of transfer of title, no other proof can be substituted; and in the numerous decisions on the subject, it is not put upon any such ground; but that the second purchase or attachment is void, as against the previous grantee, being actually or constructively fraudulent. Was the notice in this case of such a character, as to render the record of the mortgage unnecessary? A full record is all the statute requires, and no notice can be better than such record; and if the verbal notice given to the defendant and the creditor, contained no more full description, or if it was not a notice of the contents of the schedule, it certainly could give no benefit to the creditor, which he could not have derived by means of the record. If, on the other hand, it was the communication of the contents of the entire mortgage, including the schedule, we think it comes within the principles relied upon by the plaintiff, and he attempts to take the case out of the operation of the statute by showing the conduct of the defendant and the attaching creditor fraudulent; and it devolves upon him to establish this clearly. What, then, is the extent of the notice given to the creditor and his officer, who had the writ, previous to the attachment? The evidence reported is as follows: —"to prove the property in said goods, the plaintiff produced and read to the jury a certain mortgage of personal property, conveying the articles in the plaintiff's declaration mentioned, dated the 15th day of August, 1839, and proved the due execution of said mortgage, and the delivery of said goods to him by virtue of the same, on the 16th day of the same August. The said mortgage and schedule annexed to the same are to be copied," &c. The plaintiff proved that the defendant and said Ham were notified prior to the taking alleged in the plaintiff's writ, that said goods were claimed by him under the mortgage aforesaid, the same being parcel of the goods, conveyed by said mortgage. It does not appear, that the mortgage and schedule, or either, were presented to the defendant or attaching creditor, or that they saw them; they were notified of the plaintiff's claim, by virtue of the mortgage aforesaid. "Aforesaid" refers to something preceding; in the first sentence quoted, the lan-

guage is, "the plaintiff produced and read to the jury a certain mortgage" and "proved the due execution of *said mortgage.*" In the next sentence, "said mortgage and schedule, &c. are to be copied"—then follows the sentence, that the defendant and Ham were notified of "the mortgage aforesaid." The mortgage is spoken of as distinct from the schedule, and we think, on a fair construction, we are not authorized to infer that they had full notice of the schedule. And we do not think that the notice before the attachment, that the goods attached were a part of those embraced in the mortgage, would be sufficient. The record, imperfect as it was, might have conveyed all this information; but the material part of the required record would seem to be, that creditors might know the situation and the value of the property pledged, together with the sum thereby secured, that they could, if thought proper by them, discharge the debt thus secured, and attach the goods. The notice given, would not give this important intelligence — and was therefore insufficient.

It is again insisted, that the schedule being annexed to the mortgage, the entry with the town clerk was alone all that the statute required. If the mortgage and schedule were left with the town clerk, and duly entered by him, and both were remaining in his office unrecorded, it might have been sufficient, for the originals of both could have been seen and examined, and were all which was in the office indicative of the plaintiff's claim; but when it appeared that the town clerk had made up his record, it was that only which the law treats as the evidence required. When a party interested found the mortgage without the schedule extended upon the record, he is not presumed to be advertised, from that circumstance, that the schedule existed at that time, and was to be found in the office — much less to be apprized of its contents, although it might have still remained there; which, however, does not appear.

The exceptions are overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK, APRIL TERM, 1841.

SAMUEL DONNELL *versus* THEODORE CLARK.

In an action of trespass *quare clausum*, the defendant justified the trespass by setting up two rights by prescription — first, a right to depasture the beach adjoining the plaintiff's land, and secondly, that the plaintiff should fence against his cattle so depasturing — and it appearing that the beach had been used from time immemorial by the public for a highway — proof that the defendant, and those under whom he derived his title, have been accustomed to turn their cattle on their own pasture, and there being no fence on the sea-side, that they have been accustomed to run on the beach generally, and upon that part which adjoins the plaintiff's land, is not of that adverse and marked character, to establish by prescription a right to depasture on said beach — and, the right to depasture on said beach failing, the incidental and attendant right to require the plaintiff to fence against his cattle so on the beach, must likewise fail.

If the right prescribed for is not injurious to the rights of another, it lays no foundation for a prescription. It is only long continued and adverse enjoyment, which affords evidence of prescription.

THIS was an action of trespass *quare clausum.*

The general issue was pleaded. The defendant further filed a brief statement, in which he alleged that — at the time the several trespasses alleged in the plaintiff's writ are supposed to have been committed — he was the owner of a certain farm and pasture situated in Wells and bounded on the south by the sea, and that there is a certain portion of sea-beach adjoining said Clark's pasture and the close of the plain-

tiff, called Drake's Island — and he, the said Clark, and those under whom he claims said farm and pasture, have been accustomed from time whereof the memory of man runneth not to the contrary, to depasture horses and neat cattle in his said pasture and to have them run on said beach to the sea and near to and adjoining the plaintiff's close called Drake's island, and that the plaintiff, and those under whom he claims, have been accustomed from time whereof the memory of man runneth not to the contrary, whenever they have cultivated and improved said close, called Drake's island to fence it against horses and neat cattle running in said pasture and upon said beach, and that the same may be fenced with little expense and without infringing the right of the public to pass on said beach: — but that said Clark's pasture cannot be fenced without great and unreasonable expense, and without infringing the rights of the public to pass through the same into said beach through two certain roads which the public have been accustomed to use from time whereof the memory of man runneth not to the contrary, subject only to the gates and bars now and at the time when, &c. erected and standing on said roads — and at the time, when the supposed trespasses are alleged to have been committed, his, the said Clark's, horses and neat cattle were rightfully and lawfully on his said pasture adjoining the sea, and on said beach, and that they wandered on said beach a short distance opposite the plaintiff's said close, called Drake's island, and were there rightfully on said adjoining beach, and the plaintiff's said close not being enclosed with a legal and sufficient fence, the said Clark's horses and neat cattle went upon the close of the plaintiff, at the times when, &c. from said adjoining beach where they righfully were, which is all the trespass complained of, &c.

The defendant then read the following deeds. Deed from William Hammond, dated Feb. 26, 1667, conveying to William Symonds "a piece of sea-wall, beginning at that sea-wall which is already his own, and so as to run to the upland, called Drake's island, and so by the sea, which is about four or five acres, be it more or less." — Deed from Simon Epes and

wife, dated Aug. 5, 1717, conveying to Nathaniel Clark "one half part of a farm in Wells, in the county of York, that was our grandfather's, Mr. William Symonds, formerly of Wells, deceased, the whole farm containing, by estimation, about three hundred acres of upland, marsh and meadow ground, be the same more or less, bounded southerly and westerly by Gooch's island, and upon the sea-wall and Little river southeasterly and northeasterly, together with all the appurtenances." — Also, deed from Joseph Jacobs, Phillips Fowler and Susanna Fowler, of a quarter part of the same farm, dated July 17, 1717; — also, a deed from Nathaniel Clark to Adam Clark, dated March 31, 1762, conveying the Symonds farm, with certain reservations, immaterial in this case; — also, a deed from Adam Clark to Benaiah Clark, father of the defendant, and of whom the defendant is sole heir, dated Jan. 20, 1802, conveying "all my home lot of land lying in Wells, adjoining to land belonging to Nathan Wells, and also to land belonging to Dependance Wells, containing in the whole 150 acres, including upland and salt marsh, together with my dwellinghouse and other buildings."

It was proved on the part of the defendant, that his pasture, adjoining the beach, had not been fenced on the side towards the sea; and that his cattle and horses went at large on the beach freely, and have at sundry times been seen on the beach opposite Drake's island — that Drake's island had generally been fenced — It was also testified by witnesses that they had seen no other person's cattle going at large on the beach — that a gate had always been kept up on a road leading through Clark's pasture to the beach — that beach grass grew on the sea-wall in front of Clark's and Well's land and on the southwest corner of Drake's island.

It is further proved by a number of witnesses, and by several owners of Drake's island prior to the plaintiff — that the owners of that island had fenced against the sea, and kept it so fenced, and that while they so owned it Clark's cattle and horses run on the beach by Drake's island, and that no others run there, except Clark's, without objection.

Dependance Wells testified that he had known Clark's pasture and Drake's island fifty years — had known nine different families beside the plaintiff's on the island — that they kept up a fence when they improved the island, and that cattle and horses of the defendant and his father run on the beach from their pasture at all seasons of the year, and he never heard any objections to it — that he never saw any cattle at large on the beach but Clark's — that his father-in-law owned it fifteen years and kept up a fence.

On the part of the plaintiff it was proved, that he was the owner and in possession of Drake's island, bounded southeasterly by the beach; that the defendant's horses entered from the beach as stated in the defendant's brief statement — that a tract owned by Ivory Wells intervened between Drake's island and Clark's pasture, bounded in the manner described — that the beach had from time immemorial been used by the public to pass and re-pass — that it is reported to have been the post road from Portsmouth to Portland, but that it has not been used as such for a long time — that of late years it had been constantly used by the inhabitants of Wells and adjoining towns in hauling sea weed, drift wood, &c. and for carriages, fowling, fishing, &c. on both sides of Harbor river four miles east, and about six miles west of said river; that the road through Clark's pasture had also been freely used from time immemorial by all persons having occasion to go on to the beach, but that the gate had been constantly kept up and was opened and shut by those passing through it — that this road through Clark's pasture was the only road from Kennebunk to the wharves on Drake's island where coasters discharge their cargoes, and the only road, excepting at low water when teams passed down the bed of the river to the wharves — that Benaiah Clark had assisted in hauling drift wood from the beach opposite his pasture, without asserting any claim to the same; and that on building the pier, large quantities of stone were hauled from the same place, Clark assisting with his team and making no claim to the stone — that a fence at the time of the

alleged trespass, was standing forty rods on the front or seaside of Drake's island, beginning at Ivory Wells' land, and that the defendant's horses entered southerly of said fence. There is no other highway to the beach between Little river, the boundary between Wells and Kennebunk and Harbor river, except the ways through Clark's pasture, both of which are entered at the same gate.

It appeared from the testimony adduced by the plaintiff, that the island has been fenced for thirty or forty years — that the beach has been used by all persons with perfect freedom from one end to the other; that there is no sea-wall in front of the island, but the upland begins at the beach.

There has been no division of the fence according to law between Clark's and Wells' land, or between Wells' land and the *locus in quo.*

The defendants contended that although the public had a right to pass over the beach for certain purposes, it was not a public highway, and that the right to pass through Clark's pasture was a qualified right, subject to an obligation to shut the gate at all times.

On the foregoing facts, a default was entered by consent, judgment to be for eighteen dollars twenty-five cents and costs, if the plaintiff is entitled to recover — otherwise a nonsuit is to be entered.

N. D. Appleton and *D. Goodenow*, for the defendant. The evidence shows that the defendants' cattle have run from time immemorial on the beach — and the plaintiff, or those whose right he has, have always fenced against the defendant's cattle so running. The deed of the defendant's farm extends to low water mark. *Storer* v. *Freeman*, 6 Mass. R. 435; Anc. Char. 1661. By sea-wall is meant here the lower edge of the beach. *Nickerson* v. *Crawford*, 16 Maine R. 245; *Cutts* v. *Hussey*, 15 Maine R. 237. The cattle of the defendant have exclusively run on this beach. This is shown unequivocally by the testimony. 2 *Stark. Ev.* 664. To every prescription time is essential. *Thomas* v. *Marshfield*, 13 Pick. 240. The

right claimed is the proper subject of prescription. *Rust* v. *Low*, 6 Mass. R. 90; *Little* v. *Lathrop*, 5 Greenl. 356; Dane's Abr. c. 79, art. 3, 1. It is adverse and long continued. *Hoffman* v. *Savage*, 15 Mass. R. 130; *Comstock v. Van Deusen*, 5 Pick. 163.

The *locus in quo* is not a highway, nor common, within St. 1834, c. 157. The rights of the defendant are not inconsistent with those of the public. As a highway it has been discontinued. It is not a common. No road is proved to have ever been located. The rights of the public are the same on the beach as through the pasture.

So far as the parties in this case are concerned, the rights of the public are immaterial. The plaintiff cannot invoke the aid of the statute — as the defendant's cattle were rightfully on the adjoining land — and the plaintiff was bound to fence against them. Besides, the provisions of the statute do not apply, because here the plaintiff was bound by prescription to fence. *Carter* v. *Murcot*, 4 Burr. 2162; *Commonwealth* v. *Charlestown*, 1 Pick. 180; *Adams* v. *Emerson*, 6 Pick. 57; *Olinda* v. *Lathrop*, 21 Pick. 292; *Cortelyou* v. *Van Brundt*, 2 Johns. 357; Angel on Tide Waters, 90; 2 Bl. Com. 263. The case of *Thomas* v. *Marshfield*, 13 Pick. 240, having been decided upon a different state of facts, is inapplicable.

If both parties own to low water mark, then the defendant has a right to permit his cattle to run there — and the same obligation to fence, exists on the part of the plaintiff.

Bourne and *Shepley*, for the plaintiff. — The defendant resists the plaintiff's claim by a double prescription — one for his cattle and horses to run on the beach near to and adjoining the plaintiff's land — the other for the plaintiff to fence against his cattle on the beach.

The jury are the proper tribunal to establish the question of prescription. 1 Dane, 26, c. 2, 23; *Gray* v. *Bond*, 2 B. & B. 667; *Gayetty* v. *Bethune*, 14 Mass. R. 55; *Hill* v. *Crosby*, 2 Pick. 467.

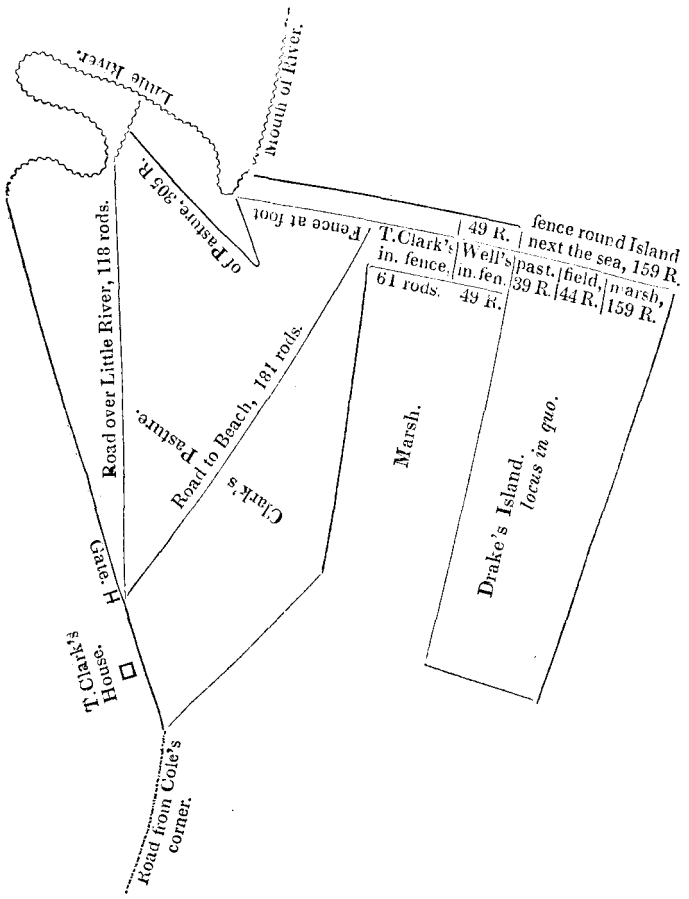
If the Court were to determine the question of prescription, or were it to be referred to the jury, no proof appears by

which it could be established. *Proprietors of Ken. Purchase* v. *Call*, 1 Mass. R. 483; *Proprietors of Ken. Purchase* v. *Springer*, 4 Mass. R. 416. One who sets up a prescription must prove a right commensurate with his claim. 1 Esp. N. P. 362. Buller on Trials, 59; *Morewood* v. *Wood*, 4 T. R. 157; *Bailiffs of Tewksbury* v. *Binkett*, 1 Taunt. 142; 1 Phil. Ev. 127; 2 Phil. Ev. 156; Yelv. 55; 5 Com. Dig. Pres. 3 K. 25.

A right by prescription is founded on the supposition of a grant and therefore it can never be established by mere length of time. 9 Dane's Ab. 413. It must be proved to be adverse — claimed as a right — and with the knowledge of the opposite party. *Robison* v. *Swett*, 3 Greenl. 316; *Tinkham* v. *Arnold*, 3 Greenl. 120; *Sargent* v. *Ballard*, 9 Pick. 251; *Bethum* v. *Turner*, 1 Greenl. 111. It must be unexplained, 3 Dane's Ab. 252; Stearns on Real Actions, 240; *Ricard* v. *Williams*, 7 Wheat. 59. It must not be unreasonable. 1 Bacon's Abr. 672. *Wilkes* v. *Broadstreet*, 2 Strange, 1224; 1 Dane, 26. No reason can be shown why the plaintiff should maintain the defendant's fence. One cannot charge the soil of another, that he may claim a discharge on his own land. 6 Coke, 60. Time is not counted when there is no injury. *Cooper* v. *Bartown*, 3 Taunt. 99; *Bethum* v. *Turner*, 1 Greenl. 111. If unenclosed for the convenience of the party, no prescriptive rights are thereby acquired. *Inhabitants of 1st Parish in Gloucester* v. *Beach*, 2 Pick. 60; Eden on Injunctions, 113. There can be no prescription for any thing which is useless or injurious. 2 Vent, 126; *Fowler* v. *Saunders*, Cro. Jac. 446.

Prescription against a statute is void. Coke on Lit. 115; 6 Bac. Abr. 670. If there be an interruption of the prescriptive or customary right it is extinguished. 1 Bac. Abr. 678; *Melvin* v. *Whiting*, 13 Pick. 184; Co. on Lit. 114.

If Clark's land adjoined that of the plaintiff he could compel him to make the fence.



The opinion of the Court was delivered by

Weston C. J. — If the defendant has title to the beach adjoining his land, it had its origin in the deed of 1667, from William Hammond to William Symonds. That deed purports to convey four or five acres of sea-wall, but one of its bounds, "so by the sea," might be sufficient to convey the beach. The deed, however, from the heirs of Symonds, under which the defendant claims, bounds the farm upon the sea-wall. But whatever may have been his title to the beach, adjoining his own land, he has shown none to that, which adjoins the land of the plaintiff. He justifies the act, charged as a trespass, by

setting up two rights by prescription; the one a right to depasture the beach, embracing that which adjoins the plaintiff's land, the other that the plaintiff should fence his land against the defendant's horses and neat cattle running upon and depasturing the beach. The second right of prescription is dependent upon, and ancillary to, the first.

The right, upon which the defendant relies in his brief statement, is what the law denominates a prescription in a *que estate.* If a man prescribes in a *que estate* nothing is claimable by this prescription, but such things as are incident, appendant or appurtenant to lands; "for it would be absurd to claim any thing, as the consequence or appendix of an estate, with which the thing claimed has no connection." 2 Bl. Com. 265; Coke Lit. 113, b. In *Cortelyou* v. *Van Brundt*, 2 Johns. 357, Thompson J. says, that prescription will in no case give a right to erect a building upon another person's land. "This is a mark of title and of exclusive enjoyment, and it cannot be acquired by prescription." Title to land requires the higher evidence of corporeal seizin and inheritance. Prescription applies only to incorporeal hereditaments. "No prescription can give title to lands and other corporeal substances." 2 Bl. Com. 264. The brief statement in this case in terms claims the right to have horses and neat cattle run upon the beach, but from what precedes it is fairly deducible, that the right intended to be set up was, that they might run there for the purpose of depasturing. If a right of common was claimed, this is consistent with a prescription in a *que estate.* But if the prescription is for the exclusive use of the herbage, growing upon land not his own, which the defendant has attempted to make out in proof, it may well be doubted, whether such a right can be claimed by prescription, as incident or appurtenant to another estate.

Who is the owner of the beach, adjoining the plaintiff's, does not appear, but it does appear, that the public, as far back as memory extends, have been in the exercise and enjoyment of a right of way over the whole beach, and that two roads thereon pass over that part, which adjoins the defendant's land

across which however there are gates. These roads are from time to time repaired by the town, and are to be considered as public highways, notwithstanding the gates. *Thomas* v. *Marshfield*, 13 Pick. 240. Whoever may be the owner of the beach, from which the defendant's horses passed into the plaintiff's close, it was lying waste, and there is no evidence that it has ever been fenced, or in any manner made available by the owner. The evidence for the defendant is, that he and those from whom he derives his estate, have been accustomed to turn their cattle and horses into their own pasture, and there being no fence on the seaside, they have been accustomed to run upon the beach generally, and upon that part of it, which adjoins the plaintiff's land. It would seem that this has been rather the consequence of the want of a fence to restrain them, than an evidence of a right in the lands adjoining. The right exercised by the defendant was, that of turning his cattle and horses into his own pasture, the effect was, there being no fence in that direction, they run upon the beach. It does not appear to us, that this was of that adverse and marked character, which is sufficient to prove the prescription, upon which the defendant relies. It was in no degree injurious to the owner of the beach, and therefore not likely to produce any resistance or animadversion on his part.

There is much waste and uncultivated land in this State, upon which cattle belonging to the owners of farms adjacent are accustomed to run. The fact may not be known to the non-resident owner, or if known he has no motive to interfere to prevent it. If there is herbage upon it, which he does not choose to make available to his own use, it does not injure him to have it fed by the cattle of others. If he forbears to resist or to complain, where complaint would be so unreasonable, an accommodation thus enjoyed or suffered, ought not to ripen into a prescriptive right. The establishment of such a principle, would be productive of extensive mischief. It is only long continued and adverse enjoyment, which is evidence of prescription. The case presented has some analogy to common *pur cause de vicinage*, where "no man can put his beasts

therein, but they must escape thither of themselves, by reason of vicinity; in which case one may enclose against the other, though it hath been so used time out of mind, for that it is but an excuse for trespass." Coke Lit. 122, a; *Thomas* v. *Marshfield*, 13 Pick. 240. No right arises in this way; but the party so circumstanced may defend against an action of trespass by the owner of the land, to which the cattle thus escape. He has no immunity in regard to lands contiguous to that upon which they run.

In the opinion of the Court, the defendant has not made out the right on the beach adjoining the plaintiff's land, for which he prescribes. If he has no such right, he must fail in the incidental and attendant right, to require the plaintiff to fence against his cattle and horses. A prescription to fence at common law, was sustained in behalf of the tenant of the adjoining close, to enforce which he might sue out the writ of *curia claudenda*. *Rust* v. *Low & al.* 6 Mass. R. 90.

INHABITANTS OF CORNISH *versus* SIMEON PEASE.

In pursuance of an article in the warrant calling the meeting, for that purpose, the town at a legal meeting voted to invest the surplus revenue in bank stock — and chose an agent to carry the vote into effect — such agent, having disposed of the money as he was authorized by the vote, was held discharged from all responsibility.

When an offer to purchase of the town the bank stock, was made in town meeting, which was accepted by vote of the town — but there was no article in the warrant calling the meeting by which the town was authorized to make such contract — it was held, that by St. 1821, c. 114, § 5, such a contract was void.

ASSUMPSIT for money had and received, and on a special contract.

At the trial before EMERY J. it was proved, subject to all legal objections, that at a regular town meeting, held April 3, 1837, the defendant was present and recommended the town to invest their surplus revenue money in bank stock in some safe bank — saying that the town would receive therefor eight per

cent. interest for their money — and that whenever the town should become dissatisfied with having it in bank stock — he would take it off their hands and pay them the money and six per cent. interest, or find some one to do it — that these statements were made in open town meeting, before the defendant was chosen agent, as is hereinafter stated.

At this meeting, in pursuance of an article in the warrant, "to see what method the town will take, respecting the surplus money," the defendant was chosen agent to receive the surplus money and therewith to purchase bank shares at par or less. The defendant, in pursuance of this authority, received the surplus money and with it, on the second day of May, 1837, purchased sixteen shares in the City Bank, Portland.

At a meeting held on the 11th Sept. 1837, by adjournment from May 19, in pursuance of articles in the warrant for that purpose, it was voted "to dismiss the defendant from acting as agent," and "that sixteen shares of the bank stock remain in said bank until they will sell at par, or for what they cost, or until further action be had."

The seventh article in the warrant calling the town meeting, which was held on the 2d day of April, 1838, was "to see if the inhabitants will divide the surplus money belonging to said town according to the census taken in 1837."

At this meeting, the defendant stated in the meeting, that if the town would wait on him till October then next, he would pay over the money he had received of the town and take the bank shares to himself — and pay six per cent. interest for the money. Upon this, the following vote was passed, — "Vote 7th, voted to distribute the surplus money agreeably to the census of 1837." "Voted to accept Simeon Pease's promise to pay to the town of Cornish sixteen hundred and ten dollars and six dollars on the hundred for the use of said money, in October next, and said if they were not satisfied with his security he would get bondsmen. He made the promise in consideration that he was to have the sixteen bank shares in City Bank of Portland, that stands to the credit of the town of Cornish,

and the balance due, after buying the shares, was put to his own account."

It appeared, that Jan. 28, 1839, an agent was chosen to demand the money of the defendant — that the agent demanded the money and at the same time offered to go to Portland any day the defendant wished, and transfer the shares — and that to this the defendant replied, that the time had expired in which he agreed to pay the money — and that he should do nothing about it.

It appeared, that there was a balance remaining in the defendant's hands, after deducting what had been paid for the bank shares, to the amount of $16,10, for which the defendant had offered to be defaulted.

The cause was tried before Emery J. and upon these facts being proved, a default was entered, with an agreement, that such judgment should be rendered as in the opinion of the whole Court should be proper.

Clifford and *Jamieson*, for the defendant. Pease was duly chosen agent with authority to invest the surplus revenue belonging to the town. He would be liable unless he was duly chosen agent, or his acts were subsequently ratified. A corporation is bound by the acts of its agent. *Salem Bank* v. *Gloucester Bank*, 17 Mass. R. 1; *Wyman* v. *Hallowell & Augusta Bank*, 14 Mass. R. 58. If not agent, if his acts have been adopted, they will be binding on his principal. *Herring* v. *Polley*, 8 Mass. R. 113; *Kupfer* v. *South Parish in Augusta*, 12 Mass. R. 185; *Pratt* v. *Putnam*, 13 Mass. R. 361; *Warren* v. *Ocean Ins. Co.* 16 Maine R. 439; *Pittston* v. *Clark*, 15 Maine R. 460; *Penobscot Boom Cor.* v. *Lamson*, 15 Maine R. 224. The defendants have recognized the agency of Pease by their vote of Sept. 11, 1837, and at subsequent meetings. If so, he is not liable.

He is not liable by virtue of any promise. The only promise made, if any, was at the meeting had April 3, 1837 — but that was not accepted. Nor could that be called a promise — it was merely advisory, and he had a right to advise without rendering himself personally liable therefor.

Parol evidence was not admissible to prove the proceedings at the meeting held April 2, 1838. *Moor* v. *Newfield*, 4 Greenl. 44. These could only be proved by record. *Thayer* v. *Stearns*, 1 Pick. 109; *Owings* v. *Speed*, 5 Wheat. 420. The vote of that date was not binding on the town, it not being made in pursuance of any article in the warrant. *Davenport* v. *Hallowell*, 1 Fairf. 323; *Chamberlain* v. *Dover*, 13 Maine R. 466, nor on the defendant, the offer being without consideration.

The town had a right to appropriate the money as they have done. Towns can purchase farms for the poor — they may equally well purchase stock, the interest of which shall constitute a fund for their support. By St. 1838, c. 311, the mode of investment was left to the discretion of the town. *Baker* v. *Windham*, 13 Maine R. 74; *Davis* v. *Bath*, 17 Maine R. 141; *Augusta* v. *Leadbetter*, 16 Maine R. 47; St. 1821, c. 122, § 3.

Howard, for the plaintiff.

1. Towns derive all their powers as well as their existence from legislative enactments. *The People* v. *The Utica Ins. Co.* 5 Johns. 358. Towns are *quasi* corporations having many of the incidents of corporations aggregate, and the whole interest in them belongs to the public. They are public corporations created for political purposes. 2 Kent's Com. 279; *Hayden* v. *Middlesex Turnpike Corporation*, 10 Mass. R. 397; *Clark* v. *The Corporation of Washington*, 12 Wheat. 40; *Bank of Columbia* v. *Palmer's Adm'r.* 7 Cranch, 299; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Bank of U. S.* v. *Dandridge*, 12 Wheat. 64.

Statute of 1821, c. 114, § 6, authorizes the raising of money for the support of the ministry, schools, the poor and other necessary charges arising within the town. By subsequent statute, the power in certain cases of assessing money for making and repairing highways, and for certain other definite purposes, is granted. An assessment for purposes not authorized by statute is illegal. *Stetson* v. *Kempton & al.*, 13 Mass. R.

272; *Dillingham* v. *Snow & al.*, 5 Mass. R. 547; *Bussey* v. *Gilmore*, 3 Greenl. 191; *Hooper* v. *Emery*, 14 Maine R. 275.

2. By the statute of 1837, c. 265, § 18, respecting the surplus revenue, the money received could only be appropriated in the same manner as money raised by taxation, or be loaned on safe and ample security. Under the Stat. 1838, c. 311, § 2, the surplus revenue might be distributed *per capita*. But this money was appropriated in neither of these modes.— Money cannot be raised by taxation to buy bank stock, and consequently the money was not legally appropriated.

3. All acts or votes of the town, transcending their corporate powers, are inoperative, and can confer no rights on any one. No one can justify under such vote, nor would it even bind the town — for the citizens of the town cannot lose their rights or property by an unauthorized vote of the town. *Pittston* v. *Clark*, Maine R. 462; *Bank of Augusta* v. *Earle*, 13 Pet. 529; *Parsons* v. *Goshen*, 11 Pick. 396; *School District in Greene* v. *Bailey*, 3 Fairf. 254.

4. Towns cannot authorize their agents to do what they have no right to do. 2 Kent's Com. 292. To constitute an agency there must be a legal vote. Nor can the agent be authorized to do an illegal act. The authority given would be void, and the act would not be binding upon the principal. *U. S.* v. *Lyman*, 1 Mass. R. 504; *Johnson & al.* in error v. *U. S.* 5 Mass. R. 441; *The Margaretta*, 2 Gall. 515; *Parsons* v. *Armor & al.*, 3 Pet. 428. The very idea of an agent, is one employed to do an act for another, which the latter might do for himself. Story's Agency, 3 Com. Dig. Attorney, A. 2 Kent's Com. 613; *Salem Bank* v. *Gloucester Bank*, 17 Mass. R. 29. The plaintiffs could not authorize the defendant to purchase bank stock, and his purchase was without justification. The town cannot raise money to buy bank stock, any more than they could to invest it in lottery tickets, rail roads or factory stock.

Nor can there be any ratification — for a void act cannot be

ratified. Story's Agency, 236, 241; *Hooper* v. *Emery*, 14 Maine R. 375.

5. The defendant is liable on the money counts — for money had and received. The defendant received the money, and illegally disposed of it, and has refused, on demand, to repay it. Purchasing the bank stock without authority, the purchase should be considered as made with his funds.

He is liable, and on the special contracts stated in the other counts, and proved by the testimony. These contracts are founded upon good consideration — a moral obligation arising from the promise at the April meeting, 1837—the delay at the defendant's request — the surplus money remaining in his hands — the town orders drawn upon this fund, of which he received his proportion.

The opinion of the Court was delivered by

Weston C. J. — In pursuance of a regular town meeting, held April third, 1837, the warrant for which, among other things, contained an article, "to see what method the town will take respecting the surplus money," the inhabitants of Cornish voted that the defendant be appointed agent to receive the surplus revenue money, and by the same vote, they authorized him to purchase therewith bank shares, at par or less. This vote was warranted by the article, under which it passed. In virtue of it, the defendant received the first and second instalments of the surplus moneys to which the town was entitled, and on the second day of May, 1837, he invested the proceeds, with the exception of a fraction, which was not sufficient to purchase an additional share, in the stock of the City Bank in Portland.

Having received and disposed of the money, as authorized by the vote, he thereby discharged himself from responsibility, unless he has violated any legal agreement, by which he bound himself to purchase of them the stock in question. The town claim to charge him upon this ground. And they rely upon certain declarations and propositions, made by him in town meeting. The first was at the meeting held on the third

of April, 1837. He then recommended the purchase of bank stock, as a safe and profitable mode of investment; and went so far as to say, that when the town became dissatisfied with having it in bank stock, he would take it off their hands, or procure some other person to do it. If a negotiation or agreement of this kind was warranted by the article, under which they were acting, it was not accepted by the town. No agreement was then made to this effect, binding upon either party.

On the second day of April, 1838, another town meeting was held, in virtue of a legal warrant, the seventh article of which was, "to see if the inhabitants will divide the surplus money, belonging to said town, according to the census taken in 1837." When this article was under consideration, the defendant is proved to have said, that if the town would wait upon him, until October then next, he would pay over the money, and take the bank shares to himself, with six per cent. on the money he had received. Thereupon the town voted in effect to accept this proposition, which was recited in their vote. If the inhabitants then assembled, were duly authorized to bind the town, the terms of the agreement, and the assent of both parties, are sufficiently proved. But with a view to a just limitation of the powers of a town at their public meetings, it is provided by law, that "no matter or thing shall be acted upon, in such a manner as to have any legal operation whatever, unless the subject matter thereof be inserted in the warrant for calling the meeting." Statute of 1821, c. 114, § 5. Now whether this agreement was provident or improvident, beneficial to the town or otherwise, there was no article in the warrant calling that meeting, by which it was authorized. If the operations of the bank had been ever so profitable, or however much their stock might have appreciated, the defendant had no remedy to enforce the agreement, indicated by a vote of the meeting, not legally binding upon the town. If the town were not bound, the defendant could not be, for the consideration, for the agreement he proposed was an agreement on their part. The defendant offered to be defaulted, for the amount by him received, over what was invested in the purchase

of the bank stock. The opinion of the court is, that upon the facts reported, the claim of the plaintiffs, beyond that sum, has not been sustained; and the default is to stand, as upon the defendant's offer.

SIMEON PEASE *versus* THE INHABITANTS OF CORNISH.

Upon the refusal by the treasurer of a town to pay an order drawn by the selectmen upon him, payable on demand, it is not necessary that it be produced and exhibited; it is sufficient that the person making the demand have it with him, that it may upon payment be delivered up and cancelled.

The clause, "it being for his proportional part of the surplus revenue fund," inserted in an order drawn by the selectmen on the town treasurer, designates the purpose for which the order was drawn, and not the fund from which it was to be paid.

THIS was an action of assumpsit brought originally before a justice of the peace, by the plaintiff, to recover the amount alleged to be due on a town order drawn by the selectmen of the town of Cornish, of which the following is a copy:

"Cornish Surplus Revenue Deposit Fund.

"Sum, $16,32.

"To Augustus Johnson, Treasurer of Cornish, or his successor in said office,

"Pay to Jonathan Sweat or bearer, five dollars on demand and eleven dollars and thirty-two cents in October next, it being his proportional part of the surplus revenue deposit fund.

"Cornish, April 11th, 1838."

On the back of this order was an indorsement of the first instalment, and an order by Jonathan Sweat to pay the within to the plaintiff.

To prove a demand on the treasurer, the plaintiff produced a paper headed, "list of surplus orders," in which list was included the one in suit — and called A. Johnson, the treasurer of the town, who testified that the plaintiff called on him, May 13, 1839, and presented said list, and said that was a list

of his orders — and a bundle of papers which he said were his bundle of orders — that he did not see them to examine them, or to know what they were — nor did he ask any questions in relation to the same — nor did the plaintiff present any other paper than the list of orders — that there were then no funds in the treasury, and he so informed the plaintiff.

The plaintiff likewise read a vote of the town, passed April 2, 1838, by which the selectmen were authorized to distribute the surplus revenue by drawing orders on the town treasurer, in favor of each person entitled to said money; the money on hand to be paid on demand, and the remainder in October next.

The defendants proved — that under the following votes of the town of Cornish, passed April third, 1837, viz: "Voted to receive the surplus revenue money;"—"Voted Simeon Pease agent to receive the surplus money and authorize him to purchase bank shares at par or less," the plaintiff received from the treasurer of the State the first and second instalments paid by the State, with which he purchased bank shares in the City Bank, Portland — and that no part of said sum or any interest thereon has ever been received by the defendants.

Whitman J. before whom the cause was tried, instructed the jury that they should find for the plaintiff if they believed the testimony offered. The jury returned a verdict for the the plaintiff, and the defendants excepted to the ruling and instructions given.

Howard, in support of the exceptions, contended that the order in suit was in fact two orders — and there should be a presentment for each instalment. Bailey on Bills, 219; *Varner* v. *Nobleborough*, 2 Greenl. 121; *Freeman* v. *Boynton*, 7 Mass. R. 486.

The first instalment was paid. When the last was demanded a list was shown but no orders presented. A presentment is necessary. Bailey on Bills, 219, 240; *Esdale* v. *Sowerby*, 11 East, 114; *Groton* v. *Dallheim*, 6 Greenl. 476; *Shaw* v. *Reed*, 12 Pick. 132. The treasurer could not waive a due

presentment, and bind the town by such waiver. 2 Kent's Com. 292; *U. S.* v. *Lyman*, 1 Mass. R. 504; *Johnson & al.* v. *U. S.* 5 Mass. R. 441; *The Margaretta*, 2 Gall. 515; *Parsons* v. *Armor*, 3 Pet. U. S. R. 428; Story on Agency, 17, 18, 156.

The order cannot be collected, being drawn on a supposed and non-existent fund. There was no surplus money to distribute. The order was drawn on the faith of the plaintiff's proposal. The fund on which it was drawn cannot be supplied. *Hooper* v. *Emery*, 2 Shepl. 75. It is then not an order but a mere certificate for distribution, upon which the town is not liable. It is without consideration, no value having been received for it.

Clifford and *Jamieson*, contra, insisted that no demand was necessary, the note being payable at a particular place. *Varner* v. *Nobleborough*, 2 Greenl. 122. Readiness to pay must be shown in defence. *Bacon* v. *Dyer*, 3 Fairf. 19. There was no funds, and a demand was unnecessary. *Flint* v. *Rogers*, 3 Shepl. 69. Being payable at a particular place, the town must take notice. *Penob. Boom Cor.* v. *Wadleigh*, 4 Shepl. 236. The order was negotiable. If not demanded the treasurer may waive a demand. *Veazy* v. *Harmony*, 7 Greenl. 91; *Belfast* v. *Leominster*, 1 Pick. 123; Bailey on Bills, 242; *Fuller* v. *McDonald*, 8 Greenl. 213; *Augusta* v. *Leadbetter*, 4 Shepl. 48. The town had authority to raise money to meet these orders. *Fletcher* v. *Buckfield*, 5 Shepl. 81; *Davis* v. *Bath*, 5 Shepl. 141.

The opinion of the Court was delivered by

SHEPLEY J. — An order drawn by the selectmen upon the treasurer of a town must be presented for payment. *Varner* v. *Nobleborough*, 2 Greenl. 121. The person making such presentment should have it with him, that it may upon payment be delivered up or cancelled. But it is not necessary, when payment is declined, that it should be produced and exhibited. The treasurer states, that a list headed, "list of sur-

plus orders due on said Feb. 1, 1839," containing names and sums was presented to him and payment demanded by the plaintiff, holding in his hand a bundle of papers and declaring them to be his orders; and that he told him, that he had no funds. On that list is found the name of Jonathan Sweat, which is the name of the person in whose favor the order was drawn. This is equivalent to a request to have $16,32, due on an order drawn in favor of Jonathan Sweat, paid; and that was a sufficient description, when payment was declined without desiring a more exact one.

It is said, that the order was drawn on a particular fund, which has never been received into the treasury. The language in the last clause of the order, "it being for his proportional part of the surplus revenue fund," designates the purpose for which it was drawn; not the fund out of which it was to be paid. The treasurer is not instructed to pay it out of the surplus revenue fund. Nor can the objections, that there was a mutual mistake, and a want of consideration, prevail. The town had by its authorized agent received its share of the surplus revenue from the State, and had voted to distribute it as the act of the legislature permitted. Sweat became thus entitled to his share; and if the money was not then in the treasury, the town might, as was decided in *Davis* v. *Bath*, 17 Maine R. 141, cause funds to be placed in the treasury for the purpose of payment.

Exceptions overruled.

JEREMIAH LORD *versus* BENAJAH BUFFUM.

It appearing from the report of the presiding Judge that after testimony had been introduced by each party, the plaintiff by consent became nonsuit, with a proviso that the nonsuit was to be set aside, if "the court should decide that the plaintiff could maintain his action on this evidence, or was entitled to have the testimony submitted to the consideration of a jury either upon the point of disseizin or title" — it was held that the latter clause must be disregarded or so limited as restricting the plaintiff's right to a new trial, if the jury might properly find a verdict in his favor — and that by consenting to a nonsuit the plaintiff waived his right to a decision by a jury.

THIS was an action of ejectment, wherein the plaintiff demanded possession of an undivided fourth part of a certain tract of land in North Berwick, describing the same by metes and bounds. The general issue was pleaded.

The plaintiff's title was derived from Nathaniel Hobbs by his deed dated Feb. 12, 1836.

There was evidence introduced, tending to show both that said Hobbs was and was not disseized at the time of this conveyance.

Much evidence in relation to the points in controversy was introduced — but as the testimony upon which the case was decided is fully set forth in the opinion of the Court, it is not here reported.

Upon the whole evidence, EMERY J. who presided at the trial, ruled that the plaintiff could not maintain his action, inasmuch as Nathaniel Hobbs was disseized at the time of the execution of the deed from him to the plaintiff, and that nothing passed thereby; and by consent, the plaintiff became nonsuit with leave to move, that the nonsuit be set aside and that he proceed to trial, if on the report of the Judge, the Court should decide that the plaintiff could maintain his action on this evidence, or was entitled to have the testimony submitted to the consideration of a jury, either upon the point of disseizin or of title.

N. D. Appleton and *D. Goodenow*, for the plaintiff.

W. A. Hayes and *Hubbard*, for the defendant.

The opinion of the Court was delivered by

SHEPLEY J. — It becomes necessary to determine what effect the conclusion of the report is to have upon the consideration of the case. Is the nonsuit to be set aside if "the court should decide, that the plaintiff could maintain his action on this evidence, *or was entitled to have the testimony submitted to the consideration of a jury either upon the point of disseizin or title?*" Testimony had been introduced by each party, and it must have been well understood, that the plaintiff was entitled to have it submitted to the consideration of a jury. The report states, and no complaint is made, that it does not correctly state, that "by consent the plaintiff became nonsuit." He could not have intended to reserve his full right to have a decision by the jury after having voluntarily become nonsuit. The two propositions, that "by consent the plaintiff became nonsuit," and that he is "entitled to have the testimony submitted to the consideration of a jury," are inconsistent. To give full effect to one would be to destroy the other. Unless effect is to be given to that, which states, that the nonsuit was entered by consent, the merits cannot be examined or decided by the court; and the effect of saving the case and of hearing an argument will be only to restore it, after the testimony shall have been introduced again, to the same position, as when the nonsuit was entered. The concluding clause of the report must therefore be disregarded, or so limited, as to consider it as restating the plaintiff's right to a new trial, if the jury might properly find a verdict in his favor.

The plaintiff contends that the premises demanded are within the bounds of the mill privilege. The defendant denies it, and contends, that they are within the bounds of the Purington lot. The bounds of the mill privilege are not defined or proved, but it is admitted, that it adjoined the Purington lot on the north. The rights of the parties must therefore, irrespective of the point arising out of an alleged disseizin, depend upon the bounds of the Purington lot. It was pur-

chased of Peter Morrill by John Purington in the year 1783. In the deed of conveyance it is described as "beginning at the northwest corner of my barn, that now stands on the southwest corner of my mill privilege on the east of the highway that leads to Sanford, from thence running southerly snug to my smith shop five rods, thence easterly by the highway two rods and thirteen feet, from thence northerly to the northeast corner of said barn, and from thence to the first beginning."

David Boyd states, that "the blacksmith shop stood in the corner of the Wells and Sanford road." Nathaniel Hobbs says, that it stood at the corner of the Wells road and nearer the corner than the Hubbard store, that it had been down about forty years, that it stood a little further south than Hubbard's store, a few feet more south, more parallel with Wells road than the store, he could not say exactly where it was. Elijah Neal says, it stood about a foot west of Hubbard's store and two or three feet nearer Wells road, Morrill's store stood between Hubbard's store and Wells road, the Morrill store stood thirty or forty years. These witnesses were introduced by the demandant. Huldah Varney, introduced by the tenant, says, the blacksmith shop was on the Wells road. It seemed to be assumed at the argument, that the first line of boundary extended from the corner of the barn southerly to the Wells road. But it extends only snug to the smith shop, which according to the testimony would intervene between the southerly end of the line and the Wells road. And the shop does not appear to have adjoined the Wells road. It is true, that after passing the shop eastward the lot was bounded on the Wells road; but the length of the eastern line of the lot, from the Wells road to the northeast corner of the barn, is not stated in the deed. So that there is no evidence derived from the title deed of the exact distance from the north line of the lot to the Wells road. The five rods appear to have been named as the distance from the corner of the barn to the northerly side or end of the smith shop. What were the dimensions of that shop, and how many feet it stood from the Wells road, does not appear. In the deed from Purington to Hobbs in 1815,

the lot is described as being on the north side of the road leading to Wells, and it would include the ground on which the smith shop stood, while the deed from Morrill to Purington appears to have excluded it; but the length of line on the Sanford road is not stated in it. This exposition is made, not without doubt of its accuracy, both because the argument did not exhibit it, and because a practical construction of the deed from Morrill to Purington may have included the smith shop. It is not therefore relied upon in the decision of the case, but exhibited as affording a possible explanation of the difficulty in reconciling the length of that line of boundary with the other testimony in the case.

The northern line of the Purington lot must remain and be established where the barn stood, if its position at the time of the conveyance can be clearly ascertained; and by it the rights of the parties must be determined, although it may be more than five rods distant from the Wells road. The witnesses differ much in opinion whether the barn stood as far north as the tenant contends. But if their opinions be disregarded, and the attention be confined to the proof of facts, there is much less difference in the testimony. Nancy Parker, who was the wife of Benjamin Parker, says — they planted the lot eighteen years, that the barn was taken down in 1811, that the fence was put up on the line where the barn stood, that she saw her husband show Moses Hubbard where the stub was, which was the corner of the Parker lot, and it was also the southeast corner of the barn. Moses Hubbard says he occupied the Purington lot in 1816, that there were marks of a fence there as built and occupied by Benjamin Parker, that he occupied up to the place where the fence stood, there was a ridge which shew where Parker had ploughed, and plain marks, which shew where the fence stood, the place where the yard was before the barn was lower, and shew where the barn stood; that in 1824 he put a shed on, and at the same time fenced his lot with posts and board fence to enclose the lot; that Parker dug in the ground and shew him a hub buried in the ground, which was at the southwest corner of the barn and the northeast corner of his

own lot: that the stub thus shewn was three or four feet west of the southwest corner of the Hussey store, and a few feet south of the store, as the barn was wider than the store; that the store called the Hussey store was built by Joseph Hoag, who held under lease from him. This is the material testimony as to the facts introduced by the tenant on this part of the case. Nathaniel Hobbs says the shed was put where the Hussey store stands, on the land in dispute by Hubbard; that the Hussey store was put on the land in dispute seven or eight years ago; the barn was taken away a great many years ago, and he thinks like enough a fence was put up to enclose the lot to plant potatoes; that Hubbard had the fence on what he called his line; that the store on the lot in dispute was occupied by Joseph Hoag, who held under Moses Hubbard. Elijah Neal says he cannot say where the barn stood. Sheldon Hobbs says the shed was put as far north as the north side of the Hussey store, and that it was put up north of the spot where the barn stood. James Junkins does not remember where the barn stood. This was the substance of the testimony on this point, exclusive of opinions, introduced by the demandant. The only contradictory statement is that of Sheldon Hobbs, that the shed was put up north of where the barn stood; and as it stands, when taken in connexion with his other testimony, is doubtful whether he intended more than to express confidently his opinion. If he did, it is not accompanied by any facts tending to sustain it. The burthen of proof was on the demandant, and a jury would not be authorized on this testimony to find that the northern line of the Purington lot was southerly of the Hussey store. If the demandant were unembarrassed by the alleged disseizin, it is not perceived that he could be entitled to a verdict. He claims by a deed from Nathaniel Hobbs made in 1836. Before that time, according to all the testimony, the Hussey store had been built and was occupied under Hubbard who claimed to own the land. Hobbs does not pretend, that he ever interfered or claimed to do so with that possession; nor does any other witness prove that Hobbs or any other person did. Hubbard's exclusive posses-

sion might be shewn for a longer time, and the apparent interference of others might be nearly all explained in a manner rather tending to confirm than to interrupt it, but this is not necessary. The proof of possession under claim of title is too conclusively proved, without considering that the levy had any other effect than to transfer it from the debtor to the creditor, to allow the deed from Hobbs to the demandant to convey the land covered by the Hussey store.

Nonsuit confirmed.

DANIEL W. KIMBALL *versus* JOSEPH WOODMAN & DANIEL APPLETON, *Trustee.*

Before revised St. c. 119, § 43, administrators could not be held as trustees of a creditor of the intestate in any case whatever.

EXCEPTIONS from the District Court.

From the disclosure of the said Appleton, it appeared that in 1839, he was appointed by the judge of probate for the county of York, administrator on the estate of Jonathan Babb, late of Buxton, in said county, deceased — that he took upon himself that trust and gave bond according to law — that said Babb's estate was by him represented insolvent, and that a commission of insolvency issued thereon, — that the creditors of said Babb proved their claims before said commissioners, and that the final report of said commissioners was made to the judge of probate aforesaid about July, 1840—that said Joseph Woodman was a creditor of said Babb, and proved his claim before said commissioners — that on the first Monday of Sept. 1840, said judge of probate passed a decree of distribution, and ordered the said Appleton, as administrator aforesaid, to pay over to the several creditors of said Babb's estate, the amount of their respective claims, being about eighty per cent. of the amount — that there was due said Woodman as a dividend upon his claim, the sum of forty-two dollars, forty-seven cents, which sum the supposed trustee was ordered to pay over to the said Woodman — that Horatio Woodman, son of said Joseph

Woodman, who presented the claim of said Joseph before said commissioners, and proved the same, had written to the said supposed trustee, and by letter directed him to pay the amount of the dividend to Samuel Bradley, Esq. — but that before he had done so, the said trustee process was served upon him, and that he did not feel authorized to pay the money agreeably to the directions of the letter of said Horatio, as it was not accompanied with an order from said Joseph Woodman.

Upon this disclosure, *Whitman J.*, who presided, adjudged that the said Appleton was not the trustee of the defendant, and thereupon ordered his discharge, to which judgment and order the plaintiff excepted.

Fairfield & W. P. Haines, in support of the exceptions, contended, that the cases which had been decided, upon the matter here presented, differed essentially from the present, in this, that after a regular accounting in the probate office, there had here been a *decree* for the *payment* of money, leaving nothing but *payment* to be made. An administrator on an insolvent estate after a regular accounting in the probate court and a decree of distribution by the Judge, and demand by the creditor, may be holden as the trustee of the creditor. *Adams* v. *Barrett*, 2 N. H. R. 374. The New Hampshire statute is, "that when any person shall have in his possession money, goods, chattels, rights, or credits, such person shall be deemed to be the trustee of such debtor"—this differing in no material point from the statute of this State. "Credits" is confined to debts due from the principal to the trustee. *Lupton* v. *Cutter*, 8 Pick. 303. The decree of payment in this case makes Appleton the debtor of Woodman, as is decided in *Adams* v. *Barrett*. The remedy provided by statute in case of non-payment by the administrator, is merely *cumulative*, and an action may be maintained against him personally as well as on the bond. *Storer* v. *Storer*, 6 Mass. R. 390. The court of probate has expended its power making the decree, and the rights acquired thereby must be pursued in the common law courts. Whichever course be pursued, the administrator is liable *de bonis propriis*. As bearing an analogy to

the case at bar, they referred the Court to *Jones* v. *Gorham*, 2 Mass. R. 375; *Decoster* v. *Livermore*, 4 Mass. R. 101; *Swett* v. *Brown*, 5 Pick. 178; *Wilder* v. *Bailey*, 3 Mass. R. 293; *Staples* v. *Staples*, 4 Greenl. 532.

N. D. Appleton, for the trustee, argued, that this money was not goods, effects, or credits, entrusted and deposited in his hands, within the meaning of the statute. The administrator was not liable to pay till after a demand, and no legal demand had been made before the service of the writ on him. There was no debt due from him to the debtor — and if no debt, there was no credit — for the terms are correlative.

2. A person deriving his authority from the law, and obliged to execute it according to the rules of the law, cannot be held by this process. The argument from inconvenience is very strong. It would subject an administrator to delay and embarrassment in the settlement of his accounts. There is no certainty that any thing is due the plaintiff — and if this process be allowed, the administrator will be unable to close his administration. *Wilder* v. *Bailey*, 3 Mass. R. 289; *Pollard* v. *Ross*, 5 Mass. R. 319; *Chealy* v. *Brewer*, 7 Mass. R. 259; *Barnes* v. *Treat*, 7 Mass. R. 271; *Brooks* v. *Cook*, 8 Mass. R. 246; *Wentworth* v. *Whittemore*, 1 Mass. R. 471; *Wheeler* v. *Bowen*, 20 Pick. 563; *Waite* v. *Osborne*, 2 Fairf. 185.

S. Bradley, on the same side, in reply to the argument that the trustee had settled his final account, and had nothing to do but to pay over the dividend according to the decree of the judge of probate, cited St. 1840, c. 21, § 2, which provides that whenever the report of commissioners of insolvency has been made to the judge of probate, and he shall have ordered distribution thereon, it shall be discretionary with him, at any time before distribution shall have taken place, upon application of any creditor of the estate, on account of any error or mistake in the report of said commissioners, to *suspend* said notice of distribution, and recommit said report, in order to correct such error or mistake — and it would be unsafe to charge the trustee, in this case, for the report of the commissioners might be recommitted, and the claims allowed greatly increased by

correcting errors, and thus the trustee be compelled to incur the risk of paying more than he had in his hands belonging to the principal — as the amount of the dividend, on a new decree of distribution, might be diminished.

The opinion of the Court was delivered by

SHEPLEY J. — It had been decided, while this State was a part of Massachusetts, "that the goods attachable by this process must have been previously entrusted to, and deposited in the hands of the trustee by the debtor." *Chealy* v. *Brewer*, 7 Mass. R. 259. And that "no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind." *Brooks* v. *Cook*, 8 Mass. R. 246. That part of the act of this State now under consideration was a transcript from the one then existing in Massachusetts, and the construction, which had there prevailed, was received here as a part of our law in the case of *Waite* v. *Osborne*, 2 Fairf. 185. The act and form of process in New Hampshire differ from it materially in language; and the case of *Adams* v. *Bartlett*, 2 N. H. R. 374, cannot therefore form a precedent here. The revised statutes c. 119, § 43, have subjected executors and administrators to the operation of this process here.

Exceptions overruled.

ELLIOT TIBBETTS *& al. versus* TIMOTHY SHAW *& al.*

The seal of the Court is matter of substance and not amendable.

The want of a seal to a writ is to be taken advantage of by motion to quash, which may be made at any time.

An offer to be defaulted for a sum certain, entered on the docket, but not accepted, is no waiver of the objection.

By the act establishing the District Court, ch. 373, all its writs and processes were directed to be under the seal of the Court; and by ch. 398, the District Judge was authorized to adopt seals for the court.

After the passage of the act establishing the District Court, the District Judge directed the clerk to provide a seal with a certain prescribed device and impression, and the clerk before this was completed, sealed writs with the seal of the Court of Common Pleas, which had the same device, but no inscription; and delivered the same out of his office — a writ so sealed was on motion ordered to be quashed — for want of a seal — the process being void.

Where the process is void no costs are allowed.

Mem. WESTON C. J. did not sit in the hearing of this case.

THIS was an action of assumpsit. The writ was dated August 3, 1839, and was returnable to the October Term of this Court. It was duly entered and continued from term to term, to the October Term, 1840, when the defendants filed an offer in writing to be defaulted for the sum of $150 — which was duly entered on the docket of the Court — but which was not accepted by the plaintiffs. Subsequently and at the February Term of the District Court, the defendants moved the Court to quash the writ because it did not bear the seal of the Court.

It appeared by the testimony of the clerk, that after the passage of the act abolishing the C. C. Pleas, and establishing District Courts, an inscription and device for a seal for said District Court were furnished by the Judge of the western district in March, 1839, to the clerk: — that the clerk immediately sent to an engraver to prepare a seal as established by said Court — that about the 4th April, 1839, the clerk received said seal from the engraver and has ever since used the same in sealing all processes issuing from this Court. That during the interval between the time when he received directions from the Court as to the seal and the receiving of the same from

the engraver — the clerk, without any direction from the Court, but from necessity, prepared a seal from the C. C. P. seal, which had the same device as the seal adopted by the Judge of the District Court, by obliterating the inscription on the seal of the Court of Common Pleas, and leaving it without any inscription — that this seal was used in impressing all processes issuing from the clerk's office, until the seal prescribed by the Judge of the District Court, was received — after which this ceased to be used. No notice was given to any attorney of these facts or of any change of seals on the processes subsequently issued.

The writ in this case bore the impress of the Court of Common Pleas seal, with the inscription erased.

On these facts, WHITMAN J. ordered the writ to be quashed, to which order and judgment exceptions were filed and allowed.

Appleton & Howard, for the plaintiff.

1. The seal is that of the District Court. It was impressed on a writ issuing from the proper office, signed by the clerk, and bearing the proper teste. The device here is that of the District Court — and that is what constitutes the seal. The inscription makes no part of the seal. The clerk had the custody of all papers — was directed to furnish a seal — and writs issued by him, are the writs issued by proper authority. 1 Cons. Rep. S. C. 104; *Prescott* v. *Tufts*, 7 Mass. R. 209; *Gould* v. *Barnard*, 3 Mass. R. 199; *Clapp* v. *Balch*, 3 Greenl. 218.

2. The error was amendable, and should have been amended. *Cheetham* v. *Tillotson*, 4 Johns. 499; *Baxter* v. *Rice*, 21 Pick. 197; *Converse* v. *Damariscotta Bank*, 15 Maine R. 431; *Ordway* v. *Wilbur*, 16 Maine R. 264. The authority of the court to allow amendments extends equally to matters of substance as to matters of form. Rules of District Court, 17; *Wimple* v. *McDougal*, Caine and Colman's Cases, 55. If the writ is in any respect defective, it is the misprision of the clerk — which the court will allow to be corrected. The clerk was an officer of the court, and should not be permitted to lead parties into difficulty by his blunders. This is merely a circumstantial error, and the furtherance of justice requires

its amendment. *Sawyer* v. *Baker*, 3 Greenl. 29; *Campbell* v. *Stiles*, 9 Mass. R. 217; *Hutchinson* v. *Crossen*, 10 Mass. R. 251.

The cases, *Bailey* v. *Smith*, 3 Fairf. 196, and *Hall* v. *Jones*, 9 Pick. 446, are distinguishable from this. There the seal of one court was impressed on a writ issuing from another office — or there was no impression whatsoever. Here the writ was signed by the right person, — had the seal of the court — all they had, — and bore the proper teste.

3. The exception comes too late. The defendant having submitted to, and acknowledged the jurisdiction of the court, has thereby waived all previous errors. The offer to be defaulted is more than the general issue. Act of 1835, c. 165, § 6; Howe's Pr. 50; *Voorhees* v. *Bank of U. S.* 10 Pet. 473; *Gordon* v. *Smedes*, 16 Johns. 145; *Ripley* v. *Warren*, 2 Pick. 592. The offer to be defaulted could not be withdrawn — and the defendant seeks now, indirectly, to do what could not be done directly.

W. P. Haines, for the defendants.

1. The seal of the District Court is required by law to be affixed to its processes. St. of 1839, c. 373, § 1 and 3. This act was approved Feb. 25, 1839, and was to take effect from and after April 1, 1839. Subsequently, on 20th March, 1839, an additional act, St. c. 398, was passed, to take effect from its passage, by the second section of which "the district judge or judges are authorized to adopt seals for their respective districts." Every act establishing a court in this State, has been specially careful in regard to seals for all judicial processes. St. c. 54, § 3; c. 63, § 1; c. 193, § 3.

The evidence of the clerk shows this was not the seal of the court — and the correctness of the decision excepted to, is directly settled, *Bailey* v. *Smith*, 3 Fairf. 196; *Hall* v. *Jones*, 9 Pick. 446.

2. It is argued, that the offer to be defaulted for a certain sum, precludes the defendants from making any objection to the process. The offer was not accepted, and until accepted it is no more than a tender. But no agreement of the parties, nor

even a default for the whole sum, can give the court jurisdiction, or make a process, in itself void, valid in law.

Where the want of jurisdiction appears of record, the defect cannot be supplied by the submission of the party; for the agreement of the parties cannot alter the law, nor make that good which the law makes void. *Lawrence* v. *Smith*, 5 Mass. R. 362; *Case* v. *Humphrey*, 6 Conn. R. 130; *Perkins* v. *Perkins*, 7 Conn. R. 558; *Hugleson* v. *Webb*, Cro. Eliz. 121; *Robinson* v. *Mead*, 7 Mass. R. 353.

The opinion of the Court was delivered by

Emery J. — This is a case of exceptions against the opinion of the Justice of the District Court for the western district. The Judge, on motion in writing, ordered the writ to be quashed, because, as the counsel for the defendants alleged, said writ does not bear the seal of that Court. Our St. c. 373, was passed Feb. 25, 1839, to abolish the Court of Common Pleas and establish District Courts, to be in force from and after the first day of April then next, with the provision that the Judges of the District Courts may be appointed and commissioned at any time after this act shall be approved by the Governor. The third section provides, that all writs and processes issuing from the District Court shall be in the name of the State, shall bear teste of one of the Justices of said Court; and *such writs and processes shall be under the seal of said Court*, and signed by the clerk thereof, in the county where the same may be returnable; and *shall have force and be obeyed* and executed in every county in the State.

By an additional act, c. 398, passed March 20, 1839, to take effect and be in force from and after its approval by the Governor; the 2d section enacted that the District Judge or Judges are *authorized to adopt seals of the Court, for the respective districts.*

The writ in this case was dated August 3d, 1839, returnable to the October Term of that court, 1839, there entered, and continued from term to term till February Term, 1841.

It is urged by the plaintiff's counsel that this order should not have been given by the Judge, because at October Term, 1840, at said District Court, the counsel for the defendants, on the 2d day of the term, certified that the defendants appeared in Court and offered in writing to be defaulted and that judgment shall be rendered against them for the sum of $150, and the costs to be taxed by the Court up to that term. This offer though duly entered on the docket was not accepted by the plaintiffs.

This circumstance seems to have roused the resentment of the defendants, and induced them to interpose their motion to quash the writ for defect of the seal of the Court. It came indeed very late; and the testimony of the clerk on the subject is detailed at considerable length *in the exceptions.*

By the 5th section of c. 373, this Court "must consider and determine *them* in the same manner as they are authorized to do in respect of actions originally commenced and entered here." The writ in fact seems to be impressed with two seals. But does it to us, judicially, appear to be the seal of the District Court for the western district?

In one case, it was recently holden, in England, that the Queen's bench had judicial knowledge of the seal of another court. By what means it was obtained, is not communicated in the report. Without a promulgation from some authority, it would at first seem difficult to discern the ground of that judicial perception. In Theobald's and Eden's reports, 223, *Doe, d.* v. *Edwards*, in an action of ejectment, a question respecting the admissibility of evidence arose in 1839, under the 76th section of the St. 57 Geo. IV, which enacted that the records of the Insolvent Debtors' Court, should be admitted as evidence, without any proof whatever given of the same, *further than that the same is sealed with the seal of the said Court as aforesaid.* No such proof was offered at the trial. A new trial was moved for, on the ground of the improper admission of documentary evidence, to which objection was made, but overruled. On the hearing of the motion, Lord Denman C. J. said, "the intention of the Legislature must have been

that the seal should prove itself; and on production of the seal, we take judicial cognizance that it is the seal of the insolvent debtors court." COLERIDGE J. observed "that the 7 Geo. IV, c. 57, does not require the seal itself, but that the document should be proved to be sealed with the seal of the court of which we have judicial knowledge," and the rule was refused.

In *Henry* v. *Adey*, 3 East, 221, in an action on a judgment obtained in the island of Grenada, a nonsuit was ordered and held proper for defect of proof of the seal. The court said they could not take judicial notice that the seal affixed, was the seal of the island and that proving the Judge's hand writing could not advance the proof of the seal. So in *Moises* v. *Thornton*, 8 Term R. 303, the production of a diploma under the seal of the University of St. Andrew's, in Scotland, was holden not sufficient evidence of the degree of a doctor of physic without proof that it was the seal of the University.

The public seal of a state proves itself. It is recognized by the law of nations. So the proceedings in a foreign prize court, when under its seal, certified by the deputy register, whose official character is certified by the Judge, and his by a notary public. *Yeaton* v. *Frye*, 5 Cranch, 343. The high credit given to exemplifications under seal, in Norris's Peake on Evidence, p. 60, is stated thus, "for the courts of justice which put their seals to them are supposed to be more capable of examining them and more critical and exact in their examination than any other person is, or can be. For the courts *under whose seals they are authenticated, making a part of the law and constitution of the country, their seals are supposed to be already known to every person like every other part of the laws. Gilb. Law of Ev.* 14, 19." This is rather a theoretical rule, but it works well in practice. Few judges meddle much with the examination of exemplifications of records. That service is confided to clerks. In this case the Judge did inspect and examine the seal and heard all the proof about it. We can have no doubt of the integrity and honesty of views on the part of the clerk in all he did. *All the attempts to come as near to the seal as the circumstances seemed*

to require were all open on the hearing, and for the consideration of the Judge. And had he adopted the seal, we should have been much embarrassed under the evidence as reported, to say that he could not do so. But he seems to be fully sustained by the evidence and the law. Neither the St. c. 373, nor c. 398, make any provision for "the *necessity*" of which *the clerk* speaks. Even that necessity terminated on the 4th day of April, 1839, when he received the seal. And this writ was made nearly four months after. The statute authorizes *not the clerk*, but the *Judge, to adopt a seal for the court.* The clerk did not consult the court on the exigency, nor obtain his direction. And this manifestly was not the seal so adopted, and communicated by the Judge to the clerk — it was *without the inscription* furnished by the Judge of the District Court. That inscription, we perceive, entitled the seal "District Court, Western District." This assumed by the clerk was as no seal. The precept under the law, for this defect, was not in "force to be obeyed." This Court has decided, in the case *Bailey* v. *Smith*, 3 *Fairf.* 196, that "the seal is matter of substance, and the process, being an original writ, not amendable."

It would poorly comport with the comity which one court owes to the Judge of another, who has the authority to adopt a seal for its court, when on full examination of the facts, it becomes convinced that the impression attempted to be palmed upon it, as its seal, is not the seal by him adopted, for this court to decide that it has better judicial perception of a fact almost exclusively within his knowledge, and that it is his seal, when he has deliberately decided it not to be the seal of the District Court for the western district.

It would really be an assumption of power not conferred on this Court.

But it would be outrageous to give costs against the plaintiffs.

The exceptions are overruled.

JOHN G. CHASE *& al. versus* STEPHEN GARVIN.

While a partnership exists or remains unsettled, no action at law can be maintained by one partner against another, except an action of account or of assumpsit on a promise to account.

After a partnership has been dissolved and its concerns adjusted and a balance found due from one to the other — and the accounts have been settled and one has by mistake paid to another more than his due, assumpsit will lie to recover such balance, or to correct such mistake.

Where the error is merely in figures or in the adoption of a wrong principle in the settlement, the amount really due may be recovered, leaving the dissolution and settlement otherwise unaffected.

But where the interest of one partner in the partnership property has been purchased by the other for a gross sum, which purchase was effected by fraud and deception, the party defrauded may repudiate the contract *in toto* and open the account anew — in which case his remedy is in a Court of Equity.

EXCEPTIONS from the District Court.

This was an action of assumpsit. It appeared in evidence that the plaintiffs, constituting the firm of John G. Chase & Co. had formed a copartnership with the defendant under the name of Stephen Garvin & Co. which had been dissolved — that after the dissolution, the defendant made, as he said, a full, true and accurate exhibit of the debts of the copartnership — and of the several balances and notes due the firm — the lumber and other property on hand, for all which, deducting the estimated amount of debts due from the firm, he offered the sum of nine hundred dollars — which offer was accepted by the plaintiff, and subsequently the stipulated amount was paid.

After this sum had been paid, the plaintiffs offered evidence of the admissions of the defendant that he had made about six hundred dollars by the settlement above stated — and on inquiry stated that he had under estimated the lumber on hand and had kept back between three and four hundred dollars in money belonging to the firm, assigning as a reason for so doing that the plaintiffs had not called for any money.

Upon this evidence, WHITMAN J. before whom the cause was tried, ruled that the plaintiffs had no remedy upon these facts in a court of law but only in a court of equity, and or-

dered a nonsuit. To which ruling and order, exceptions were filed and allowed.

D. Goodenow, for the plaintiffs, argued that there was a full settlement of the affairs of the firm except as to the money fraudulently withheld. 1 Story Eq. § 665, 666 — that the dissolution was a severance of the joint funds — and that assumpsit would lie for the plaintiffs' share of the balance withheld. Collyer on Partnership, 147, 8, 9. *Jones* v. *Harraden*, 9 Mass. R. 540; *Bond* v. *Hays*, 12 Mass. R. 34; *Wilby* v. *Phinney*, 15 Mass. R. 116; *Fanning* v. *Chadwick*, 3 Pick. 420; *Brinley* v. *Kupfer*, 6 Pick. 179; *Williams* v. *Henshaw*, 11 Pick. 79.

N. D. Appleton, for the defendant. The plaintiff's only remedy is in equity. Collyer on Partnership, 143–7, 153; *Chandler* v. *Chandler*, 4 Pick. 78. Assumpsit will not lie except on an express promise after the settlement of all concerns. *Harrington* v. *Fry*, 2 *Bing.* 179.

The plaintiffs by this suit would disaffirm the settlement. If disaffirmed, there must be a new adjustment on equitable principles. They cannot hold on to the settlement and at the same time repudiate it for the purpose of recovering the money withheld.

The opinion of the Court was delivered by

Weston C. J. — While a partnership exists, or remains unsettled, no action at law can be maintained by one partner against another, except an action of account, or of assumpsit on a promise to account. *Wilby & al.* v. *Phinney*, 15 Mass. R. 116. This doctrine is well established, and is conceded by the counsel for the plaintiffs. But where the partnership has been dissolved, and its concerns adjusted, a suit at law may be maintained for a balance found due from the one to the other. So where in such case, the accounts have been settled, and one has by mistake paid to another more than was his due, it has been held, that it may be recovered back in an action of assumpsit. *Bond* v. *Hays*, 12 Mass. R. 34.

In the case before us, there was no settlement of the partnership accounts, but the defendant purchased out the interest and claim of the plaintiffs for a gross sum. There is reason to believe from the evidence, that in the exhibits and statements made by the defendant, which led to and occasioned this arrangement, he was guilty of fraud. If the plaintiffs have sustained an injury from this cause, they may repudiate the contract and open the account between the parties. They are not bound by a contract, based in fraud and deception, on the part of the defendant. If an account had been stated, in which there was a manifest error in the figures, or in the principles upon which it was adjusted, the amount really due to the plaintiffs might be recovered in assumpsit, leaving the dissolution and settlement otherwise unaffected. But here was no adjustment of accounts. What might be realized from the partnership funds, was a matter of conjecture. A deduction was made for debts due, supposed to be bad or doubtful, and an allowance was made for responsibilities thrown upon the defendant. The whole affair is infected with fraud, and the remedy is in opening it for further investigation. The extent of the plaintiffs' injury can then be ascertained, and such relief afforded them, as the justice of the case requires. As it was presented in evidence, the opinion of the Court is, that the nonsuit was properly ordered.

Exceptions overruled.

PAUL LANGDON *& als.* in Equity, *versus* JOHN K. PICKERING *& als.*

The introduction of scandalous and impertinent matter in a bill, does not authorize nor justify similar matter in an answer to meet such improper allegations in the bill.

Upon exception taken to such answer, the court will order it to be expunged.

If a defendant would object to such matter in the bill, it should be by way of exception.

A codicil revoked, which was duly executed, is as much part of the will as if on the same paper with the will — is necessary in its construction — and upon a bill in equity, filed for that purpose, the court will enforce its production.

If not duly executed, its production will not be required.

BILL in equity.

From the complainants' bill it appeared, that the respondents had filed a bill against them, to have their rights under the last will of Elizabeth Sewall ascertained, and for the appointment of trustees for the preservation of them. The complainants, executors of said will, and legatees and devisees claiming under the same, filed this cross-bill for the production of a codicil to said will, executed by said testatrix, but shortly after its execution revoked by a second codicil — which revoked codicil they allege is in the possession of William Goddard, one of the respondents, having been taken away by him from the possession of the testatrix without her knowledge. The bill further alleges that this codicil belongs to the executors, in their capacity as such — and that the production of the same is necessary to the full understanding of the intention of the testatrix, and to the just and proper construction of the will.

To this bill, Wm. Goddard answered in part, and demurred to the residue. Exceptions were filed to his answer, admitting the execution of the codicil and asserting the same had been improperly revoked, on the ground that it contained certain scandalous, impertinent, and irrelevant allegations. The other respondents demurred, generally, to the bill. The several questions arising under the bill and demurrer thereto, and the

answer and exceptions to the same, were, by agreement, argued and submitted to the decision of the Court at the same time.

Preble, for the complainants. A revoked codicil is an instrument executed with the concurrence of the party interested, and with all the solemnities of the law. Being referred to in the codicil approved, it becomes a part of the will, and is necessary to a proper understanding of it. Unless the will were doubtful, why did the defendants invoke the aid of the court in its construction? Their original bill admits the meaning is doubtful. The intention of the testatrix is the thing to be ascertained — what will aid in that, should be received. The codicil revoked may be as important as the codicil which revokes. One cannot be understood without the other. Both are necessary. To say, that because it has been revoked, it can have no bearing upon the decision, is to assume the functions of the Court, and to decide in advance the very question which is in dispute.

D. Goodenow, for the respondents.

The revoked codicil is a nullity. The construction of the will must depend upon the language there used. The codicil revoked being a nullity, no resort can be had to that to ascertain the intention of the testatrix. The cross-bill claims a disclosure of facts wholly immaterial. It alleges no equivocal expressions, no ambiguities, in the bill which are to be explained by the codicil — nor how, nor in what way, that will aid him. The intention is to be gathered from the whole will, and from that alone, of which that is no part. The plaintiff in no way shows how this would be material — and if not material, he has no right to compel disclosures in which he has no interest. 2 Story's Eq. § 1497.

Parol evidence is inadmissible to explain the meaning of a will. *Richards* v. *Dutch*, 8 Mass. R. 506; *Thomas* v. *Thomas*, 6 D. & E. 671; 1 Phil. Ev. 468.

The portions of the answer excepted to, are only in explanation of and in answer to certain scandalous charges in the plaintiffs' bill, and are proper for that purpose.

The opinion of the Court was delivered by

SHEPLEY J. — The respondents have filed their bill to have their rights under the last will of Elizabeth Sewall established, and to have trustees appointed to preserve them. These complainants being the executors and the legatees and devisees have filed this cross-bill for the production of a codicil alleged to have been executed by the testatrix, and to be now in the possession of one of the respondents. That respondent answers the bill in part, and demurs to the residue; and the other respondents have demurred to the whole bill. The complainants have excepted to parts of the answer, and by consent the questions arising under the exceptions, as well as those arising under the answer and demurrers, have been argued at the same time; and are presented for decision. The only exception, which it will be necessary to notice separately from the merits, is that the answer contains certain allegations scandalous, impertinent, and irresponsive to the bill. They have reference to the conduct of one of the executors in procuring the last codicil to be made and executed. That codicil has been approved in the proper tribunal and the allegations become entirely immaterial in the further investigation of the rights of the parties. They were said in argument to have been introduced by way of answer to certain improper allegations contained in the bill; but this, if correct, would be no justification. If the bill be liable to such objection, the exception should be regularly taken, if the party would insist upon it. If one introduces scandalous or impertinent matter, that does not authorize another to follow the bad example. That part of the answer embraced in the second exception, must be expunged.

It does not clearly appear by an examination of the bill and answer, whether the codicil which was revoked was duly executed in the presence of three witnesses according to the provisions of the statute. The bill speaks of it as a codicil and as having been executed, but it does not state in what manner it was executed. The intendment may be, that it was according to the provisions of the statute, as it could only

in that manner become, properly speaking, a codicil. The answer admits the paper to have been drawn by his procurement, and to have been signed by the testatrix and delivered to him; and it alleges that it "was never published and declared by her in the presence of the witnesses as a codicil to her last will." If by "the witnesses," reference is made to the witnesses required by the statute, the paper would seem to have been executed in due form; and the proper testimony relating to the publication of it should come from them, and not from the answer. As the objections to its production did not rest upon the ground that it was never legally executed, it will be regarded as having been so executed, in the subsequent inquiry whether it should be produced.

In the case of *Acherley* v. *Vernon*, 3 Bro. P. C. 107, it was said, "that the codicil being executed and attested by three witnesses, was a republication of the will." And in the case of *Barnes* v. *Crowe*, 1 Ves. 486, the cases opposed are examined, and the doctrine appears to have been finally declared, that neither a re-execution of the will, nor any express declaration in the codicil, or annexation of it to the will, was necessary for this purpose; but that every codicil executed by three witnesses, according to the statute, though it relates only to personal estate, operates as a republication of the will, because it supposes a former will, refers to it, and becomes a part of it. In *Crosbie* v. *McDoual*, 4 Ves. 610, it is said, that "unless there is something to shew it was meant to be coupled with another instrument, it is not taken to be a codicil. But if it does purport to be coupled with another instrument, it is as much a part of that instrument as if it was written upon the same paper." In *Westcott* v. *Cady*, 5 Johns. Ch. 343, the chancellor recognizes it as a clear and well settled rule, that a will and codicil are to be taken and construed together as parts of the same instrument.

The effect of a republication of a will by a codicil is to make the will speak and operate as of the date of the codicil, so that after purchased estates, though not named in the codicil,

will be devised by a will containing language appropriate for the purpose. This rule was received in the case of *Bowes* v. *Bowes*, in the House of Lords, 2 B. & P. 500, although it was decided in that case, that the after purchased estate was not devised, because it appeared to have been the intention of the testator by the language of the codicil to exclude it. Such being the effect of a codicil, the revocation of it or of the devises or bequests contained in it cannot disconnect it, or wholly destroy its influence upon the will. The simple act of revocation can never destroy the effect of a republication. A codicil legally executed although afterward revoked, must therefore be regarded for certain purposes as a part of the will. And it may, like other parts of it which have been altered or annihilated by subsequent acts of the testator, serve to explain his intentions, which are to be collected from all his last testamentary declarations, which have been legally executed. If such therefore be the character of this codicil it should be produced and a decree is to be entered accordingly.

If it should prove that it was never legally executed, it would not become a part of the will, and could have no operation upon it. It would in such case be but a loose and extrinsic paper not receivable in aid of its construction. This is the doctrine as established by the case of *Brown* v. *Selwin*, Cas. temp. Talbot, 240; and recognized in the case of *Jackson* v. *Sill*, 11 Johns. 201; where many of the previous cases are examined. And in such an event there would be no reason for requiring its production in this case.

GEORGE HOBBS, Plaintiff in Error, *versus* JOHN STAPLES, JR.

The judgment in an action for a penalty given by statute is erroneous, if it do not state the offence to have been incurred against the form of the statute.

A judgment conclusive upon the rights of the parties and from which there is no appeal but by error, is considered a final judgment.

Statute c. 121, § 45, gives no authority for the Court to make an amendment of the record of another Court, brought before it by writ of error.

ERROR, to reverse the judgment of a justice of the peace, in an action of debt, brought to recover the penalty given by statute for non-attendance at a company training.

One error assigned was, that the declaration did not allege the penalty to have been incurred against the form of the statute.

A motion was made at the argument, by the counsel for the defendant in error, to amend by inserting "against the form of the statute."

Bourne, for the plaintiff in error, cited *Peabody* v. *Hayt*, 10 Mass. R. 36; *Heald* v. *Weston*, 2 Greenl. 348.

N. D. Appleton, for the defendant in error, in support of his motion to amend, cited 6 Dane's Abr. 278; St. of Maine, c. 178, § 6; *Baxter* v. *Rice*, 21 Pick. 197; *Cheetham* v. *Tillotson*, 4 Johns. 499.

If judgment were to be reversed, there would be a trial at the bar of this Court, when amendments might be made. *Cutter* v. *Tole*, 2 Greenl. 181; *Avery* v. *Butters*, 9 Greenl. 16; *Same* v. *Same*, 2 Fairf. 405; *Hill* v. *Fuller*, 14 Maine R. 121; *Winslow* v. *Prince*, 5 Greenl. 264.

He also objected that the statement of facts sent up by the justice, was dated long after judgment was rendered. *Howard* v. *Folger*, 15 Maine R. 447.

The opinion of the Court was delivered by

SHEPLEY J. — The declaration does not allege the penalty to have been incurred contrary to the form of the statute. The judgment was therefore erroneous. *Heald* v. *Weston*, 2 Greenl. 348.

The defendant's counsel moves to amend the declaration; and relies upon the provisions of the statute, c. 121, § 45, and the case of *Cheetham* v. *Tillotson*, 4 Johns. 499. The provision of the statute is, that it shall be lawful "to amend his writ or complaint in any stage of the process before the rendition of final judgment therein." A judgment conclusive upon the rights of the parties and from which there is no appeal but by error, is considered a final judgment. According to the English practice a judgment is not considered complete and final when the proper officer has marked the postea for judgment, but when the prothonotary's allocation of costs has been completed by the insertion of the amount in the record. *Blackburn* v. *Kymer*, 5 Taunt. 672; *Butler* v. *Bulkeley*, 1 Bing. 233. In *Wray* v. *Lister*, 2 Stra. 1110, it was decided, that an amendment could not be allowed after final judgment and error brought. And in *Hutchinson* v. *Crossen*, 10 Mass. R. 251, that court decided, that it had no authority to make an amendment of the record of another court brought before it by writ of error. The statute commented upon in *Cheetham* v. *Tillotson*, differs from the statutes of Massachusetts and Maine on the same subject. It provided for amendments by the judges, "where such judgments are or shall be given, or whereunto the record is or shall be removed by writ of error.

This court only can decide upon the record as it is presented by the writ of error. It is not necessary to decide upon the other errors assigned.

Judgment reversed.

INHABITANTS OF KENNEBUNK *versus* INHABITANTS OF ALFRED.

Expenses incurred for supplies furnished a pauper under the provisions of act St. 1821, c. 127, providing against the spread of contagious sickness, are a proper charge against, and may be recovered of, the town where the person receiving such supplies has his legal settlement.

Expenses incurred for the protection of the inhabitants of the town from the smallpox, and to prevent the spread of contagious diseases, cannot be recovered of the sick person, but must be borne by the town thereby to be benefitted.

Expenses "for nurses, attendance, and other assistance and necessaries," may be recovered — but not those incurred by virtue of c. 127, for the protection of the inhabitants of the town in which such expenses are incurred.

ASSUMPSIT for supplies furnished one Amos W. Wormwood and wife, and nine children.

It was admitted that Wormwood had his legal settlement in Alfred, that he lived in Kennebunk, and had resided there about one year previous to his receiving any supplies from the plaintiffs — that he was taken sick in Kennebunk with the smallpox a short time after his arrival in a coaster from Boston, where he had been employed as a laborer — that he and his family, to wit, wife and four children, remained sick of the aforesaid disease about six weeks — that after the said Wormwood and family were taken sick, to wit, on the 31st day of December, 1839, the overseers of the poor of Kennebunk notified the overseers of Alfred, that said Wormwood and his family, naming them, were sick with the smallpox, and requesting the overseers of Alfred to "order their removal or otherwise provide for them" — it was likewise admitted, that the overseers of the poor of Alfred, within a few days after the receipt of said letter, returned an answer to the overseers of the poor of Kennebunk, denying the right of Kennebunk, under the circumstances, to charge the expenses of Wormwood and family to the town of Alfred, and referring them to the act relating to the smallpox. Part of the expenses in the plaintiffs' account were for expenses in moving the house, &c. for the residence of said Wormwood and family, and for the protection of the inhabitants of Kennebunk, and to prevent the spread of the disease.

Upon these facts, the plaintiffs' right to recover was submitted to the consideration of the Court — and if the defendants are liable, the amount of damages is to be determined by an auditor, or by a jury, if the defendants should so wish.

Bourne, for the plaintiffs, referred the Court to St. 1821, c. 102, § 11, and c. 127, § 1.

W. C. Allen, for the defendants, argued that Wormwood did not fall within the provisions of the law for the support of the poor, c. 102, § 11 — but within those of the act to prevent the spreading of the smallpox, c. 127, § 1. The first cited law, imposes upon the *overseers of the poor* the duty of providing for the comfort and relief of persons found or residing in their towns — and who stand in need of relief, but having a *lawful settlement* in other towns. Ch. 127, § 1, makes it the duty of the *selectmen* to make provisions for the preservation of the inhabitants, by removing persons coming from abroad or *belonging* to said town, visited with the smallpox, &c. In all the provisions of the poor law the pauper is under the care of the overseers of the poor.

By c. 127, the overseers of the poor have no control over the person, but that is confided to the care and control of the selectment — neither in this statute is the phrase *legal settlement* used.

The different phraseology used in these statutes — *legal settlement* — *belong* and *belonging*, could not have occurred except to carry out a different intention of the legislature.

There are good reasons why the burthens imposed by this statute should be thrown upon the town to which the person belonged — or at which he arrived when coming from abroad. The expense is for the benefit of the town incurring it. The poor law provides that the pauper shall be supported at the expense of the town where he has his legal settlement until he be removed; but here Wormwood, was under the charge of the selectmen of Kennebunk and his removal would have been a violation of law.

If the defendants are liable it is only for the expenses necessarily incurred for the paupers' relief — and not for what

was done for the preservation of the health of the inhabitants of Kennebunk.

The opinion of the Court was delivered by

SHEPLEY J. — The expenses were incurred under the provisions of the first section of the act c. 127, providing against the spread of contagious sickness. The father of the sick family had a legal settlement in Alfred. The counsel for that town contends, that the law does not impose the burthen in such case upon the town where the sick person has a settlement, but upon the town where he has an established residence. That the phrase in the act, "at the charge of the town or place whereto they belonged," shews such to have been the intention; otherwise the term settlement would have been used as in the act providing for the relief of the poor. That these persons are not under the charge of the overseers, and cannot be removed like paupers, but are under the charge of the selectmen, for the preservation of the inhabitants.

It must be conceded, that the primary object of the act appears to have been the protection of the people against contagious sickness. And part of the expense authorised appears to have been designed solely for that purpose, and another part for the healing and comfort of the sick. The latter portion is to be repaid to the town by the sick persons, their parents or masters, if able, and if not, by the towns or places where they belong. If the construction contended for should be adopted, it might impose burthens upon towns for the support of poor persons resident therein, who had legal settlements in other towns within the State, contrary to the general policy and provisions of the law for the relief of the poor. And there would be no law providing for notice to the town to be charged, or for the recovery of the expenses incurred, for the statute provisions respecting these matters have reference only to towns where the pauper has a settlement. It must have been the intention, that the town should be referred to the act for the relief of the poor for these purposes. The word "belong," is not often, if at all, used in the legislation on this subject to

signify a merely established residence. Where he resides, or where he dwells and has his home, is the language usually employed; while in the eleventh section of the general act, the word is used in contra-distinction from that of residence, and communicates the same idea as settlement. The provision is, "that it shall be the duty of said overseers, in their respective towns, to provide for the immediate comfort and relief of all persons residing or found therein, not belonging thereto;" that is, not having a settlement therein. In the same sense the word appears to have been used in the section under consideration. The town of Alfred must therefore be considered liable for such expenses as are properly chargeable by the plaintiffs to any other town. The agreed statement finds, that part of the expenses were incurred "in moving a house," "and for the protection of said inhabitants of Kennebunk, and to prevent the spread of said disease." These may have been very necessary expenditures. But the statute, while it empowers the selectmen to make provision for the preservation of the inhabitants, and for the removal of the sick into separate houses, does not authorize the town to recover the expenses incurred for these purposes from the sick person or from another town. They are also to provide "nurses, attendance, and other assistance and necessaries for them," which nurses, attendance, and other assistance and necessaries, and not all the expenses incurred for all the objects provided for in the statute, are chargeable to the sick person, or town where he belongs. The plaintiffs may recover all reasonable expenses incurred for these purposes, and no more.

State *versus* Patrick Furlong.

To sustain an indictment for larceny, proof must be adduced that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that a felony has been committed.

In an indictment for stealing three sides of sole leather, the property of A. B. when the alleged owner testifies that he could not swear positively that "he had lost leather, or that he had not sold the same leather to some other person than the defendant" — this is not sufficient proof that the ownership of the property taken was at the time of the taking, in the person described as owner in the indictment.

Proof that the person charged with a larceny, was poor, and that for years before he had not been the owner of property to the amount alleged to be stolen — that he made false statements as to where he obtained the property, and that when selling it, he called himself by a wrong name — and that he did not, or could not give any account how he came by the property — though tending strongly to implicate his integrity — has no tendency to prove the ownership of the property stolen — as alleged.

Exceptions from the District Court.

This was an indictment for larceny alleged to have been committed by the defendant in taking and carrying away three sides of sole leather, the property of one Ezra Eastman, of Limerick, on the 23d day of October, A. D. 1839.

To prove the facts charged in the indictment, Ezra Eastman was called, who testified that he could not positively swear that he had lost leather, or that he had not sold the same leather to some other person than the defendant; but that previous to the time of taking, alleged in the indictment, he had thought, but could not swear, that he had lost leather. It further appeared that about October 25, 1839, said Eastman, after hearing of Furlong's having sold leather in Portland to one Hanson, took with him a side of leather of his own tanning and called on Hanson — that most of the leather purchased by Hanson of the defendant, had been sold, with the exception of a small remnant, and that one side had been sold, which was in Court at the trial. The witness testified that he thought the leather produced was of his tanning and had no doubt of it — but could not positively swear that it was.

It appeared from the testimony of Moses Eastman, a son of

the witness first called — that he had worked in the shop of his father during the past year and that he did not miss any leather, nor hear of any being missed. He further testified to the identity of the leather.

It appeared from the testimony of Hanson, who was a witness in the case, that Furlong called at his store in Portland, on the 23d day of October, 1839, and sold him three sides of sole leather, manifestly from the same tannery, the side produced being one of them — at nineteen cents a pound — that he asked the defendant his name — that the defendant gave his name, but it was not Furlong — but that he was the man from whom he purchased it — that defendant said the leather was tanned by one Kimball of Parsonsfield, of whom he thought, he said he purchased it — that it is easy for tanners to designate leather of their tanning — that when he paid defendant for the leather, he let him have a one dollar Calais bill, which he returned saying there was a discount upon it — and that he gave him another bill for it. There was other testimony to show the facility of discriminating between the leather from different tanneries.

It appeared in evidence that the defendant had never been employed in the sale, purchase or manufacture of leather, or had been the last eight or ten years in the possession of property to that amount at any one time. There was no evidence offered by defendant to show how he came by the leather.

Whitman J. who presided at the trial, instructed the jury that if the evidence satisfied them, that the leather must have come from Eastman's tannery, and had not been sold by him to the defendant; and that the defendant was destitute of property and could not be believed to have had three sides of sole leather in his possession without being able to give some account of how he came by them, consistently with his innocence, if he came by them fairly; and if they should be satisfied that he sold the leather to Hanson, calling himself by a wrong name and stated falsely as to where the leather was obtained by him, they might, as he had given no intimation as to how he

came by the leather, be justified by the rule of law in finding him guilty.

The jury returned a verdict of guilty and exceptions were filed to the instructions of the Court.

Caverly, for defendant — That there was no evidence that a larceny had been committed — there being no certainty that there had been any lost, without proof of which, the indictment could not be sustained. 4 Bl. Com. 359; 2 Starkie's Ev. 840; 2 Hale's P. C. 290; 2 East's P. C. 657. The circumstances proved are not sufficient to overcome the presumption of innocence. 3 Dane's Abr. 503; 2 B. & A. 386; 3 Bl. Com. 371; 4 Bl. Com. 289.

Goodenow, Attorney General, *contra*

The opinion of the Court was delivered by

Emery J. — To suppress the commission of crimes, is one of the primary objects of the administration of criminal justice; and nothing is more likely to accomplish this object, than the speedy detection and certain punishment of the offender. But still, as it is deemed of the highest consequence that a uniform application should be made of the rules of law in the trial of criminal offences, great care should be taken that no strong desires to advance imagined justice, and array in the most imposing manner evidence to bear it down in its concentrated form upon an accused person, as is right, should deprive him of all the protection which the law can extend to his case. Thus, every one is presumed, the law says, to be innocent, till the contrary be shown. It is possible that this defendant is guilty; and if we sustain the exceptions, the result of another investigation may yet not be variant from that of which he now complains. With that, however, we have nothing to do. But with the facts reported, and the charge of the Judge to the jury, we must endeavor to discern the true course indicated by a long exposition of principles hitherto supposed of great importance in trials for larceny. It is essential, upon the trial, to prove that the defendant is the person who actually committed the offence. It may be by circumstantial evidence. It

must be proved that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment. This is so essential, that if he be described in the indictment as a certain person, to the jurors unknown, and it appears in evidence that his name is known, the defendant should be acquitted of that indictment, and tried upon a new one, for stealing the goods of the owner, by name. 2 East. P. C. 651; 3 Camp. 264. And in prosecutions for stealing goods of a person unknown, some proof must be given, sufficient to raise a reasonable presumption that the taking was felonious, or against the will of the owner; for it is not enough that the prisoner is unable to give a good account how he came by the goods.

If a man lose goods, and another find them, and not knowing the owner, convert them to his own use, this is not larceny. 1 Hawk. c. 33, § 2. Even although he deny the finding of them, or secrete them. 1 Hale, 506. But it is otherwise if he know the owner. 2 Leach, 952; *Rex* v. *Wynne*, 2 East, 1664.

Generally, *wherever the property of one man, which has been taken from him*, without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise, the presumption is that he obtained it feloniously. 2 East's Cr. Law, 656.

But the bare circumstance of finding in one's possession, property of the same kind which another has lost, unless that other can, from marks or other circumstances, satisfy the Court and jury of the identity of it, is not, in general, sufficient evidence of the goods having been feloniously obtained. Though where the fact is very recent, so as to afford reasonable presumption that the property could not have been acquired in any other manner, the Court are warranted in concluding it is the same, unless the prisoner can prove the contrary.

Thus, a man *being found coming out of another's barn, and upon search, corn being found upon him of the same kind* with what was in the barn, is pregnant evidence of guilt. So persons employed *in carrying sugar and other articles from ships and wharves*, have often been convicted of larceny

at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could no otherwise be proved.

But this must be understood *at least of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them;* for Lord Hale says, he would never convict any person of stealing the goods of one unknown, merely because he could not give an account how he came by them; unless *due proof were made that a felony had been committed of those goods.* Neither is the fact of concealment, *the identity of the property not being proved,* of itself, evidence of stealing, though undoubtedly very strong corroborative proof of it. 2 East's Cr. Law, 657.

The leather is alleged in the indictment to be the goods and chattels of Ezra Eastman. He testified, that he could not positively swear that he had lost leather, or that he had not sold the same leather to some other person than the defendant; but that previous to the 23d day of October, 1839, he had thought he had lost leather, but did not mention it to any one, and could not swear that he has lost any leather. One of the sides of leather which the defendant sold to Mr. Hanson, was brought into court at the trial, and compared with leather of said Eastman's tanning, and said Eastman testified that he thought the leather was of his tanning, and had no doubt of it, but could not positively swear that it was, although he thought he could designate leather of his tanning wherever he might find it.

The testimony of Moses Eastman, son of said Ezra, was, that he had worked in the shop of his father during the past year, but that he did not miss leather, or hear of any leather being missed, or suspected that any had been stolen, and that the said Ezra Eastman, during the said year, had tanned and sold leather to a large amount to various individuals in Limerick, and the neighboring towns, to the amount of several tons, but had sold no leather to the defendant. It further appeared in evidence, that the defendant was not a man of property,

and would not have been likely to have been the purchaser of leather to that amount, and had not been known to be possessed of property to that amount at any one time for ten years past. Said Moses Eastman testified to the identity of the side sold to Hanson, as having come from said Ezra's tannery.

Mr. Hanson, the purchaser, at Portland, of the leather from the defendant, asked defendant his name; the defendant told his name, but that it was not Furlong. Hanson further testified, that Furlong told him that the leather was tanned by Kimball of Parsonsfield, and he thought Furlong said he bought it of Kimball. The defendant was never employed in the sale, purchase, or manufacture of leather, nor was there any evidence offered by defendant to show how he came by the leather.

It appears to us that the evidence does not warrant the instructions given by the Judge, upon this indictment. Had the indictment included a count for stealing the goods and chattels of some person, to the jurors unknown, if proof were made that a felony had been committed, the facts reported might have justified the instruction. The question was not, solely, whether the three sides of leather came from Eastman's tannery, but whether, also, they were the property of Ezra Eastman. They might have been from his tannery, and yet not have been his property. He had in that year tanned and sold several tons of leather, to various individuals in the town of Limerick, and the neighboring towns. He could not positively swear that he had lost leather, or that he had not sold the same leather to some other person than the defendant; and Moses Eastman, said Ezra's son, who had worked in the shop of his father during the then past year, testified, that he did not miss leather, or hear of any leather being missed, or suspected that any had been stolen.

That the defendant was a poor man, and would not have been likely to have been the purchaser of leather to that amount, and had not been known to be possessed of property to that amount, at any one time, for ten years past — or even his calling himself by a wrong name, and stating falsely as to

where the leather was obtained by him, though strongly implicating the integrity of his conduct, would not amount to proof that this leather was the property of Ezra Eastman, even though the defendant had the three sides of leather in his possession, without being able to give some account of how he came by them, consistently with his innocence, if he had come by them fairly.

It is urged, by the defendant's counsel, that there is incorrectness in the remark of the Judge, "that the defendant had given no intimation as to how he came by the leather," that the instruction "was one sided, argumentative, tending to mislead the jury." We are not aware of any rule of law which prevents a Judge from expressing his sentiments as to the evidence, and suggesting to the jury such views as may aid them in coming to a right conclusion. To be sure, if he should be so unfortunate as to do injustice to a defendant by an argument tending to mislead the jury from a just consideration of the evidence, or give a wrong direction in matter of law, it is an event deeply to be lamented. The counsel of the prisoner, however, can request specific instructions as to the law, or take general exceptions.

It is not every false account which is given by an accused, as to how he obtained an article, which is proved to have been stolen, which will screen an offender. If the prisoner's confession is offered in evidence it must be taken altogether. Yet it does not supersede the necessity of proof on his part how he came by the article, when a *prima facie* case is made out against him of having the property of the alleged owner in his possession.

We perceive but little in the case to excite interest in favor of the defendant. His omission to give account rouses suspicion. But that is not enough.

We apprehend it would be dangerous to let the doctrine here in the instruction communicated to the jury, *be sanctioned as the law upon this indictment.* And we feel bound to sustain the exceptions. For we do not see but that any tanner of extensive business who may have sold tons of leather man-

ufactured by him, on a suspicion, though not announced to any one, may upon finding a quantity of leather which was originally prepared at his tannery, in the possession of a poor man, where the possessor of it does not choose to give an account how he came by it, may cause the possessor to be indicted and under such an instruction convicted, when in fact none of the tanner's property may have been purloined, and if a conviction should take place, the tanner may obtain restitution of leather, which neither he himself nor any one for him can positively swear he has lost.

The verdict must be set aside and the cause remanded to the District Court for further proceedings.

NOAH BURNHAM *versus* EBENEZER WEBSTER.

The cashier of a bank is the regularly authorized agent of the bank and whatever is done by him in that capacity is the act of the bank.

When a note is left with a bank for collection, although the bank has no interest in it; yet for certain purposes they are to be considered the real holders.

Where the date of the note is the only date upon it, the indorsements are to be considered as made at that time unless proved to have been made subsequently.

Proof that a note indorsed to a cashier — and by him handed to a notary for protest, is sufficient to establish the fact that it was either negotiated to or left in the bank for collection — and consequently that the makers are entitled to grace.

THIS was an action of assumpsit brought by the plaintiff as indorsee of a note of hand, dated Newburyport, July 10, 1835, given by William Palmer and Samuel Phillips for $3302,03, payable in three years with interest annually to the order of Eben Webster, and by him indorsed and likewise by Daniel Burnham and David Webster. Above the names of the indorsers was written, "I hold myself responsible and waive all notice."

It appeared in evidence that the above note, indorsed S. S. Fairfield, cashier, to John Andrews, cashier of the Mechanics' Bank, Newburyport, was delivered by said Andrews to W. Woart, a notary public at Newburyport, Mass. by whom the note was on the 13th July, 1838, presented to Samuel Phillips, one of the promissors, of whom he demanded payment, which was refused. That inquiry was made for Palmer, the other promisor, and for the indorsers — but they could not be found at Newburyport.

Upon this evidence the defendant was defaulted, with an agreement of the parties that if the Court should be of opinion, that the evidence offered by the plaintiff was not sufficient to enable him to maintain the suit, the default was to be taken off, and the cause stand for trial, otherwise judgment was to be rendered for the plaintiff.

J. Shepley, for the defendant, argued — that this note had never been discounted nor left in a bank for collection — and that the presentment should have been on the 10th of July. The plaintiff should show, affirmatively, that it was in the bank as early as the 10th. If placed in the bank subsequently to that day, it would be too late. The holder might retain a note till the 11th — then place it with a cashier, procure his indorsement thereon — and have the demand made on the 13th. But this would be after the indorser was discharged. The plaintiff is bound affirmatively, to show either that it was discounted, or left for collection, and not producing that evidence, the suit cannot be sustained. *Warren* v. *Gilman*, 15 Maine R. 70.

Leland, for the plaintiff. By St. 1824, c. 272, all bills out of the State are entitled to grace. The demand on the maker was sufficient, and is fully proved. *Shed* v. *Brett*, 1 Pick. 401; *Clark* v. *Bigelow*, 16 Maine R. 248; *Phœnix Bank* v. *Hussey*, 12 Pick. 483; *Warren* v. *Warren*, 16 Maine R. 260; *Green* v. *Jackson*, 15 Maine R. 136. Possession is sufficient evidence of title. *Lord* v. *Appleton*, 15 Maine R. 270; *Fisher* v. *Bradford*, 7 Greenl. 28; *Mc Donald* v.

Smith, 14 Maine R. 99. When one has a beneficial interest, the action may be rightfully maintained in his name. *Fairfield* v. *Adams*, 16 Pick. 381; *Folger* v. *Chase*, 18 Pick. 66; *Ellsworth* v. *Brewer*, 11 Pick. 316; Bailey on Bills, 390.

The opinion of the Court was delivered by

TENNEY J. — This suit is against the defendant as the indorser of the promissory note declared on. He defends on the ground, that no legal demand was made upon the makers. The note is dated July 10, 1835, payable in three years, and purports to have been made in Massachusetts. On the 13th day of July, 1838, John Andrews, Jr. cashier of the Mechanics' Bank in Newburyport, put it into the hands of a notary, that a demand might be made upon the makers — a demand was made by the notary on that day, conformably to law. It was indorsed by S. S. Fairfield, cashier, to said Andrews, cashier.

For the purpose of rendering bills of exchange and promissory notes negotiable, the right of property passes with the bills themselves, if taken in the course of trade, when not over due or otherwise dishonored by any thing apparent on the face. The possession and property are inseparable. *Collins* v. *Martin*, 1 Bos. & Pul. 648. The cashier of a bank is the regularly authorized organ thereof, and whatever is done by him in that capacity is the act of the bank. When a bill is left in a bank for collection, although the bank has no interest in it, yet for the purposes of receiving and transmitting notices, they are to be considered the real holders. *Warren* v. *Gilman*, 17 Maine R. 360; *Freeman's Bank* v. *Perkins*, 18 ib. 292. The note in question was not only holden by the Mechanics' Bank for the purposes of collection on the 13th of July, 1838, but may be regarded as their property; it came by regular negotiation into their hands. But it is insisted that there is nothing which shows this note to have been in a bank previous to that time; and if suffered to expire without a demand upon the makers, it could not be revived by being negotiated

to a bank. The date of the note is the only date upon it. The indorsements are to be considered as made at that time, unless proved to have been made subsequently; this note is to be treated as having been in the bank from its origin; and the demand was conformable to the laws of this state.

But this note was made in Massachusetts; and it is there that the makers are to be regarded as undertaking to pay it. Story's Conflict of Laws, 263. By the laws of that State, we are to be governed in ascertaining when it fell due, and the days of grace belonging to it, whether for the benefit of the holder, or the debtor; in one word, every thing which relates to the right of requiring payment of the debt. Story's Conflict of Laws, 289–299. By the laws of Massachusetts the note was not due till the expiration of the three days of grace and the makers were not bound to pay it till that time; consequently the holder could make no legal demand for payment before. Mass. St. 1825, c. 130; Rev. St. Mass. 303.

The default must stand.

WILLIAM L. THOMPSON *versus* BENJAMIN THOMPSON, JR.

By receiving a second deed of warranty from the same grantor of the same premises, the grantee is not estopped from asserting that his title passed by the first conveyance.

One may fortify an existing title without putting it in jeopardy, if the rights of others are not thereby prejudiced; and by so doing, he cannot originate rights in others.

A stranger to the first deed, having no authority to contest its validity when given, cannot defeat that title by means of the doctrine of estoppel because the grantee has taken a second deed of the same premises.

THIS was a writ of entry. The general issue was pleaded and joined.

To support his suit, the demandant read in evidence a bond given to the Judge of Probate for the county of York, signed by Phineas Ricker, as guardian of the demandant, and by Benjamin Thompson and Joshua Roberts, as sureties, dated

Oct. 20, 1820. Also, a judgment rendered in an action brought in the name of the Judge of Probate, on said bond, against said Benjamin Thompson and Joshua Roberts, at the September Term of this Court, 1837; and an execution issued thereon, and the levy upon the demanded premises, as the property of said Benjamin Thompson, on the 4th November, 1837, upon and by virtue of said execution.

The defendant offered in evidence, a deed from Benjamin Thompson to the defendant, his son, dated June 15, 1820, and acknowledged March 4, 1836, subsequent to the commencement of the suit before mentioned, against Ricker and his sureties, and proved by the attesting witness the execution of the deed at its date; and that at the time of its acknowledgement, the defendant and Benjamin Thompson were present before the attesting magistrate; that the defendant took the deed out of his pocket, handed it to the magistrate, and took it back after its acknowledgement.

The tenant then offered a copy of a bond from himself to Benjamin Thompson, dated Nov. 14, 1820, acknowledged Nov. 15, 1820, recorded Dec. 12, 1820; also a deed from Benj. Thompson to the defendant, of the same date, acknowledged Nov. 15, 1820, and recorded Dec. 12, 1820, conveying the same premises included in the deed of June 15, 1820, from said Benjamin Thompson to the tenant, and two acres in addition. The only consideration for either of these deeds, were certain bonds executed at the date of the respective deeds.

There was evidence introduced, tending to impeach the conveyance of Nov. 15, 1820, as void, as to the plaintiff, whose rights, as a creditor, accrued Oct. 20, 1820.

The counsel for the demandant, contended, that the deed of June 15, 1820, was not executed and delivered to the tenant, and that from all the evidence in the case, the jury would be justified in so believing, and requested the Court to instruct the jury as follows: — 1. That the tenant was estopped by the deed to him of Nov. 14, 1820, and the bond from him to Benjamin Thompson, sen., of the same date, to deny the seizin of the latter at that time. 2. That if the jury found that the

deed of June 15, 1820, was delivered at that time, but was afterwards cancelled or abandoned, and the deed of Nov. 14, 1820, was made and executed to consummate the arrangement of the parties as agreed upon, then the plaintiff had a right to recover.

But EMERY J., who tried the cause, instructed the jury, that if, from the evidence, they were satisfied that the reason for taking the second conveyance, was for the purpose of carrying into effect the agreement of the parties, as to the two acres, and that it was fairly and honestly done, without any fraudulent intent, the taking of the second deed would not estop the defendant from setting up his claim under the deed of June 15, 1820.

But that if they were satisfied that the said deed of June 15, 1820, was intentionally cancelled and abandoned by the parties, the said deed of Nov. 14, 1820, might be considered as estopping the tenant from denying the seizin of Benjamin Thompson, sen., at that time.

If these instructions were erroneous, or if the requested instructions should have been given, the verdict, which was in favor of the tenant, is to be set aside, and a new trial granted; otherwise, judgment is to be entered on the verdict.

Fairfield, for the demandant. The plaintiff's right arises under and by virtue of the bond given by Roberts, Oct. 20, 1820, as his guardian. The deeds under which the tenant claims, are voluntary; but the latter only was made after his rights, as a creditor, accrued. The tenant, taking a deed with covenants of seizin, Nov. 14, 1820, is estopped thereby to assert any claim under the prior deed of June. Estoppels are only odious when misapplied. *Adams* v. *Cuddy*, 13 Pick. 460.

The tenant, giving a bond and taking a deed, with the usual covenants, is estopped to deny that any thing passed by such deed. *Nason* v. *Allen*, 6 Greenl. 243; *Kimball* v. *Kimball*, 2 Greenl. 226; *Fairbanks* v, *Williamson*, 7 Greenl. 96; *Hains* v. *Gardner*, 1 Fairf. 383; *Smith* v. *Ingalls*, 13 Maine R. 285; *Ham* v. *Ham*, 14 Maine R. 351. The cases cited

refer mostly to questions of dower, but the principle on which they were decided, applies equally to the case at bar.

The second requested instruction should have been given. If the first deed was cancelled, and the fact that it was neither acknowledged nor recorded till after the attachment in the suit against the grantor, as surety of Roberts, tends to prove that the tenant did not claim under it, then the question of estoppel became immaterial. Hence, the second requested instruction was important, without reference to the question of estoppels; as, if the first deed were cancelled, then the plaintiff would have been permitted to contest the fairness of the second.

J. Shepley & Howard, for tenant. The jury have found that the title to the demanded premises passed to the tenant by the deed of June 15, 1820, and that the object of giving the second was to carry into effect an agreement as to the two acres. 1 Maine Laws, c. 36, § 1; *Smith* v. *Ingalls*, 13 Maine R. 284; *Marshall* v. *Fisk*, 6 Mass. R. 24; *Sewall* v. *Lee*, 9 Mass. R. 370; *Barrett* v. *Thorndike*, 1 Greenl. 73; *Commonwealth* v. *Dudley*, 10 Mass. R. 403.

There is no evidence that the title acquired by the deed of June ever vested in the grantor. The grantee is not estopped to deny the title of his grantor. The grantee may fortify his title by a purchase. *Small* v. *Procter*, 15 Mass. R. 499; *Somes* v. *Skinner*, 16 Mass. R. 357; *Johnson* v. *McIntosh*, 7 Wheat. 535. The law considers estoppels odious — dark windows, shutting out the light. *Carver* v. *Astor*, 4 Pet. 83; *Crane* v. *Morris & al.* 6 Pet. 611; Co. Lit. 352, a, b; *Terrett* v. *Taylor*, 9 Cranch, 43. The grantor is estopped by the first deed — not the grantee. The covenants contained in the deed of Nov. 14, 1820, apply only to the two acres. Where there is any thing for the covenant to operate upon, the doctrine of estoppel does not apply. *Jackson & al.* v. *Hoffman*, 9 Cow. 273. If this deed covered the same property, it would only enure to support the first deed, and be subsidiary thereto. *Jackson* v. *Murray*, 12 Johns. 201; *Jackson* v. *Stevens*, 13 Johns. 316. The tenant is not estopped by accepting a deed of his own land.

The question presented is whether the tenant by accepting a second deed lost the title acquired by his first. The title passing by the first deed, the second was in effect but a deed of release. *Fletcher* v. *Willard*, 14 Pick. 464.

The claim of the plaintiff is inconsistent. He would consider the covenants of the deed of Nov. 15, valid by way of estoppel — to disprove the fact that any title passed by the first deed. But valid, to that effect, he wishes it to be considered fraudulent so that nothing may thereby pass, making the deed valid as to one covenant — yet invalid in its effect to pass any title — good and bad at the same time.

The opinion of the Court was delivered by

TENNEY J. — Both parties claim under Benjamin Thompson, sen. The demandant by virtue of a levy of an execution issued upon a judgment in a suit, the basis of which was a bond to the Judge of Probate, executed by Benjamin Thompson, sen. and another as the sureties of one Ricker, the guardian of the demandant, dated Oct. 2, 1820; and the defendant by deeds dated June 15, and Nov. 14, 1820, both of the same land, excepting that the one of Nov. 14, embraced two acres more than the other, and both containing covenants of seizin and warranty. It is contended by the demandant, that the latter deed is an estoppel upon the defendant to say that he was seized previously to the date thereof, and that the demandant is allowed as a creditor at that time to impeach the same deed as fraudulent against him, being a creditor by virtue of a bond.

It is well settled that a party shall not be allowed to deny a fact, clearly stated in his deed — and also that he shall not be permitted to prove he had no title to land by virtue of a deed, under which he holds, when it contains a covenant or recital inconsistent with the proof offered. In cases of dower, the latter principle has been applied: the tenant has been estopped to deny the seizin of the demandant's husband, when he has taken a deed from him containing a covenant of seizin, and when it appears he has relied upon that title. But in

a claim for dower, it is not required to show a perfect title in the husband, seizin only being necessary. The same principle has extended to other cases. One has not been allowed to set up a title, derived from another previous to his own agreement to purchase of that other's grantee, if the conveyance should be made to such grantee. *Sales* v. *Smith*, 12 Wendell, 57.

But denying and repudiating a title under which one holds, or refusing to be bound by a contract to hold under another made solemnly and with full understanding of all the circumstances, where rights have been acquired by others, by reason of such contract, is different from his supporting that title, and complying with his contract by other means, not inconsistent therewith. One may fortify an existing title, without putting it in jeopardy, if he do not prejudice the interests of others; and doing so, cannot originate rights in strangers, where there was nothing before on which they could rest. Claiming under one conveyance, and denying effect to another, where he has entered and enjoyed under the latter, is widely distinguished, from his claiming under two conveyances from the same grantor. In 4 Peters, 83, the Court say, "It is laid down, that recitals of one deed in another bind parties. Technically, it operates as an estoppel, binding parties and privies, &c. It does not bind strangers, or those claiming by a title paramount to the deed; it does not bind persons, claiming by an adverse title, or persons claiming from the parties by title anterior to the reciting deed." "The grantee may be permitted to show that the grantor was not seized as is every day allowed in actions of covenant." *Small* v. *Procter*, 15 Mass. R. 495. "It is generally competent for the vendee to deny and disprove the seizin of the vendor." *Ham* v. *Ham*, 2 Shep. 351. Covenants of seizin in this respect differ from covenants of warranty, the former do not prevent the grantor from setting up an after acquired paramount title in himself. *Allen* v. *Sayward*, 5 Greenl. 227. Otherwise in covenants of warranty, 12 Johns. 201; 13 Johns. 316. One is not estopped by accepting a deed of his own land, for this does not deny

his former title, but may be done to silence adverse claims and to purchase his own quiet; "and every estoppel ought to be a precise affirmation of that which maketh the estoppel." Co. Litt. 52 a. "One is not estopped when the thing is consistent with the record." Com. Dig. (E. 3.) "If any interest pass, there shall be no estoppel." Com. Dig. (a. 1,) (B.) (E. 2,) (E. 4,) (E. 8;) Co. Litt. 352 a., 45 a. It is a general rule, that when there is any thing for the warranty to operate upon, the doctrine of estoppel will not apply. *Jackson & al.* v. *Hoffman*, 9 Cowen, 271.

In the case at bar, the jury have found by their verdict, the question being submitted to them without objection, that the deed of June 15, was executed and delivered at the time it was dated — that passed all the grantor's title, and none was remaining in him, when he executed the probate bond, which is the origin and basis of the demandant's claim. The defendant does not repudiate his deed of Nov. 14, but holds two acres by that alone, on which all the covenants therein must operate. Receiving this deed, interfered with no existing rights, is not and could not be a cause of complaint with any one; so far from it the demandant resorts to it as the foundation of his title to the land therein described. It gave no rights inconsistent with those established by the deed of June 15, so far as it embraced the same land, nor did it take away any; so far, it in no respect changed the relation of the parties. A stranger to the first deed, having on no principle, any authority to contest its validity, until after the title had wholly passed from the grantor, seeks to avail himself of a doctrine, which being denied him, takes away no interest, which in any manner had previously attached.

It is not perceived that the demandant is in any better situation than he would have been, if he had taken Benjamin Thompson, senior's, deed under his own seal after the conveyance of June 15, and before that of Nov. 14, having notice of the first deed. Such a deed as is supposed, to the demandant, would confer no rights till after the second deed to the defendant, and then the former could succeed to none, which his

supposed grantor would not have possessed, so far as they relate to the seizin previous to Nov. 14. If the defendant is estopped to deny the seizin of his grantor previous to the deed of Nov. 14, in consequence of taking it, that estoppel could not operate to the advantage of the demandant any more than it would to that of the one whose interest he claims. Could the grantor say, after the 14th of November, that the defendant was precluded from saying the seizin was in himself after June 15th? If he should claim the benefit of this principle, would it not be an answer to him, that his deed of June 15th was an equal estoppel, to shut his mouth? "Estoppel against estoppel doth put the matter at large." Co. Litt. 252 b. One cannot maintain an action on a covenant of seizin by showing the seizin in himself; "the covenant of seizin extends only to guaranty the bargainee against any title existing in a third person, and which might defeat the estate granted." *Fitch* v. *Baldwin*, 17 Johns. 161. One cannot allege seizin in himself after he has, by his own deed, parted with it. "It would be contrary to the established principles, that a grantor cannot by his own actions or declarations defeat a deed, which he has before made to one, who is claiming and holding under him." *Barrett* v. *Thorndike*, 1 Greenl. 79. "It would seem to be unjust, and contrary to the intent of the grantee, to affect his rights by his acceptance of a deed beyond the rights and interests which should actually pass by it." *Flagg* v. *Mann*, 14 Pick. 482.

The error of the presiding Judge, complained of, was, in submitting to the jury the question in his instructions, whether the reason for taking the conveyance of Nov. 14, was for the purpose of carrying into effect the agreement as to the two additional acres, and whether that was honestly and fairly done without any fraudulent intent. They have answered in the affirmative by their general verdict, and we do not find, that the doctrine of estoppel has been applied in any case analogous to the present; and as the question of intention in executing a deed or release, has been considered by the Courts to be one for the jury, and not for them, where it would seem to be for

the determination of the latter, with as much propriety as the one arising in this case, we do not feel authorized or required to extend the principle to suits not clearly within its legitimate operation. *Fox & al.* v. *Widgery*, 4 Greenl. 214.

On another ground, we think this verdict can be well sustained. The demandant's title rests upon the assumption, that the deed to the defendant, of Nov. 14, was fraudulent as against him, and therefore void. If not fraudulent against him, he cannot contest its operation to convey the land to the defendant. Can he say that the deed which is void against him, admits him by its recitals and covenants to hold land in opposition to what is the truth? Shall he say, the covenants of seizin allow him to come in, and when in, to deny the whole effect of that same covenant of seizin? Is it for him, in this manner, to silence the voice, which honestly and fairly proclaims the title in the defendant? If he attempts to hold, solely, by showing a deed to be fraudulent, does not the very doctrine, which he invokes in his support, dislodge him from such a position? Shall he say, a deed void entirely as against him, contains in it, that without which he has no pretence of title? He cannot be permitted to defeat the deed for one purpose, and set it up for another. *Crosby v. Chase*, 5 Shep. 369. In any view, which we are able to take of the case, we see nothing which leads us to doubt that the verdict was properly returned for the defendant.

Judgment on the verdict.

NATHANIEL L. THOMPSON *versus* DAVID S. THOMPSON.

Where a bond with surety is given by the guardian to secure the ward against official neglect or misconduct, the relation of debtor and creditor arises at the time of signing of the bond, and the obligee or those whom the bond is designed to protect, as creditors may impeach any conveyance made after its date, though prior to any breach of the bond.

THIS was a writ of entry on the seizin of the demandants, in which they claimed to recover a tract of land in Kennebunkport. The general issue was pleaded.

To support their action the demandants read in evidence a bond given to the Judge of Probate for the County of York, signed by Phineas Ricker as guardian of the demandants and by Benjamin Thompson and Joshua Roberts as sureties, dated Oct. 2, 1820 — also a judgment on *scire facias* against the said Thompson and Joshua Roberts at the Sept. Term, 1838, of this Court, to revive a former judgment in favor of the Judge of Probate for said county, against them, and an execution issued thereon, for the benefit of the demandants — and an extent upon the demanded premises as the property of said Benjamin Thompson, on 26th Nov. 1838.

The defendant then read in evidence a deed from said Benjamin Thompson to him, dated Nov. 13, 1820, acknowledged Nov. 14, 1820, and duly recorded, of the demanded premises and other lands which were included in the same conveyance.

The demandants then read in evidence a copy of a deed from Benjamin Thompson to Benj. Thompson, Jr., his son, dated Nov. 14, 1820, duly acknowledged and recorded, conveying a valuable farm, estimated to be worth from three to four thousand dollars.

A copy of the schedule of the sums proved to have come into the hands of said Ricker as guardian, which was filed in the case in which the judgment on *scire facias* was rendered, was offered. From this schedule it appeared that the first sum received by Ricker, was of the date of Dec. 16, 1820, and

that the whole amount received by said Ricker exceeded seven thousand dollars.

Benjamin Thompson, Jr. and David L. Thompson, are sons of Benjamin Thompson, senior, and the demandants are his grandchildren.

Evidence was introduced on the part of the tenant, tending to show that the conveyance from Thompson, senior, to the tenant was *bona fide* and for a valuable consideration — and on the part of the demandants, that in fact no consideration was paid, and that the deed was fraudulent and void as to existing creditors.

The counsel for the tenant contended, that this land conveyed by said Benjamin Thompson, senior, to the tenant, was conveyed to him in payment of a debt which they contended was proved to be justly due from the grantor to the grantee, and also contended, that if the jury should be satisfied that the said conveyance from Benjamin Thompson to the tenant, was made without a full and valuable consideration paid therefor, but in whole or in part, a gift, and only in settlement of his estate, and were also satisfied, that the said Phineas Ricker, the former guardian of the demandants, had not received any money or property for which he was accountable as guardian of the demandants, at the time the deed was executed and delivered — that the demandants were not to be considered prior creditors, because the said guardianship bond had been previously executed and delivered and that the action could not be maintained.

But Emery J. who tried the cause, instructed the jury that the plaintiffs from the time of the execution of the guardianship bond, were to be considered as creditors of the said Benjamin Thompson, senior, and entitled to impeach the conveyance made afterwards by said Benjamin to the tenant — and submitted the question to the jury, whether the deed aforesaid was without consideration and fraudulent, or not.

The jury returned a verdict in favor of the demandants. If the instructions given, were erroneous, the verdict is to be set

aside and a new trial granted; otherwise judgment is to be rendered on the verdict.

Howard, for the tenant, with whom was *J. Shepley*.

1. If the conveyance was voluntary, it is good against subsequent creditors, there being no proof of fraudulent intention. The jury did not find actual fraud. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Hinde's Lessee*, v. *Langworth*, 11 Wheat. 199; *Seward* v. *Jackson*, 8 Cow. 406; *S. C.* 5 Cow. 67; *Cadogan* v. *Kennett*, Cow. 432; *Doe* v. *Rutledge*, Cow. 705; *Briggs* v. *French*, 2 Sum. 251; *Howe* v. *Ward*, 4 Greenl. 195. In the case of *Howe* v. *Ward*, the breach of the bond was before the conveyance. In this it was subsequent. The case, 5 Cow. 67, is based on *Jackson* v. *Myers*, 18 Johns. 425; but it was subsequently reversed in *Seward* v. *Jackson*, 8 Cow. 406. The case in 18 Johns. 425, was a case of actual, not constructive, fraud; and refers to Roberts on Fraudulent Conveyances, 499. In the case there referred to, the conveyance was found actually fraudulent.

2. The plaintiff was not a creditor at the time of the conveyance to the tenant, and consequently is not entitled to impeach this conveyance. Benjamin Thompson was not liable upon the bond till a breach. The bond was not given for the payment of money. No action could be sustained till a breach, for Ricker had then received no property. If Ricker had deceased, or been removed, there would have been no indebtedness upon the bond. The liability of Thompson upon this bond was contingent; it did not happen till after this conveyance, and might never have happened. A discharge in case of bankruptcy would not have been a bar to the liability under this bond, unless there had been a breach. Bonds, of which there has been no breach, are not choses in action; property, not debts. *Lansing* v. *Prendergast*, 9 Johns. 127; *Frost* v. *Carter*, 1 Johns. Cases, 73; *Buel* v. *Gordon*, 6 Johns. 126; *Mechanics' Bank* v. *Capron*, 15 Johns. 467; *Mills* v. *Aurial*, 1 H. Black. 433; *Utterson* v. *Vernon*, 3 T. R. 539; *Aurial* v. *Mills*, 4 T. R. 94; *Young* v. *Hackley*, 3 Wils. 346; *Root* v. *Wilson*, 8 East, 310; *Westerdell* v. *Dale*, 7 T. R.

305; 1 Story's Eq. 359, 369, 345, 410; Fonblanque's Eq. 1, c. 4, § 12; Roberts on Fraud. Conv. 396.

3. This was not a voluntary conveyance. There was a debt due the grantee. To constitute a voluntary conveyance, it must be without any valuable consideration. *Jackson* v. *Peck*, 4 Wend. 300; *Spencer* v. *Harford*, 4 Wend. 383; Roberts on Fraud. Conv. 61–74.

4. If the conveyance was voluntary, it is not to be impeached, if the grantor was then solvent — which was the case here. *Taylor* v. *Mills*, Cowp. 525; *Hinde's Lessee*, v. *Langworth*, 11 Wheat. 199.

Outstanding bonds are not to be considered debts — if it were so, they would constitute a perpetual injunction not to convey — they would be a perpetual lien on the property of the surety so signing.

5. At the time of this conveyance, the guardian had not received any thing. He was then a creditor of the ward, and not the ward a creditor of his. He had then advanced the expenses incurred by him as guardian. *Fales* v. *Thompson*, 1 Mass. R. 134; *Meserve* v. *Dyer*, 4 Greenl. 52; *Reed* v. *Woodman*, 4 Greenl. 400; *Riggs* v. *Thatcher*, 1 Greenl. 72; *Little* v. *Little*, 13 Pick. 425.

N. D. Appleton and *D. Goodenow*, for the demandant. As between the plaintiff and defendant, the case stands precisely as if Thompson was the principal on the bond. The bond given to the Judge of Probate was prospective in its design — being to secure the minor. It was a contract, the parties to which stood in the relation of debtor and creditor. The intention was to obtain continuing and abiding security. The bond was intended to be for years, and to protect the rights of those who were devoid of a natural protector.

The case of *Howe* v. *Ward*, 4 Greenl. 195, establishes the correctness of the ruling of the presiding Judge, and is stronger than the case at bar — as that was the case of an implied promise, this the case of an express contract. *Meserve* v. *Dyer*, 4 Greenl. 52.

The opinion of the Court was delivered by

TENNEY J. — This is a case where the demandants have obtained judgment in the name of the Judge of Probate, on a bond executed by their guardian, against the sureties thereon, one of whom was the grantor to the defendant of the land in controversy, and have made a levy of an execution issued on said judgment.

The demandants attempted to impeach the conveyance to the defendant as fraudulent against creditors, and the only question is on the correctness of the ruling of the Judge who presided in the trial, that the demandants were creditors at the time of the conveyance, and so at liberty to take that ground. The verdict settles the fact of a fraudulent conveyance; but whether by actual or legal fraud, does not appear, and we do not consider it material. It is insisted, that as there was no breach of the bond, consequently no cause of action arising thereon at the time of the execution and delivery of the deed to the defendant, he was not a creditor. The demandants rely upon the case, *Seward, plaintiff in error*, v. *Jackson*, 8 *Cowen*, 406, in which the judgment rendered for the defendant in error, reported in 5 Cowen, 67, was reversed. Other cases are cited on the same side, as analagous to the one at bar. The judgment in 5 Cowen was reversed, but it appears, that it was not in consequence of a supposed error in the court in regarding the defendant in error a creditor. — On this question the chancellor gave no opinion, but after fully considering other points in the case, thought the judgment should be reversed for error in the court on those other points. — One senator thought there were fatal errors other than the one discussed upon that point, and was of opinion, that the defendant was not a creditor; another was in favor of reversing the former judgment, though he held him to have been a creditor; no other member of the court of errors discussed the questions presented in the argument. The decision then of the court in the first case reported, is not to be considered as disturbed on the question now under consideration, and in the opinion of the court it is said, "the demand in this case, fundamentally as it is expressed

by Roberts, in his treatise on fraudulent conveyance, p. 459, arose before the conveyance. It arose upon a covenant prior in date to the conveyance, for the performance of a collateral, and if you please, contingent act. But it cannot be said, that the covenanter was ignorant of his liability, &c. The demandants also cite the case of *Howe* v. *Ward*, 4 Greenl. 195. In that case there was a breach before the conveyance, but the remarks of the court apply to this case, and we think they are sound. MELLEN C. J. says, "so far as the obligee of a bond or the promisee of a note is concerned, the principal and sureties are each and all equally liable, but as between and among themselves each surety is liable for his proportion. What, then, is the relation in which one of the sureties stands to each of the others? The answer is, *at the time* of executing an instrument by several persons as sureties each one impliedly promises all the others, that he will faithfully perform his part of the contract and pay his proportion of loss arising from the total or partial insolvency of the principal, and to indemnify them against any damages by reason of his neglecting so to do. A similar promise is implied on the part of the principal, to indemnify and save harmless each of the sureties. This promise is in both cases conditional in its nature. The principal may remain solvent and punctually pay the debt; and again, in the case of the failure on the part of the principal to pay, each surety may honestly pay his due proportion. It is a promise, which may never be broken, but it is binding until it is broken or performed. In this respect such a promise resembles that by which a man binds himself to pay a certain sum of money on a certain day; here a debt exists *in presenti*, though payable *in futuro*. The debt exists long before the right of action accrues for its recovery." All these obligations and implied promises arise from the express and direct covenant in the bond. The latter is the only foundation on which they can rest, and without that basis, they cannot exist; and consequently it cannot be less binding than those which grow out of them.

What is the object intended to be secured, by the requirement of the statute, that such a bond shall be taken? Can it be treated as having no existence, until there is some mismanagement, some pecuniary liability aside from the bond, resting upon the principal obligor? Or is it not rather that there shall be the acknowledgement of an existing debt, to be cancelled only, when all duties required are fully discharged? It is given in the expectation, and it is accompanied with the power and the duty of taking the whole property of the ward into the custody of the guardian, whatever the amount may be. Those to be benefitted, are incapable of speaking for themselves, and protecting their own rights; their property, it may be, to almost an unlimited amount, is secured by nothing but the official bond of the guardian. To the Judge of Probate is entrusted the power to guard these rights of wards, which are often beyond their own control, and his duty is co-equal to his power. He is required to take to himself a bond sufficient in amount and ability, of the obligors, to cover all probable contingencies. The Judge would be treacherous to this high trust, if he accepted sureties not possessed of means adequate to the restoration to those entitled, of the property received. Gross negligence in this respect would be visited by impeachment and removal from office. And why all this requirement for the protection of minors and others incapable, if the obligors can immediately after and before any breach of the bond, divest themselves of all which rendered their names valuable, by voluntary or fraudulent conveyances? The treatises on the 13th and 27th Elizabeth, regard all obligees in bonds as creditors from their execution, and Lord Mansfield has said, "these statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud." *Cadogan* v. *Kennett*, Cowp. 432. The sureties on such bonds know their liability, and are supposed to be apprized of their danger, often before a breach. They may see the extravagance and mismanagement, generally, of their principals, before any of the property which they are appointed to protect may have come to their hands: they may wish to escape from their obligations,

whether present or future, and the doctrine contended for by the demandant's counsel, would enable them always to shun their liability, throwing the loss from themselves upon those, who, it is the plain intention of the law, should be made secure.

We are, therefore, of the opinion, that the only instruction objected to was correct, and that there must be

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD, MAY TERM, 1841.

LEVI FOLSOM *versus* DEXTER B. MOORE.

The owner of real estate may sell whatever is capable of severance and such sale is a license to enter and remove the property sold.

A tenant at will, upon the termination of his tenancy, has the right of ingress and egress, so far as may be necessary for the purpose of removing his goods and personal property.

THIS was an action of trespass for breaking and entering the plaintiff's close, in Lovel, and carrying away from his dwellinghouse a Franklin stove. The writ is dated May 28, 1839.

The plaintiff proved that on the 10th of August, 1835, he was the owner of the premises described in the writ — and that on that day he conveyed the same to Jonathan Small, who on the same day mortgaged the same premises to the plaintiff, to secure the payment of the purchase money. The said Small, failing to pay the notes as they became due, the plaintiff commenced an action on the mortgage and recovered a conditional judgment for possession of the premises against said Small, on which judgment a writ of possession issued under which the plaintiff entered on the 9th February, 1839. The plaintiff proved that the defendant on the 11th February, 1839, entered

in the dwellinghouse and took away the stove mentioned in the writ.

The defendant introduced Jonathan Small as a witness, by whom he proved that at the time of the purchase, the plaintiff mentioned among other improvements which he had made upon the premises sold, the stove in question, and that it cost him twenty dollars — that he insisted that the price he required was reasonable, on account of the improvements he had made, and that at the time of the purchase he (Small,) supposed he bought the stove with the house. Subsequently and before the witness entered into possession of the premises purchased, the plaintiff sold the stove to one Randall — that to the remonstrance of the witness at his selling the property, the plaintiff replied that the stove was personal property — that he had sold it to Randall, and that Randall would remove it unless he (Small,) purchased it of Randall, which he advised him to do — and which, to save further trouble, he did — and the stove remained in the house till removed by the defendant — to whom it had been sold a few days before the 9th of Feb. Said Small further testified that the fire place, near which the stove was situated, was a large one, the room having been occupied as a kitchen — that the fire place had been bricked up, and the wall plastered over and that an orifice had been left in the wall to receive the smoke from the back part of the stove and that in removing the stove, not a particle of the brick or plaster work was disturbed.

At the trial, which was before Weston C. J. a nonsuit was entered by consent, to be confirmed or set aside, and such judgment to be entered as the court shall order upon the foregoing facts.

Hammons, for the plaintiff. The stove was a fixture. *Farrar* v. *Stackpole*, 6 Greenl. 156; *Goddard* v. *Chase*, 7 Mass. R. 443. The stove being a fixture, the character of the property was not changed by selling it as personal property. If the bricks in the chimney, or the rocks in the underpinning had been sold as personal property it would not have made them so. *Smith* v. *Goodwin*, 2 Greenl. 173.

Small had no right to remove after notice to quit. *Elwes* v. *Mann*, 3 East. 37. If the tenant was lessee the removal was not till after the expiration of his term as lessee. *Gafield* v. *Hapwell*, 17 Pick. 19.

Littlefield, for the defendant, contended that whether the stove was real or personal property — it was competent for the parties to agree that it should be personal — which had been done in this case. *Ropps* v. *Barker & al.* 4 Pick. 239. The tenant was entitled to a reasonable time in which to remove his effects. *Davis & al.* v. *Thompson*, 13 Maine R. 209.

The opinion of the Court was delivered by

Weston C. J. — The better opinion is, upon the authorities, that the stove in question, being fitted, adapted and designed for the use of the house would pass by a conveyance of it, as part of the real estate. But it was doubtless competent for the owner to sell it as personal, and if the purchaser or any under him thereupon takes it away, the former owner has no just cause of complaint. A tree, while standing, is part of the realty, and belongs to the owner of the land, upon which it grew. But if he sells it, for a valuable consideration, the purchaser may cut and carry it away, and the sale is a license for him to enter to do so. A fence is part of the realty, but it may be sold or reserved as personal property. *Ropps* v. *Barker & al.* 4 Pick. 239. When Randall purchased the stove, no other person had any interest in it, except the plaintiff and Jonathan Small. The plaintiff sold to Randall, and Jonathan Small finally acceded to that sale, and bought it of Randall for a valuable consideration, by the advice of the plaintiff. By the consent, then, of all concerned, and for an adequate price, Small became the owner of the stove, by a title independent of the house, from which it had been severed by the sale.

It would be against every principle of justice, to permit the plaintiff, after having sold it as personal, to turn round and reclaim it, as part of his real estate. The defendant is a pur-

chaser from Small, and has the same rights. The plaintiff and Small stood in the relation of mortgagor and mortgagee. Small, while he occupied the estate, was the tenant at will of the plaintiff, and when he took possession by process of law, he terminated that tenancy. But Small had the right, with such assistance, as might be convenient or necessary, of ingress, egress, and regress for the purpose of removing his goods and personal property. *Davis & al.* v. *Thompson*, 13 Maine R. 209. The entry of the defendant with Small, in furtherance of this object, was justified.

Nonsuit confirmed.

JOSIAH SMALL *versus* MOSES HUTCHINS, JR.

The general owner of property in the hands of a bailee, may maintain replevin against an officer, who, having attached the same as the property of the bailee, puts it in the hand of a receipter, by whom it is suffered to go back into the hands of the bailee — the attachment being not thereby dissolved.

But if the attachment be dissolved by the neglect of the officer to seize the goods attached within thirty days after the rendition of judgment, the property being actually in the hands of the bailee of the plaintiff, the constructive possession of the officer would be gone, and that, as well as the actual possession, would revert to the plaintiff — in which case, replevin could not be supported.

THIS was an action of replevin, for a horse, gig, and harness. The writ was dated November 22d, 1838. The plea was the general issue, *non cepit*. The plaintiff proved that the defendant attached the property in question, as coroner, on a writ, in a suit, *Levi Folsom* v. *Jonathan Small*, Aug. 21, 1838, and took a receipt from Dexter B. Moore for the same property. He also proved that judgment was rendered in the suit, *Folsom* v. *Small*, aforesaid, Oct. 12, 1838, and execution issued same day. It also appeared, that the defendant demanded the property of the receipter aforesaid, before the expiration of thirty days after the rendition of the judgment aforesaid, in said suit of *Folsom* v. *Small;* and that the re-

ceipter told the defendant that he would show it to him (defendant); and that the defendant said it might remain where it was, and that he was going to sell it.

It was also proved, that Jonathan Small was brother of the plaintiff, Josiah Small; and that the property in question belonged to said Josiah, he having purchased the same from said Jonathan about one year before the attachment aforesaid. It was also proved that the same property was suffered by the plaintiff to remain in Jonathan's keeping and possession, at Lovel, where it was attached, from the time of the purchase aforesaid until the attachment; and that it was never removed from his keeping, but has ever remained with him, in the same manner as before the attachment; that Jonathan Small was a physician, and that he had the horse, gig, and harness, of his brother, the plaintiff, to use in his practice, and was to pay his brother a fair price for their use; and that the same was still in his keeping, and in use by him.

Jonathan Small testified, that the defendant told him that he should sell the property attached if it was not replevied.

Dexter B. Moore testified, that after the attachment, the property was suffered to remain in Jonathan Small's possession, by his consent, he, Moore, having the oversight of it.

Upon the foregoing statement of facts, appearing in this case, the Court are to render such judgment as they shall deem proper.

Howard, for the defendant. Replevin will not lie. There has been no taking, nor detention from the plaintiff. Maine Laws, St. 1821, c. 63, § 9. The return of an officer, that he has attached, is not conclusive of taking so as to subject the defendant to an action of trover. *Bryant* v. *Willard*, 10 Pick. 166.

If there was a taking or detention, actual or constructive, still the property was all the plaintiff's. The possession was his, and Small was his bailee. After the expiration of thirty days from the judgment in the suit in which the attachment was made, all claim by the officer on account of his attachment was extinguished. *Denny* v *Willard*, 11 Pick. 519. As the pro-

perty was in the plaintiff, the attachment gave the officer no rights. The receipter would, if sued, have been discharged on proof of that fact. *Fuller* v. *Holden*, 4 Mass. R. 498; *Tyler* v. *Ulmer*, 12 Mass. R. 169; *Learned* v. *Bryant*, 13 Mass. R. 224. An officer is not liable to the true owner of property attached by him, when such owner has the possession of the property attached or has appropriated it to his own use. *Fisher* v. *Bartlett & al.* 8 Greenl. 122; *Lathrop* v. *Cook*, 14 Maine R. 414. The plaintiff by his bailee having always been in possession cannot maintain this suit. A mere threat to attach or seize on execution does not constitute an attachment or seizure nor furnish the foundation for a suit against an officer.

Littlefield, for the plaintiff. The case is conclusive as to the fact of an attachment — as to the detention, this is clearly distinguishable from the case of *Lathrop* v. *Cook*, 14 Maine R. 414, — as in that, the receipter was the plaintiff — here he was a stranger.

The opinion of the Court was delivered by

Weston C. J. — The case before us differs from *Lathrop* v. *Cook*, 14 Maine R. 414, in this important particular, the property there was receipted for by the owner, the receipt not admitting, as is usual in such cases, that it was received as the property of the debtor; here the receipt was given by a stranger, and must be taken to have been in the usual form. The defendant having attached the property, and put it into the hands of a third person, it was thereby in the custody of the law, and a special property therein was acquired by him in his official capacity. *Perley* v. *Foster*, 9 Mass. R. 112. The receipter was the mere servant of the officer, who had the constructive possession, and the possession of the plaintiff, or of his bailee, Jonathan Small, actual or constructive, was vacated, or at least suspended. That the receipter suffered the property to remain in the hands of the debtor, did not dissolve the attachment, or change the constructive possession, thence resulting, in the officer. Nor did the fact, that the plaintiff, and

not the debtor, was the general owner, vacate the attachment or the constructive possession of the officer, which depended upon it, and was necessary for its preservation. The general owner could not take the property from the custody of the law, without a process of replevin. Upon the attachment, as the facts are reported, the general property was in the plaintiff, and the special property in the defendant, the officer; the receipter was the servant or keeper for the officer, and the debtor for the receipter.

While the attachment continued, in the eye of the law, the property was both taken and detained by the defendant. And if the plaintiff would take it from his legal custody, an action of replevin was the apt and proper remedy. But if the attachment was dissolved, the property being actually in the hands of the bailee of the plaintiff, the constructive possession of the officer would be gone, and that, as well as the actual possession, would revert to the plaintiff, represented by his bailee. In such a case, upon the principle decided in *Lathrop* v. *Cook*, replevin would neither be suitable nor proper. And we are of opinion that the attachment was dissolved when this suit was instituted, the property not having been seized on execution, within thirty days of the rendition of judgment. Forty days had then elapsed, and no impediment had before been interposed to the proceedings of the officer. If he would have preserved the lien, he ought before that time to have sold the property. He had demanded it seasonably of the receipter, who had responded to the call by offering to show it to him, and was told that it might remain where it was, for he was going to sell it. Instead of doing so, he voluntarily suffered the thirty days to expire, by which his official connection with the property and his constructive possession became vacated and dissolved.

In the opinion of the court, the action is not maintained.

Judgment for defendant.

JOHN KNIGHT, Petitioner, &c. *versus* DANIEL BEAN *& al.*

Where an appeal was dismissed because the recognizance required by the Court was not filed within the time appointed — it appearing that the appellant entered into a recognizance before the commissioner within the specified time — but that it was not seasonably transmitted to the clerk's office, leave to enter the appeal was granted upon a petition for that purpose.

The St. 1821, c. 57, regulating reviews, applies to a judgment rendered in the District Court, upon a sham demurrer, from which an appeal was claimed, but which through mistake was not entered.

THIS was a petition to enter an appeal, or for a review and new trial of the action appealed.

The petitioner in this case proved, that at the Nov. Term of the District Court, Western District, the original action between the parties was demurred, and on demurrer the plea of the defendant adjudged good — that from this judgment the petitioners appealed, and were required to find special sureties within ten days from the adjournment of the Court — that Judah Dana, Esq. was appointed commissioner to take the recognizance for the prosecution of the appeal — that the requisite papers were not forwarded to Mr. Dana, that this fact was known, on the fourth day after the adjournment — that the attorney of the plaintiff immediately sent for them and that on the tenth from the adjournment the recognizance was entered into — and immediately after, was placed in the post office, to be transmitted to the clerk's office, but that it was not received till after the expiration of the ten days specified for taking it. The appeal was entered at the next term of the Supreme Judicial Court, but was dismissed because the recognizance was not seasonably filed.

Bradley and Deblois, for the petitioners, cited St. 1821, c. 57, § 6; *Coffin* v. *Abbott*, 7 Mass. R. 252; *Champion* v. *Brooks*, 9 Mass. R. 228; *Raynard* v. *Bicknell*, 4 Pick. 302; *Elder* v. *Cole*, 8 Greenl. 211; *Sturtivant* v. *Greeley*, 4 Greenl. 534.

Howard, for the respondents. Review will not lie. St. 1821, c. 157, § 1 and 2. There is no accident or unforeseen cause, on account of which the action of this Court alone is

justified. The appeal was lost by neglect. *Williard* v. *Ward*, 3 Mass. R. 24; *Rogers* v. *Hill*, 4 Mass. R. 349.

Per Curiam. Under this petition for a review, it is unnecessary to go into the merits of the case. All that is required, is, that the petitioner should make affidavit, that he has merits and that he relies on them to maintain his action.

The case is not within the principle of *Elder* v. *Cole*, 8 Greenl. 211. Here there was a mere informal demurrer. The facts were not so presented before the pleadings, that the party aggrieved might have revised the judgment of the Court upon writ of error.

Though there was some omission of strict diligence yet the facts show there was such a mistake or misapprehension, as entitles the petitioner to enter his appeal.

Leave granted to enter the appeal.

COLUMBUS COOPER, Petitioner for leave to enter an Appeal from a decree of the JUDGE OF PROBATE.

An appeal lies from the judgment of the Probate Court, giving an allowance to the widow — though the amount to be allowed is a matter of discretion in the Judge.

THIS was a petition for leave to enter an appeal from a decree of the Judge of Probate.

The facts appear in the opinion of the Court.

May, for the petitioner.

Emery, for the respondent.

Per Curiam. There is no doubt an appeal lies from every decision of the Judge of Probate. This Court are disposed to respect the exercise of the sound discretion of the Judge of Probate, in all cases. The allowance, to the widow, in this case, was one thousand dollars. We think the Judge of Probate was not in the full possession of all the facts in relation to the outstanding debts, sufficient for the exercise of a sound discretion — and that he erred in the allowance made.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN, MAY TERM, 1841.

ISAAC FLITNER *versus* JOHN HANLEY, Executor.

The commissioners of insolvency are required by St. 1821, c. 51, § 25, to pass only upon the claims of such creditors as are entitled to a *pro rata* distribution of what may remain after the payment of the preferred claims; and their report should not embrace the preferred claims.

If a preferred claim is submitted to the commissioners, without the assent of the creditor, he is not bound to give the notice required by the section before referred to, that he should prosecute his claim at common law.

It is no defence to a suit for medical services rendered in the last sickness of the testator, that the physician's claim was presented, if without his direction, allowed by the commissioner, and that he received his *pro rata* in the amount allowed — but he is entitled to the balance.

EXCEPTIONS from the District Court.

This was an action of assumpsit brought against the defendant, as executor of the will of Noah Sprague, by the plaintiff, as physician, for medical and surgical attendance upon said Sprague, during his last sickness. The defendant pleaded the general issue, and filed a brief statement, in which he alleged that the said estate was represented insolvent, and that he had fully administered the same.

The plaintiff proved that the services, to recover which this action was brought, were rendered to the testator during his last sickness, and that the defendant was duly commissioned as executor.

The defendant introduced copies from the records of the register of probate for Waldo county, of the representation of insolvency of the estate of said Sprague — the decree of insolvency and the warrant of the Judge of Probate to Abiathar Richardson and A. A. Keane, commissioners, and their report.

The warrant of insolvency directed the commissioners, among other things, to designate in their report "all claims for taxes, for debts due to the State, for debts incurred in the last sickness of the deceased, and necessary funeral expenses, from the other expenses."

Among the claims allowed by the commissioner is that of the plaintiff, for the sum of $33,41.

The plaintiff did not give notice in writing at the probate office, within twenty days after the report of the commissioners was made, as required by St. c. 51, § 25.

The defendant then introduced the original decree of distribution, on the back of which was a receipt signed by a part of those creditors of said estate, whose claims were allowed by the commissioners, and by the plaintiff — but there was evidence tending to show that the amount paid was not to be in full of the plaintiff's claim.

The plaintiff then introduced Abiathar Richardson, one of the commissioners, who testified, that the amount allowed the plaintiff was laid before the commissioners by the defendant, Hanley — that it was well known by the defendant and the comissioners that the services were rendered the testator during his last sickness — that the plaintiff did not appear at all before them — that the commissioners allowed the full amount of the plaintiff's claim without further evidence — and that they intended to designate it for services rendered during the last sickness of the testator.

Redington J., who presided at the trial, instructed the jury that the estate of Sprague having been represented insolvent, if the plaintiff's account was for services rendered during the

last sickness of 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 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 commissioners for allowance — that the frequent mode of getting claims allowed before commissioners was to hand them to the 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 — 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 in favor of the defendant — and in answer to interrogatories put by the Court, replied, that the plaintiff consented that his claim should go before the commissioners for allowance and that he ought to have attended and shown before them that his was a preferred claim.

The plaintiff filed exceptions to the rulings of the Court, which were allowed.

J. S. Abbott, for the plaintiff, contended that the defendant was bound at his peril, to retain sufficient in his hands to pay the claims preferred by Statute; — that he is bound to pay them without any adjudication by the commissioners; that the Judge of Probate, has no authority to order the commissioners to designate and set apart the preferred claims from the rest; that such an adjudication by the commissioners would be *coram non judice*, and void; and that a decree of distribution upon such an adjudication would be no protection to the executor. *Flitner* v. *Handy*, 18 Maine R. 270.

M. H. Smith, for the defendant. The defendant having pleaded *plene administravit*, the plaintiff was bound to prove

that he had assets. 2 Stark. Ev. 554; 1 Esp. N. P. 145, 308; *Dewit* v. *Schoonmaker*, 2 Johns. 243; *Hindsley* v. *Russell*, Ex. 12 East. 232; Buller's N. P. 141; 2 Selwyn's N. P. 715; 3 Will. Abr. 521; *Fairfax* v. *Fairfax*, 5 Cranch, 19; 1 Dane's Abr. c. 29, art. 17, § 31.

2. The defendant fully administered before the commencement of this suit — without legal notice of its existence — which is by suit alone — and the suit in this case was after he had administered. 2 Stark. Ev. 321; 1 Esp. N. P. 291; Jacob's Law Dict. Executor; 2 Bl. Com. 512.

3. All claims should be examined by the commissioners. St. 1821, c. 5, § 25; *Paine Judge* v. *Nichols*, 15 Mass. R. 267; *Johnson* v. *Ames*, 6 Pick. 333. The privileged claims should be examined by the commissioners — because they are to be paid in full — and because it often happens that the estate is insufficient to pay even those claims — in which case a *pro rata* distribution should be made. But this the executor has no right to make. It can only be done by the commissioners of insolvency.

4. The payment having been made in pursuance of a decree of the Judge of Probate — such decree is a full protection. St. 1821, c. 51, § 7. The very form of the executor's bond is that he shall pay to such persons, as the Judge of Probate shall decree, &c.

The opinion of the Court was delivered by

Weston C. J. — Where estates are represented and decreed to be insolvent, favored claims, of which that of the plaintiff is one, are to be paid, as if the estate were solvent, if sufficient for that purpose; as was true in the case before us. It is manifest from the statute of 1821, c. 51, § 25, that the commissioners of insolvency are required to pass only upon the claims of such creditors, as are entitled to a *pro rata* distribution of what may remain, after the preferred claims shall have been paid and satisfied. That section provides, that from the aggregate of the assets, the favored claims shall first be deducted, and the residue rateably distributed among the

creditors, whose claims may have been allowed by the commissioners. It is very clearly deducible, that their report was not intended to embrace the preferred claims. If these are, by just and fair implication, excluded by law from their consideration, the warrant of the Judge could confer no such power.

The jury have found, that the plaintiff's account was not submitted to the commissioners, by his direction, privity or assent; and it was not a matter, which was legally submitted to their determination. The plaintiff then was under no obligation to give the notice, required by the section of the law, before referred to, that he should prosecute his claim at common law. There having been sufficient estate, to satisfy the preferred claims in full, the defendant has not fully administered according to law, in a manner to sustain his defence, by showing the estate exhausted by those, who were entitled only to be paid *pro rata*, after the favored claims had been satisfied. What the plaintiff has received, is to be allowed to the defendant; but as it was not payment in full, he is entitled to the balance.

Judgment on the verdict.

JONAS E. STONE *& al. versus* EDWARD C. TILSON.

The provision of St. 1839, c. 412, § 2, by which certain property disclosed is to be appraised, does not apply, save when the debtor has made the full disclosure provided by St. 1835, c. 195, § 4.

The adjudication of the justices before whom the disclosure of the debtor is made — that the debtor having disclosed sufficient, in the opinion of the justices, to pay the debt, is not bound to answer further — and, having offered the property disclosed, that he is entitled to his discharge, being erroneous — is no defence to a suit on the bond.

THIS was an action of debt, brought on a poor debtor's bond, and was submitted to the decision of the Court upon the following facts: —

It is agreed that on the 16th of May, 1839, the said Tilson procured a citation, which was duly served on the attorney of the plaintiffs — that at the time and place therein specified he

appeared before two justices of the peace and quorum, and there commenced his disclosure — that he disclosed notes sufficient in the opinion of the magistrates to pay the debt upon which he had been committed — that the attorney of the plaintiffs made further inquiries in relation to the debtor's real and personal estate — that the magistrates having decided that the debtor had disclosed more than sufficient to pay the execution upon which he had been arrested, he was not bound to make further answers — that thereupon the debtor declined answering any additional inquiries in relation to the situation of his affairs — that appraisers were selected and sworn to appraise the notes disclosed, by whose valuation it appeared that the notes were sufficient to satisfy the execution — that the plaintiffs' attorney objected to all these proceedings — but that the debtor was discharged by the justices.

J. S. Abbott, for the plaintiffs.

Ruggles and *Wilson*, for the defendants.

The opinion of the Court was delivered by

Weston C. J. — The disclosure, upon which the defendant relies, was made in pursuance of the tenth section of the statute of 1835, c. 195, for the relief of poor debtors. That section provides, that the disclosure and examination shall proceed in the manner prescribed in the fourth section of the same statute. The debtor is to "make a full disclosure of the actual state of his affairs, and of all his estate, property, rights, and credits in possession, expectation or reversion and answer all interrogatories in regard to the same." It was a duty imposed upon him by law, which he was bound to discharge at his peril. When such disclosure is made, and not before, the statute of 1839, c. 412, § 2, makes further provision for the appraisement of the property disclosed, not exempt by law from attachment, but which cannot be come at to be attached.

The disclosure required by law, the defendant did not make. His obligation to do so, is not discharged by the opinion of the justices that it was not necessary. They had no authority to dispense with the law. The interrogatories of the counsel for

the creditors were suitable and proper. They related to the affairs and estate of the debtor, which he was bound to disclose.

Without considering other objections, taken by the plaintiffs to the discharge of the defendant, we are of opinion, that as he has complied with none of the conditions of the bond, nor made such a disclosure as he was legally bound to do, the plaintiffs are entitled to judgment and to execution for their debt, interest and costs.

GEORGE BABB *versus* OTIS KENNEDY *& al.*

When by the conditions of the bond, certain acts are to be performed simultaneously, the obligee cannot maintain an action thereon, without performing, or offering to perform the stipulations therein contained, on his part to be performed.

But if the obligors in a bond, agree to be bound, unless the principal defendant by the time appointed should make and secure the payments mentioned in the bond, "and demand a deed of the premises," — such stipulation is a waiver of the tender, which otherwise the obligee would be bound to make.

EXCEPTIONS from the District Court.

This was an action of debt on a bond, dated Nov. 8, 1838, signed by the defendants — the condition of which was, "that whereas the said Otis Kennedy, has this day bargained and agreed with the said Babb, as follows, viz. in consideration that said Babb on or about the 10th day of May next, shall convey to said Kennedy, by deed, the lot of land on which said Babb lives, &c. and in as good order and condition as it now is, the privilege of cutting firewood excepted — that he, the said Otis, would make payment for the land, as follows, viz. two hundred dollars on the delivery of the deed, one hundred dollars with interest in one year from said delivery, and one hundred dollars in two years with interest, and seventy dollars in three years, and secure the last three payments, by a mortgage of said premises to said Babb, his heirs, administrators, or assigns. Now if the said Otis Kennedy, his heirs and assigns, shall on or about the 10th day of May next,

make and secure the payments as aforesaid, and demand *a deed of said Babb, of the premises, as aforesaid*, then this bond shall be void, and of no effect, otherwise in full force."

It is agreed that on the 29th of June, 1835, Samuel Jackson conveyed the land in question to James S. Waters, in whom the fee remained until after May 10th, 1839. It appeared from the testimony of said Waters, that he would have deeded, in pursuance of an arrangement between Babb and himself, the premises to said Kennedy, had said Kennedy complied with the conditions on his part.

It further appeared that said Babb removed from the premises prior to 10th May, 1839 — that the plaintiff had made no tender of the deed to Kennedy, and that said Kennedy had made no tender of the purchase money and securities to the plaintiff.

Upon this evidence, REDINGTON J. who presided at the trial, directed a nonsuit, to which direction exceptions were filed.

Abbott & Reed, for the plaintiff.

E. Smith, for the defendant.

The opinion of the Court was delivered by

WESTON C. J. — By the condition of the bond in suit, and the agreement recited therein, the plaintiff was to convey the land there described, by the time limited, and upon the delivery of the deed, the principal defendant was to pay two hundred dollars, and give security for the residue of the purchase money, as is stipulated in the condition. These were acts to be performed simultaneously, and if the condition had stopped there, it is very clear, upon the authorities, that the plaintiff could maintain no action upon the bond, without performing, or offering to perform, the stipulation on his part. *Brown* v. *Gammon*, 14 Maine R. 276; *Howe* v. *Huntington*, 15 Maine R. 350.

But if the parties were not satisfied to leave the matter, subject to the legal deductions, usually drawn from an instrument of this character, they were at liberty, in any lawful manner, to modify their contract at pleasure. Now the de-

fendants expressly agree to be bound, unless the principal defendant, by the time appointed, should make and secure the payments, "and demand a deed of said Babb of the premises." No other sensible construction can be given to a clause so unusual, but that the first movement was to be made by the principal defendant, and that the plaintiff might await his demand. It was in effect a stipulation, that the defendants should be liable upon the bond, without the tender of a deed from the plaintiff, unless demanded. Where a tender would be otherwise necessary, it may be expressly waived by the party, to whom it is to be made.

In our opinion, a nonsuit was improperly directed.

Exceptions sustained.

THOMAS A. SNOW *versus* PRESIDENT, DIRECTORS & CO. OF THE THOMASTON BANK.

If the transfer of bank stock, for the purpose of making the owner a witness, be unconditional, the contingency that he might again become the owner of the same, is not such an interest as goes to his competency.

The entries by the cashier, of the appropriation of money which the bank was to apply to the payment of notes belonging to it, are admissible to prove the fact of such appropriation — they having been shown to the party interested without objection on his part.

The receipt by a creditor of collateral security, does not prevent him from making the principal security available by suit or in any other way.

THIS was an action of assumpsit, in which the plaintiff sought to recover $600, for the transportation of money between Thomaston and Boston, for a series of years, at the rate of $100 *per annum*, and upon a special contract made by the defendants.

It appeared in evidence on the part of the plaintiff, who was the master of a packet at Thomaston, that he transported a large amount of money in bills and specie for the defendants, between Thomaston and Boston, nearly every trip during a period of six years.

The plaintiff further produced a contract of the defendants, dated Jan. 20, 1838, by which it appeared that on that date he had deeded certain real estate to the Thomaston Bank, "for the better security of said bank"— he being indebted to the bank as principal on five notes, to the amount of the sum of $1693, in the whole; and that the defendants agreed, on condition that the plaintiff should pay the first note in ten days and the two last notes within ninety days, and the remainder in quarterly payments, at certain specified times, &c. &c.— that they would re-convey the premises, deeded as before stated — and it was further agreed, "that provided thirty days shall expire after the time of any payment, then the said President, Directors & Co. agree and promise to sell the premises aforesaid at public auction, and appropriate the proceeds of said debts and costs and incidental expenses, and should there be a balance remaining, to pay the same to the said Thomas A. Snow, his executors," &c.

The defendant introduced the following receipt:

Thomaston Bank to Thomas A. Snow, Dr.

1838, March 1. To my bill transporting bank bills, and other services rendered bank up to this date, - - $30 00

Received payment of bank, by their giving three per cent. damage on protested draft. THOMAS A. SNOW.

The defendants called Wm. R. Keith, who, on his *voir dire*, testified, that he was called upon by the attorney to the bank, to sell out his stock, in order that he might be a witness, which he at first declined; but that previously to the commencement of this suit, he directed a sale of his stock at par by the cashier — that he transferred it to Mr. O'Brien, and took his note on time in payment — and that O'Brien was to have time in which to elect whether he would keep the stock or not — and that till then, the notes and the transfer of stock were to remain with the cashier — that Mr. O'Brien concluded to purchase, and so notified the witness — and that he did not expect to have the stock returned.

Upon this testimony, the plaintiff objected to the admission of the witness — but the objection was overruled, and the wit-

ness further testified that in February he was requested to call on the plaintiff in relation to a protested draft of his for $1000, belonging to the bank, payable out of the State, and on which the bank claimed three per cent. damage — that said Snow claimed no pay for his services, but objected to the payment of damages, saying, that he carried a great deal of money for the bank, &c. and that the claims ought to be offset — that he went to the directors, who assented to that arrangement — whereupon the witness wrote the receipt, except the words "up to this date," which were written by another director, and the receipt was then signed by the plaintiff.

It appeared in evidence, that the plaintiff failed to make the several payments of his notes, according to the contract before referred to, and that the real estate referred to in said contract was sold at public auction for $1282,50. To prove that the proceeds of the sale were applied to the payment of the notes then due, the defendants introduced, subject to objection on the part of the plaintiff, the day-book of the bank, kept by the former cashier, in which it appeared that the proceeds had been appropriated to discharge the liabilities of the plaintiff to the bank.

The defendants further proved that the books of the bank were shown the plaintiff, who made no objections except to a charge of interest. It appeared that suits had been commenced on the notes referred to in the contract of Jan. 20, 1838.

Upon this evidence, the plaintiff's counsel requested the Judge to instruct the jury that the written agreement aforesaid was, in legal effect, a promise on the part of the bank not to sue the notes, excepting the two first to be paid, until after a sale by the bank of the said real estate, and the appropriation of the proceeds, so far as they would go, to the payment of the notes — but Emery J. who tried the cause, declined giving such instructions.

In relation to the claim for transporting money and bills, he instructed the jury that the receipt was not conclusive evidence against the plaintiff, but that it was subject to explanation. If

from the evidence they were satisfied that it was the plaintiff's proposition to accept the offset of the damages as a compensation for his services, and adjust the matter in that way, the parties were competent so to do.

They would consider the time, and opportunity which the plaintiff had for deliberation and examination, that if any deceit or slight of hand as to the receipt, or fraudulent management was adopted by the directors in procuring the receipt, the jury might disregard it.

The jury returned a verdict for the defendants — which was to be set aside if the rulings of the Court, or the instructions given were erroneous.

Holmes & Ruggles, for the plaintiff. Keith was an incompetent witness. He should clearly discharge himself else he is incompetent. *Evans* v. *Eaton*, 1 Pet. C. C. R. 332. The instructions given in relation to the services rendered were indefinite. The alleged settlement was unreasonable, and every presumption is against it.

The bank is responsible for the value of the real estate at the time it was taken.

E. & M. H. Smith, for the defendant, cited *Ely* v. *Fennell*, 7 Mass. R. 25; *Phillips* v. *Bridge*, 11 Mass. R. 242; *Worcester* v. *Eaton*, 11 Mass. R. 368; *Bean* v. *Rose*, 12 Mass. R. 20; Phil. Ev. 38; *Union Bank* v. *Knapp*, 3 Pick. 96.

The opinion of the Court was delivered by

Weston C. J. — Keith, the witness objected to, was legally examinable, upon the *voir dire*, respecting contracts, records or documents not produced at the trial, so far as they related to his interest in the case. *Miller* v. *Mariner's Church*, 7 Greenl. 51. Prior to his testimony, he had divested himself of his interest as a stockholder in the bank. This was done through the agency of the cashier. There was an understanding, that the purchaser might, if he elected so to do, re-transfer the stock, within a limited period. The witness however had been notified by the cashier, that the purchaser was satisfied with his bargain. As the transfer was unconditional in its

terms, the contingency, that he might again become the owner of the stock, at the option of the purchaser, was not, in our opinion, such an interest as goes to his competency.

With regard to the receipt, the evidence did not require nor justify the instruction requested, and that which was given, was quite as favorable, as the case presented would warrant. The jury were in effect instructed, that if the plaintiff acted under any misapprehension, he was not to be concluded by the receipt; and the whole merits of his claim, together with that paper, were submitted to their consideration.

The defendants were to account for moneys received by them, which were to be applied to the payment of demands, due from the plaintiff. It was competent for them to do so, by the production of their books, the entries being proved to be made by the cashier at the time, the whole account having been submitted to the inspection of the plaintiff, and he making no objection, except to the charge of interest, which being again calculated was found to be correct.

Certain real estate was conveyed to the bank, as is shown by the written agreement, "for the better security of the plaintiff's liability to the bank." This was in its nature collateral; and did not prevent the bank from making their principal security available, in any manner in their power. The presiding Judge was therefore correct, in withholding instructions requested of an opposite character.

JOB RACKLEFF *versus* JONATHAN NORTON.

In a writ of entry by a mortgagor without declaring upon the mortgage, the tenant should set up by way of defence his right to redeem, to restrict the demandant to a conditional judgment.

When no time nor place appears in a magistrate's acknowledgement of a deed — the date of the deed — and the county in which such magistrate has jurisdiction, are presumed to be the time and place of such ackowledgement.

The sheriff's deed of an equity of redemption is not required to be recorded by St. 1821, c. 60.

THIS was a writ of entry brought to recover possession of certain lands in St. George. The general issue was pleaded and a brief statement filed alleging the title to be in William Pierce and others.

The plaintiff replied to this brief statement by denying the title of Pierce and others, and the right of tenant to set up said title, because he had in no way connected himself with such supposed title of Pierce and others.

It appeared from the report of SHEPLEY J. before whom the cause was tried, that the land was mortgaged to one Thomas Sylvester by the tenant, by deed dated Oct. 5, 1818, to secure the payment of fifty-six dollars. The mortgage was assigned to one Brown, by whom a suit was brought on said mortgage and judgment for possession obtained, upon which a writ of possession was issued the 19th Nov. 1822, which is lost.

The tenant's right in equity to redeem the mortgaged premises was duly sold on an execution, Durgin against him, Dec. 5th, 1823, having been attached on the writ, July 7th, 1823. The officer's deed was recorded Sept. 14th, 1840. The tenant's right in equity to redeem the same was attached on a writ in favor of J. Ruggles against him, Dec. 17th, 1825, and was duly seized on execution, and sold on the 24th of June, 1826. The officer's deed bears the same date, but the acknowledgement is without date and no county is stated within which it is stated to have been taken. The deed was recorded Oct. 8, 1839.

The demandant also introduced deeds of the demanded

premises from Isaac Brown to Otis, and from Otis to the demandant, both being dated and recorded Oct. 9, 1839.

It was also proved that said land was attached at the suit of Wm. Pierce and others against said tenant, on the 11th of Feb. 1828, in which suit judgment was duly recovered and execution issued, on which within thirty days from the rendition of judgment the demanded premises were set off and the return duly recorded. The return was objected to by the demandant's counsel, because the officer chose two of the appraisers without having certified that he had notified the debtor to choose one, but the objection was overruled— the return showing that "said Norton had neglected to choose any person."

It was proved that the tenant had been in possession of the land since 1818, and that on the 4th of Dec. 1824, he paid the sum and interest for which the equity had been sold on the 5th of Dec. 1823.

There was evidence in the case, from which the tenant contended that the sum secured by mortgage was paid before the equity was attached or sold on the process of Ruggles against him; and that the officer's deed to Brown, on the sale upon the Ruggles execution, was not executed until after the attachment made by Pierce and others. There was testimony that the deed was not delivered until 1839, and testimony from which a different conclusion might be drawn.

The presiding Judge was requested to instruct the jury, if they should be satisfied the equity was attached and duly sold on the process, *Durgin* v. *Norton*, that the second attachment on the writ in favor of said Ruggles, and the sale consequent thereon, were void.

2. That if the jury should be satisfied that the deed from Ulmer to Brown, given on the sale of the equity on the execution of said Ruggles was not delivered until after the 11th of Feb. 1828, they should find for the tenant.

3. That neither the deeds nor officers' returns on the Durgin and Ruggles executions having been recorded until long after the attachment and levy in favor of Pierce and others, they should find for the tenant.

These instructions were withheld, and the jury were instructed that if they should find that the mortgage was not paid before the equity was sold on the execution in favor of said Ruggles, and that the deed given on that sale was executed before the attachment was made by Pierce and others, they should find for the demandant.

The jury returned their verdict for the demandant, and found specially that the mortgage was not paid before the equity was sold on the Ruggles execution; and that the said deed was executed before the attachment made by Pierce and others.

If these rulings and instructions were erroneous, the verdict for the plaintiff is to be set aside and a new trial granted.

J. S. Abbott, for the tenant.

H. C. Lowell, for the demandant.

The opinion of the Court was delivered by

Weston C. J. — The demandant, having the interest of the mortgagee, and it being found that the money secured by the mortgage has not been paid, is entitled to prevail against any title derived from the mortgagor. He might maintain a writ of entry, without declaring on the mortgage; and if the tenant would set up a right in equity to redeem in himself, or any one under whom he holds, he should set it up in defence, to restrict the demandant to a conditional judgment. This not having been done, the demandant is entitled to judgment on the verdict, whatever may be the title derived from the sale of the equity on the execution in favor of John Ruggles.

With regard to the acknowledgement of the deed from the officer to the demandant upon that sale, the authority of the magistrate, by whom it is certified, is not controverted, and it must be taken to have been done in the county where he has jurisdiction. The law does not require, that the place where it is taken should appear in the certificate. That not being dated, the word then, which is a relative term, indicating time, must refer to the date of the deed. And as the grantee is in possession, claiming under it, it must be taken to have been

delivered at the time, in the absence of all testimony, showing it to have been delivered at a later period.

When the officer, having previously taken the preliminary steps, sold the equity of redemption and made, executed, acknowledged and delivered a deed to the highest bidder, the title of the execution debtor is thereby divested. Publicity of the seizure and sale is by law required to be given in the fullest and most effectual manner. Unless it is redeemed within the time limited, or the sale is abandoned, the same property cannot be again seized by another creditor. The return of the officer, on the execution, is additional notice to the public of his proceedings. The statute does not make it essential to the validity of the sale, that the officer's deed should be recorded. St. of 1821, c. 60. The eighteenth section provides, that his deed shall be as effectual to convey the equity, as if made by the debtor. That may be considered as declaring, that these proceedings operate a statute transfer of his title. If the registry of the deed is necessary to put the estate out of the reach of other creditors, or of a subsequent purchaser, it is deducible by construction. And it being a public transaction, notified by advertisements posted and published, and by the officer's return, we are of opinion, that a subsequent levy or sale, by another creditor, although the purchaser's deed may not have been recorded, ought not to have the effect to defeat his levy. It might have the effect to give more perfect notice to purchasers and others, if the officer's deed should be required to be recorded, within a limited period, as in cases of levy. But this is a matter, which belongs to the legislative department.

Judgment on the verdict.

ROBERT L. DODGE *versus* ISAAC FARNSWORTH.

The judgment debtor, upon whose estate a levy is to be made, to be entitled to choose an appraiser by virtue of St. 1821, c. 60, § 27, must be actually a resident, at the time of the levy, in the county where the land levied upon is situated.

The officer, if the debtor be absent, having a domicil within the county, is not bound to leave notice at the last and usual place of abode of the debtor.

A return that certain persons, assuming to act as agents of the debtor, he being absent, had selected an appraiser, whom the officer making the levy appointed, is good.

The reservation or exception of a part of the premises described in the return of the officer, does not vitiate it.

Parol testimony is not admissible to show, against the officer's return, that the appraisers were not sworn nor affirmed.

It is not essential, that the officer should name the magistrate by whom the oath was administered, or that his name should appear in the proceedings.

THIS was an action of ejectment, brought to recover certain real estate, described in the plaintiff's writ. The defendant disclaimed all the land embraced in the plaintiff's writ, except the estate set off to him by virtue of an execution hereinafter referred to, under which levy he claims title.

It was admitted, that on the 22d of Aug. 1836, the estate demanded was the property of one Wm. H. Fales, and that on that day the tenant sued out his writ of attachment against said Fales, and caused all his real estate in the county of Lincoln to be attached. The writ was duly entered, and judgment rendered thereon in favor of the plaintiff, April Term, 1838, upon which execution duly issued, by virtue of which a levy was seasonably made on that portion of the demanded premises claimed by the tenant.

The officer, in his return, certifies, "that the within named debtor is not, and for some months has not been within this State; and understanding that David Fales and Robert L. Dodge were his agents, I called upon them to choose an appraiser for him, and they selected Roland Hatch; and I appointed thereupon said Hatch for an appraiser for said debtor." It further appeared from the return, that part of the premises described in the return were excepted from the levy.

The demandant proposed to prove, (if admissible) that David Fales and said Dodge, who is the plaintiff in this suit, were the agents of the debtor at the time of the levy, and that the said Fales then resided without the State.

On the 18th of Jan. 1837, said Wm. H. Fales, by deed duly acknowledged and recorded, conveyed the premises levied upon, to the demandant.

The plaintiff proposed to prove that the said Dodge was not the agent of Wm. H. Fales, and that though said Fales was absent at the time of the levy, that his family resided in the neighborhood; and that said Dodge was not present at the levy, and did nothing in relation to it; that said Fales did name an appraiser, and that an appraiser was agreed to by the counsel for the plaintiff and the officer, who was subsequently rejected, without the knowledge of said David; and that one of said appraisers was not sworn or affirmed.

If the parol testimony proposed to be offered is not legally admissible, or would not be sufficient to control the other evidence in the case, and to change the decision which would be made on such other evidence alone, the Court is to decide upon the case as presented, and such judgment is to be rendered as may be conformable to law. If the parol testimony offered would be available, the facts are to be submitted to a jury.

Holmes & Ruggles, for the plaintiff.

J. S. Abbott, for the defendant.

The opinion of the Court was delivered by

Weston C. J. — By the statute of 1821, c. 60, prescribing among other things the mode of extending executions upon real estate, § 27, the officer may appoint an appraiser for the debtor, if he neglect or refuse to choose one, after being duly notified by the officer, if the debtor be living in the county, where the land lies. If he be not living in the county, it presents a case, in which the officer may appoint in behalf of the debtor. The officer returned that the debtor was not, and for some months had not been, within the State. He was not then

living within the county, so as to be entitled to notice under the statute; for living has not there been held to have the sense of domicil; but to mean an actual residence at the time. If he is not to be found in the county, which limits the range of the officer's power, he is not required to give him notice. *Russell et al.* v. *Hook*, 4 Greenl. 372; *Buck* v. *Hardy*, 6 Greenl. 162. He might have a domicil in the county, while on a distant voyage. In such case, the officer is neither obliged to give notice, nor to await his return. As the officer is to appoint disinterested and discreet men, who are to be under oath, and the debtor has a year to redeem the estate, his interest is protected, although absent. It might be reasonable in such case, as stated in *Buck* v. *Hardy*, that the officer should leave notice at the last and usual place of abode of the debtor; yet the law imposes no such duty upon him; and the court did not in that case hold it to be necessary.

The officer however manifested a desire, that the debtor should be duly represented in the appraisement. He returns that having been given to understand, that David Fales and Robert L. Dodge were his agents, he called upon them to choose an appraiser for him; and that they assumed the agency by making a selection. He thereupon appointed the man thus selected, who is stated in his return to have been a disinterested and discreet freeholder. He does not assume the responsibility of returning, that they had the authority they assumed, of which he may not have had sufficient evidence. But if not authorized, which does not appear affirmatively, it was a good appointment for the debtor by the officer; and none the less so, for his stating the reasons, which induced him to make it. *Russell & al.* v. *Hook*, before cited.

The return is, that the appraisers were duly and legally sworn, faithfully and impartially to appraise such real estate as should be shown to them. This was sufficient. It was not essential, that the officer should name the magistrate, by whom the oath was administered, or that his certificate should appear in the proceedings. *Bamford* v. *Melvin*, 7 Greenl. 14. The officer's return was there as general upon this point, as it is

here. The part of the premises described in the return as reserved or accepted, does not vitiate the levy. The judgment debtor may have had no title to that part. And if he had, there may have been satisfactory reasons for the exception.

The parol testimony, proposed on both sides, if admissible, could not legally affect the title, which the tenant derived from his levy.

Judgment for the tenant.

JOHN AYERS & *al. versus* EPHRAIM G. HEWETT.

A person obtaining goods by fraudulent pretences, is guilty of a tortious taking and no demand is necessary to enable the person defrauded to maintain replevin.

The rule of law that instruments in writing purporting to be witnessed by a subscribing witness, are not allowed to go in evidence, till the execution of them has been proved by such witness, does not extend so far as to require every instrument, which may incidentally and collaterally be introduced, to be so proved.

If the instrument introduced is a contract *inter alios*, under which neither party claims, proof of its execution by the subscribing witness, is not required.

Fraud does not render contracts void, except at the option of the party defrauded, and if the party defrauded in the sale of goods by false pretences would rescind the contract, and reclaim the goods — he should offer to the purchaser the notes taken on the sale or have them ready at the trial. — It is too late to make the offer after the verdict has been rendered.

THIS was an action of replevin. Plea — the general issue. The defendant filed a brief statement, justifying as a deputy sheriff the attachment of the goods replevied, as the property of Edward Boyles on a writ in favor of Smith & Price against him.

From the report of SHEPLEY J. before whom the cause was tried, it appeared that the plaintiffs, who were merchants residing in Boston, on the 24th June, 1839, sold the goods replevied, and other goods to said Boyles, and took his negotia-

ble notes in payment thereof. On the 24th of the following August, they were attached by the defendant on writs in favor of Smith & Price, as the property of Boyles.

The plaintiffs proved representations made by said Boyles at the time of the sale and before the goods were put up, in relation to his solvency and the situation of his property — and that they were false. It appeared in evidence that he was in embarrassed circumstances, and had little or no visible and attachable property — and the witness being about to state that Boyles had before that time sold his goods to him, to secure him for being a surety for him — it was objected that he could not testify to the sale if it was made by a written bill of sale without its production — upon its production, it was objected that it could not be read in evidence unless the subscribing witness was first called, but this objection was overruled and the paper read.

The plaintiffs did not produce nor offer the notes given for the goods, or prove that they had ever been offered to Boyles. It was objected that this action could not be maintained, but for the purpose of having the facts settled, the objection was overruled.

It did not appear that any demand had been made of the defendant or of Boyles or of the attaching creditors for the goods before this suit was commenced.

It was contended in the defence, that there was no evidence that the plaintiffs were deceived by the representations used or that the goods were obtained by their means.

Upon the facts proved, the jury were instructed that it was incumbent upon the plaintiffs to prove that the said Boyles made the representations proved — that those representations were false and were made fraudulently with an intention to deceive the plaintiffs and obtain the goods, and that the goods were obtained from them in consequence of these false and fraudulent representations — and that they must have been made before the sale was so far completed as to be binding on the parties — that if there was no delivery of any part of the goods, nor any money paid, nor any notes given, nor any mem-

orandum in writing respecting the sale, when the representations were made — the sale would not be so completed as to be binding in law, and the plaintiffs might legally have refused to deliver the goods — and if they were satisfied that the plaintiffs were induced by the representations so made to complete the sale and deliver the goods, when they would not have done so without them, the plaintiffs were entitled to recover — otherwise they were not.

If these instructions or rulings were erroneous, the verdict which was for the plaintiff, is to be set aside and a new trial granted, or a nonsuit entered, or judgment on the verdict as justice and law may require.

H. C. Lowell, for the defendant. Where the testimony offered by the plaintiff is insufficient in law to establish his claim, it is the duty of the Court, either to direct the jury to render a verdict against him, or to order a nonsuit. 1 Stark. Ev. 447–471; *Inhabitants of Sanford* v. *Emery*, 2 Greenl. 5; *Perley* v. *Little*, 3 Greenl. 97. The Court should have so done in this case. The plaintiff's evidence was insufficient. The subscribing witness should have been called to prove the bill of sale which was read to the jury. 1 Stark. Ev. 289; *Willoughby* v. *Carlton*, 9 Johns. 136; 1 Selwyn's N. P. 545; *Whittemore* v. *Brooks*, 1 Greenl. 58; *Whitaker* v. *Salisbury*, 15 Pick. 534; 2 Evans' Pothier, 132; *Strong & al.* v. *Whitehead*, 12 Wend. 64.

The notes given for the goods purchased should have been produced at the trial. The sale was voidable — not void — and if the plaintiff wished to rescind, he should do it in a reasonable time. 1 Ev. Poth. 15; *Rowley* v. *Bigelow*, 12 Pick. 307. What is reasonable time, is a question of law for the Court. Here, one of the notes given for the goods had fallen due before the suit was commenced, and the other before the cause was tried. To retain these till after a verdict was rendered, and then offer to rescind the contract by producing them, was too late. *Thurston* v. *Blanchard*, 22 Pick. 18; Com. on Contracts, 38; Long on Sales, 242; *Prentiss* v. *Russ*, 16 Maine R. 50.

J. Holmes, for the plaintiffs. The defendant, representing attaching creditors, has no greater rights than Boyles. This differs from the case of an innocent purchaser. *Buffington* v. *Gerrish*, 15 Mass. R. 156; *Man. & Mech. Bank* v. *Gore & al.* 15 Mass. R. 75; *Boardman* v. *Gore & al.* 16 Mass. R. 331. The plaintiffs' rights are the same as if the goods had been stolen. *Dame* v. *Baldwin*, 8 Mass. R. 518; *Towne* v. *Collins*, 14 Mass. R. 497. The sale being void, the goods might be reclaimed. *Badger* v. *Phinney*, 15 Mass. R. 359.

The contract, the jury have found, was disaffirmed in a reasonable time; and that was a fact for their consideration. The tender of the notes was unnecessary. *Young* v. *Adams*, 6 Mass. R. 182; *Bickford* v. *Maxwell*, 6 D. & E. 52; *Man. & Mech. Bank* v. *Gore*, 15 Mass. R. 75. The goods may be reclaimed, in whose hands soever they may be found. *Thurston* v. *Blanchard*, 22 Pick. 18.

The plaintiffs have the notes in this case; they have not indorsed, and the defendant may take them.

The opinion of the Court was delivered by

Whitman C. J. — This being an action of replevin, and a verdict having been returned for the plaintiffs, it is now brought before us, upon a report of the facts proved, and opinions delivered by the Court, in the course of the trial. And it appears to have been agreed, that the defendant was a deputy sheriff, and, as such, had attached the goods replevied, by virtue of legal process, against one Edward Boyles, at the suit of Smith and Price, who were his *bona fide* creditors. And it seems further to have been agreed, if the opinions, delivered by the Court in the course of the trial, were not wholly correct, that a new trial should be granted, or a nonsuit be entered, as justice and law may require; otherwise, that judgment shall be entered on the verdict.

The counsel for the defendant, in his argument, has labored to make out, that the finding of the jury, upon matters of fact, under the instruction of the Court, was erroneous. His right to take this ground, must depend on those instructions. If

they were erroneous, and the finding was in conformity thereto, his right to make that apparent, would be unquestionable. We have, however, carefully reviewed these instructions, as exhibited in the report, and we are unable to discern, that they were not as favorable to the defendant, as, in a legal point of view, could have been claimed by him, with one exception.

The defendant insists, that the action of the plaintiffs should have been preceded by a demand of the goods replevied. But he admits, if the taking by Boyles was tortious, that no such demand was necessary; and we cannot doubt, if a person obtains goods by fraudulent and deceitful practices, as the plaintiffs contend was the case on the part of Boyles, in regard to the goods replevied, and as the jury have found to be true, that he is guilty of a tortious taking. *Thurston* v. *Blanchard*, 22 Pick. 18, and cases there cited.

On the part of the plaintiffs, a witness was called to prove that Boyles, at the time he obtained the goods in question, of the plaintiffs, was destitute of property, and in embarrassed circumstances. In the course of his examination, it came out, that some time previous to that time, he had purchased goods of him, and that the purchase was evidenced by a regular bill of sale, which, on the suggestion of the defendant, he produced, and which appeared to have been witnessed by a person whose name was thereto subscribed as a witness, who, the defendant insisted, should be produced to prove the execution of it. The Court overruled the objection, and permitted the instrument to be read in evidence. In so doing, the defendant contends that the Court erred.

It is undoubtedly a general rule of law, that instruments in writing, introduced by a party, purporting to be witnessed by a subscribing witness, are not allowed to go in evidence, till the execution of them has been proved by such witness, if to be found within the jurisdiction of the Court. But it is believed that this rule does not extend so far as to require every such instrument, which may incidentally and collaterally be introduced, to be so proved. If it be the foundation of a party's claim, or if he be privy to it, or if it purport to be executed by

his adversary, there may be good reason for holding him to strict proof of its execution. But if it be wholly *inter alios*, under whom neither party can claim to deduce any right, title, or interest, to himself, it would be carrying the rule to a more rigorous and inconvenient extent, than the reason and spirit of it would seem to warrant. In this instance, the writing was produced by the witness, at the suggestion of the defendant, as corroborative of his testimony, or to enable the adverse party to determine whether it was in conformity to the evidence contained in the writing. The introduction of it was merely collateral and incidental, and cannot therefore be considered as within the reason of the rule requiring proof of its execution by the subscribing witness.

The courts in this State have gone much further in dispensing with the proof of the execution of deeds necessary to the support even of the title of a party producing them. A rule was made, many years since, that office copies of deeds of conveyance, certified by the register, should be admissible, without proof of their execution, provided the party offering them was not a party thereto, nor claimed as heir, nor justified as servant of the grantee, or their heirs. And it has been decided, that an original deed may be received as evidence, without proof of its execution, in cases where an office copy, by the above rule, might be admitted. *Knox & al.* v. *Dilloway*, 1 Fairf. 202.

The next position relied upon by the defendant, is, that the contract between the plaintiffs and Boyles, even if it were conceived in fraud, was not void, but voidable only; and that the plaintiffs, before the institution of this suit, had not done any act indicative of their intention to avoid it; and that the notes which were negotiable, which Boyles gave for the goods, ought to have been given up to Boyles, or to have been tendered to him before the commencement of the action; or produced at the trial, that it might be seen that they were not negotiated, or in a situation to remain obligatory against him. And upon this point, the Judge at the trial would seem not fully to have made up an opinion adverse to the defendant, for he says that

"for the purpose of having the facts determined, this objection was not sustained." It is undoubtedly true, that, at common law, fraud does not render a contract void, except at the option of the party defrauded. And if he would avoid it, he must do it within a reasonable time after the discovery of the fraud; and must reinstate, or offer to do so, the party who has defrauded him, in the condition he was before the time at which the contract took place.

In the case at bar it does not appear, that the plaintiff did any act by way of rescinding the contract, till the institution of this suit — nor how long that was after the falsity of the representation made by Boyles, became known to them. Nor did they, at the time of the trial, or at any time previous, produce the notes given for the goods, and offer to give them up. This was an omission on their part, as it seems to us, which should have defeated their right to recover. It is true, that, at the argument of the motion to set aside the verdict, the notes given for the goods, were brought into Court, and there offered to be surrendered. But this could not have the effect to render it proper, that the jury should have returned their verdict as they did. The utmost extent to which any court has gone, in allowing a contract like the one in question to be considered as rescinded, by an offer to surrender the notes given for the goods, was the admission of such offer as being sufficient, when made at the time of the trial. To this extent the Court did go in *Thurston* v. *Blanchard*, 22 Pick. 18. And, upon the authority of that case, it may be, that, this verdict being set aside, on another trial, the plaintiffs may, by then tendering the notes, become entitled to a verdict in their favor; but, not having done so at the former trial, we think, for this cause, that the verdict should have been for the defendant. A new trial is therefore granted.

CHARLES CARGILL, Plaintiff in Error, *versus* JOTHAM SEWALL.

The minister of a parish settled for life, or for a term of years, is seized of an estate of freehold upon condition in the ministerial land, and is answerable for waste.

Being answerable for waste he has his remedy by an action of trespass against a stranger for any injury done to the freehold.

The right of action being vested in him personally, an action commenced by him before, may be prosecuted to final judgment after the ministerial relation has been dissolved.

THIS was a writ of error to reverse a former judgment of the Court in an action of trespass *quare clausum*, in which the plaintiff in error was defendant.

The error assigned was, that said action was commenced by said Sewall by writ dated the 11th day of August, A. D. 1836, in his character and capacity of clerk and minister of the first Congregational Church and Parish in Newcastle, in said county of Lincoln, for an alleged trespass upon a lot of land in said Newcastle, called and alleged in said writ to be a ministerial lot and known as such — that the only right or title which the said Sewall had or pretended to have, or to which he, the said Sewall, offered any evidence tending to prove, was his being the settled and ordained minister over said church and parish in said Newcastle, and that all the damages and costs awarded to him in said action, belong to the settled and ordained minister of said parish — and that there is error in said judgment, in this, that after the last continuance of said action in May last and before final judgment was rendered thereon, the said Sewall had ceased to be clerk and minister of said first Congregational parish in Newcastle, to wit, from and after the 14th day of August now last past, at which time the ministerial connexion between said Sewall and said church and parish was wholly terminated and dissolved — and that the said Sewall has removed from said parish to the town of Westbrook, in the county of Cumberland, and that no judgment could be rendered in the name of said Sewall, after he had ceased to be the clerk and minister of said parish.

A motion was filed by the defendant to quash the writ of

error because the same was not served on the parish of which he was a minister when the suit was commenced.

Mellen and *F. Allen*, for the plaintiff in error. The original plaintiff has no interest in his *personal* or *natural* capacity, in the premises upon which the trespass was committed. His right to recover arose solely in consequence of his relation to the parish as minister, and continued no longer than he sustained that relation. Whether the relation terminated by death, resignation, or removal, the consequences are the same; the suit is, *ipso facto*, abated. It is analogous to a suit by a Judge of Probate on an administrator's bond, which is discontinued by the resignation of the Judge of Probate. *Cutts, Judge*, v. *Parsons*; *Holden, Judge*, v. *Cook*, 12 Mass. R. 575. The action being discontinued, his successor might institute a new suit. His connexion with the parish was formed by a written contract. By that contract, a trust was created by operation of law, which ceased when he ceased to be minister of the parish, as much as if he had died during the action. *Weston* v. *Hunt*, 2 Mass. R. 500. The successor might institute a suit. The minister is merely a trustee, and he is to account for what he receives. As a sole corporation, there can be no termination to his existence. The parson, *quatenus* parson, like the king, never dies. 1 Bl. Com. 470. The defendant in error, has been settled in Westbrook. Could he maintain a suit for an injury done to the parish property in that town? Could he maintain actions in the capacity of minister of two parishes? It would seem not. 3 Com. Dig. 210. When one, having a benefice with cure, accepts another with cure, the first shall be void. The plaintiff having commenced the suit in his official capacity, that being annihilated, he has no rights in his personal character. After the termination of his ministerial relation, could he collect and retain the money? Could he discharge a suit commenced? It is apprehended he could not; for the damages to be recovered are for the use, not of the minister, but of the parish. Neither could he commence a suit. If he could not commence, nor discharge a suit commenced, neither could he prosecute a suit after his par-

ochial connexion has terminated — his official, having the same effect as his natural death.

Mitchell, for the defendant in error. The writ in this case should have been served on the first parish in Newcastle. The argument of the plaintiff goes on the ground that when there is no minister the fee is in abeyance. When he ceased to be minister, the parish held the use and benefit to themselves. They were the parties interested in this judgment, and are the only parties upon whom service should have been made. *Porter* v. *Rummery*, 10 Mass. R. 64.

This suit is entitled to no favor, because substantial justice has already been done; and it is a general rule, that a man cannot reverse a judgment for error, unless he can show the error to his disadvantage. *Shirley* v. *Lunenburgh*, 11 Mass. R. 383; 5 Coke, 39; 8 Co. 59.

The opinion of the Court was delivered by

WHITMAN C. J. — The plaintiff claims to have a judgment against him in this Court, wherein the defendant in error was plaintiff, reversed, because the plaintiff, in that action, which was trespass *quare clausum fregit*, sued, styling himself clerk and minister of the first Congregational parish in Newcastle; and before judgment was rendered therein, had ceased to be such minister; the land on which the trespass was alleged to have been committed, being ministerial land.

The plaintiff in error contends, that when the plaintiff, in that suit, ceased to be the minister of the parish, the suit then pending *ipso facto* abated, or that it worked a discontinuance; and so that the judgment, thereafter entered up, was erroneous. He contends, that the dissolution of the parochial relations was tantamount to a natural death, as it respected the action pending. The arguments of his counsel, which were in writing, were learned and ingenious on the subject. Many supposed analogous cases were cited, and urged upon the attention of the Court, with great force; and much analogical reasoning has been gone into, which would have had great

weight if the state of the case were such as it was assumed to be.

It was assumed, that the suit was by the plaintiff, in his ministerial capacity, solely: and it was likened to that of many other persons, suing in an artificial capacity, which, when it ceases, terminates the power to do and perform any and every act, depending upon such capacity.

But it is apprehended, that this is altogether a mistaken view of the subject. The plaintiff in that suit did, to be sure, style himself clerk and minister. But this may, if the merits of the case will admit of it, be taken and deemed to be merely *descriptio personæ.* It may, and, indeed, must be contended by the plaintiff in error, that the merits are not such as to render this admissible. It is true, that the land, on which the trespass was alleged to have been committed, was described, in the plaintiff's declaration, as a ministerial lot. This, however, may also be regarded merely as a description of the land on which the trespass was committed, provided it be not essential to the maintenance of the action by the plaintiff in his artificial character or capacity solely.

The plaintiff, in this case was seized and possessed of the *locus in quo.* His estate was a tenancy of a certain description. If settled for life, as the minister of the parish, it gave him an estate of freehold upon condition; if for a term of years, his estate in the land was commensurate with the term. The usufruct was in him, for the time he might be so continued in the occupancy. He might cut thereform, what in law is denominated, housebote: but like other tenants, having less than a fee, he could not commit waste. Ecclesiastics are punishable for waste on their church lands or glebes. 2 Atk. 217; Bacon, title waste, D. All such tenants are answerable, not only for actual, but for permissive waste. If a trespass be committed, on their tenements, by a stranger, they are answerable for it, as they have their remedy by an action of trespass, against the stranger. 4 Kent, 77; 2 Inst. 145, 6; Bacon, title waste, H.

The tenant, Sewall, then, had all the rights incident to his tenancy. If a stranger trespassed upon the land, a right of action accrued to him, and vested in him personally. He might have brought his action without alluding to the nature of his tenure. His description, then, of himself as minister, and of the land as a ministerial lot, may be regarded as superfluous, and may be rejected as such or as merely descriptive. If the right of action was in him personally, when commenced, it would follow him, after his tenure ceased. If trespass be committed on land of the owner in fee, or as tenant of any less estate, and he, subsequently, parts with his estate, his right of action for the trespass remains, whether commenced before or after parting with the estate. As the defendant in error was the tenant of the land, when the trespass was committed; as he was answerable therefor as for waste; as the right of action for the trespass vested in him personally, and continued in him after he parted with the estate, the judgment, against the plaintiff in error, was properly entered up and must be affirmed.

We have taken no notice of the objections, of the defendant in error, to the service or to the sustaining of the writ of error. The view, we have taken of the case, has rendered it unnecessary to do so.

THE INHABITANTS OF JEFFERSON, Plaintiffs in Error, *versus* THE INHABITANTS OF WASHINGTON.

In an adjudication of a Judge of the Court of Common Pleas, rendered on a complaint originally filed under the statute providing for the settlement and support of the poor, as in a special verdict, they being placed by the legislature upon the same footing, this Court will only notice such facts as are specially found in such adjudication or verdict.

The word settlement, in reference to a pauper, means that such individual has, in case of need, a right to support from the inhabitants of the town where his settlement may be.

Dwellingplace, or home, means some permanent abode or residence, with intention to remain; and is not synonymous with domicil, as used in international law, but has a more limited and restricted meaning.

An individual, abandoning his home or dwellinghouse, with or without design of acquiring one elsewhere, has no home by construction, in the place abandoned.

A home, or dwellingplace, does not continue till another is gained; it may be abandoned, and the individual cease to have any home.

THIS was a writ of error to reverse a judgment of the Court of Common Pleas.

The facts upon which the judgment sought to be reversed was rendered, appear in the report and adjudication of REDINGTON J., which was as follows:—

This is a complaint made before a justice of the peace, by the overseers of the poor of Washington, to recover the expenses incurred by them in the support of one Nathaniel Place, a pauper, whose legal settlement is alleged to be in Jefferson, and also to procure his removal.

It was admitted, that the pauper fell into distress in Washington, and was supplied with necessary relief by the complainants. It was further admitted, that the proper notice and reply were seasonably given, but it was denied that the settlement of the pauper was in Jefferson, when the supplies were furnished.

A commissioner was appointed to take the evidence. His report is very voluminous, containing the testimony of nearly one hundred witnesses. By this testimony, in connexion with several depositions, it is proved, that the pauper was born in

what is now Wiscasset, several years before the revolutionary war. His father died at that place, sixty-two years ago, being the owner and in possession of real estate in that place.

Soon afterwards, the pauper, at the age of fifteen years, went to what is now Alna, where he resided six years, within which time he learned the shoe-making trade, and then worked one year on his own account. At the end of that year, he departed from Alna, and went to Balltown plantation, which now comprises Jefferson and two other towns. After sauntering about for some time, without any home, he hired a small strip of land in what is now Jefferson, which he cultivated, though quite negligently, about two years, between 1797 and 1802, living at the same time within what is now Jefferson. From this fact, it is considered to be proved, that he there acquired a residence, and had his home in that part of the plantation now Jefferson.

In 1802, he left that home, and from that time till 1810, (within which period, viz. on the —— day of February, 1807, the town of Jefferson was incorporated,) he was habitually roving from house to house, and frequently from town to town, with his little wallet of tools to do shoe-making work, as he happened to be sent for, or could find employment, carrying a little jug in which to get his pay; eating his food where he happened to work, or where the hand of charity supplied it, and often failing to get his regular meals. Where night came down upon him, there he lodged. Measuring the circuit of his ramblings, the central point would fall within the limits of Jefferson. In that town, around the head of the pond, he loitered and spent much more of his time than in all other places, attracted especially by a couple of drunkeries located there. But while thus lingering about these fountains of "blue ruin," or roving from place to place, often drawn back, by the allurements of rum, to his favorite haunts at the head of the pond, poor Nat Place knew no spot, except, perhaps, in the public highway, where he had any right to deposit himself, his jug, or his pegging awl, except by indulgence of others, from hour to hour. There were two families in Jefferson, who were

particularly kind to him. In one of those families he had an aunt. They permitted him to be frequently at their tables, sometimes for several days, perhaps weeks together. He occupied no shop nor land, never contracted or paid for any board, had no trunk nor chest. His second shirt, when he had such a thing, he sometimes washed at the brook, but more frequently got it done in these families. He was occasionally incited to work a day or two, for the persons upon whose families he had been so much a burden. Though not taxed in the books, he worked out a poll-tax on the highways in Jefferson, two or three years, thinking he was bound to do it.

By these facts, it is considered to be proved, that from 1802 to 1810, Place had no residence or dwellingplace in Jefferson, unless constructively, from the domicil which he had previously acquired in the plantation as above mentioned.

In 1811, he was taxed in Jefferson to state, county and town taxes. A tax of some kind was also assessed upon him in 1812. Between 1810 and 1816, he took up without right, a small lot of land in that town — fenced it and raised crops upon it two seasons; upon this spot he erected a coarse cheap camp, having a rude fire place. In that camp he sometimes lodged and took his meals, and was occasionally favored by night and by day, with the society of some of his old fellow sufferers in the cause of rum. Over this apology for a house he exercised dominion, it was under his own control, nobody was known to claim any rights above him, and here he had a right to deposit himself. It is considered as proved, that by reason of possessing, cultivating and camping upon that lot, taken in connexion with the taxing aforesaid, that he there acquired an *actual* residence and a home at sometime between 1810 and 1816.

As early as 1816, his vagrant habits were resumed, his camp was torn down, and he never afterwards had any *actual* home in any place. In 1819, he made a parol sale of his supposed claim in his camp ground for fifty cents; and it was not satisfactorily proved where he was on the 21st March, 1821. Upon the foregoing evidence it is considered by the Court that

at the time of furnishing the supplies aforesaid, the legal settlement of the pauper was in Jefferson, and that the complainants recover against said town of Jefferson, the amount of supplies furnished to the pauper up to the second day of May, 1838, being two hundred and twelve dollars and sixty-one cents, together with legal costs, and that said Place be removed to said town of Jefferson.

Very elaborate written arguments were furnished the Court.

Mellen, for the plaintiffs in error. The pauper gained no settlement under the act of March 21, 1821. The facts, upon which the decision sought to be reversed rests, took place prior to that time and subsequently to Feb. 11, 1794, when the statute of Massachusetts which prescribes what shall constitute a legal settlement was passed. The act of Massachusetts remained in force until 1821. Whatever settlement the pauper gained was under the act of Feb. 11, 1794. By that act twelve modes of gaining a settlement were designated, none of which apply to the present case.

The decision of the Court below, "that the pauper acquired a residence and had his home in Jefferson," amounts to nothing. Residence is not settlement, and by act of 1794, a settlement can never be gained by residence for any length of time.

That there can be no constructive residence is determined in *Exeter* v. *Brighton*, 15 Maine R. 58.

F. Allen, for the defendants in error. From the evidence it is fully established, that the pauper whose settlement is in dispute, had a home in the town of Jefferson, prior to 1821. It is equally clear that he never had any home in any other place whatsoever. A home, or domicil, once acquired by actual residence, continues until that home is abandoned, and a new one acquired. This is a principle of universal application, and every where adopted. Once having a home, it *constructively* continues till the acquisition of a new one, in this case, equally as if the pauper had been traversing the ocean or travelling on land. One may have a home in a town, without any fixed abode in that town. *Parsonsfield* v. *Perkins*, 2 Greenl. 211; *Boothbay* v. *Wiscasset*, 3 Greenl. 354; *Wilton* v. *Falmouth*,

15 Maine R. 479. A domicil, once acquired, is not lost until a new one has been actually gained. Vattel, b. 1, c. 19, § 218; Story's Conflict of Laws, 40; *Jennison* v. *Hapgood*, 10 Pick. 77; *Somerville* v. *Somerville*, 5 Ves. 756; 2 Kent's Com. 431; *Andrews* v. *Hinds*, 4 Cow. 516; *St. George* v. *Deer Isle*, 3 Greenl. 390. The case, so far from finding that he removed or intended to remove to any other place, does not even find that he remained a single week in any other town. Having then a constructive home in Jefferson, his settlement is fixed there by the incorporation of that town, as well as by the St. 21st March, 1821.

Ruggles, in reply. The pauper had no home in Jefferson except for two brief periods of time. He was not there at the incorporation of the town, nor in March, 1821. The principle upon which the counsel for the defendants rests his case, is, that a man can never be without a home, actual or construc tive, and therefore can never lose one home till he has acquired another. This principle, which, with certain exceptions and qualifications, is recognized by writers on the civil law, applies to questions of national domicil, arising in the consideration of citizenship, allegiance, and other public and social relations and conditions. In those cases, domicil is used in a broad and indefinite sense, and not to express a dwellingplace or a family establishment.

When questions of national domicil have arisen, the inquiry is not whether a man has a dwellinghouse in a particular town or district, or whether he has any fixed abode; but to what country he belongs, and to what nation he owes allegiance, independently of any considerations of residence in any particular spot. His original national domicil, *(forum originis,)* continues by the law of nations till another is acquired. In our own, as well as in the European jurisprudence, domicil is of different kinds — *commercial*, *national*, *political*, *civil*, and *forensic* — the evidence of which varies with the subject matter to which it relates.

The cases cited as adverse to the plaintiffs, relate to questions of allegiance, or to the distribution of property, and analogous

cases, in all which it is perceived the individual must have a home somewhere—and in which this fiction of the continuance of the old home till the acquisition of the new, is adopted.

But *home*, as used in the pauper acts, is a very different thing. In no instance has the doctrine here contended for ever been recognized as applicable to questions arising under them. The language of those statutes, *(dwelling and having a home,)* indicate what kind of home was contemplated; not a home without a dwelling, nor a dwelling without a home; but both a dwelling and a home, each qualifying the other.

It is true, by statute, that a *settlement*, once established, remains till another is acquired; but settlement, like citizenship, or allegiance, may be where home is not. Derivative settlement may exist where a person never had a home. Settlement and home are therefore different. One is a municipal qualification, imposing municipal obligations, without regard to home. The other is inseparable from the idea of definite locality or habitation — changes with it, and is lost by losing it. *Turner* v. *Buckfield*, 3 Greenl. 229; *Hampden* v. *Fairfield*, 3 Greenl. 436.

The opinion of the Court was delivered by

WHITMAN C. J. — The plaintiffs have sued out a writ of error, against the defendants, to reverse a judgment of the late Court of Common Pleas, rendered on a complaint, originally filed before a magistrate, and brought into that Court by appeal, under a statute providing for the settlement and support of the poor. The present defendants allege, in their complaint that, one Nathaniel Place had become chargeable to them, and that his settlement is in Jefferson; and pray for his removal, &c. The statute required that the Court of Common Pleas should state the facts, on which it might ground its decision, in cases of this kind. Accordingly the Judge of that Court stated the facts, as they were developed on the trial. The question now is, whether they will support his decision.

It appears that the pauper, between 1797 and 1802, hired a small strip of land, in what is now Jefferson, then an unincor-

porated plantation, which he cultivated about two years; and lived there during that time. The Judge who tried the cause says, "from this fact, it is considered to be proved, that he then acquired a residence, and had his home" there. Jefferson was incorporated in 1807. From 1802 to 1810 the pauper seems to have been in the habits of vagrancy, wandering from place to place; but that the centre of his rambles, as the statement is, would have fallen somewhere within the limits of Jefferson; and in 1807, when that town was incorporated, the Court say, "he had no residence or dwellingplace there, unless constructively, it may be inferred from the domicil, which he had previously acquired in the plantation above mentioned. Sometime between 1810 and 1816, it appeared, that the pauper, for two seasons, occupied, without right, a small lot of land in Jefferson, and built a camp thereon; in which he sometimes lodged and took his meals; and in 1819 sold his "supposed claim" for fifty cents. In 1811 and 1812, he was taxed in that town. Aside from this, his vagrant life was continued, without being confined to any spot or town, for any considerable length of time, working at one place or another, occasionally, just enough to procure the means of relief from instant distress, or from the cravings of his appetite for ardent spirit, having no property or even a change of apparel. On the 21st of March, 1821, the Judge says, it did not appear where he was.

From these facts it would seem, that the Judge must have considered the settlement of the pauper to have been in Jefferson, either because he dwelt and had his home there, on the 21st of March, 1821, or because he dwelt and had his home there at the time the town was incorporated, or both. The Judge is silent as to which of them he relied upon. It might be upon both.

In requiring the Judge of the Court of Common Pleas to report the facts, on which any decision he might make, might be predicated; and providing for a revision of his adjudication by writ of error, it is manifest, that the legislature intended to place his finding, as to the facts, upon the footing of a special

verdict. In a special verdict whatever fact is explicitly found the Court will notice; but whenever the facts necessary to the support of any position, are indistinctly found, or are left to be gathered from inference, only, the Court must reject them. In the case at bar, the decision of the Court of Common Pleas must be supported by facts distinctly found by the Court, or it cannot be sustained.

The Judge in making his statement of facts, having used the terms residence and home *as being such constructively*, would seem to have considered, that residence and home were synonymous with settlement, as applicable to paupers, and it is well understood that a settlement thus applied, may be derivative.

This word settlement, in reference to paupers, has become in a manner technical; insomuch, that, when it is said that a person has his settlement in a particular town, the meaning is, that he has, in case of need, a right to support from the inhabitants of that town. The words dwellingplace and home, and the term settlement therefore may have very different significations. A person may have his settlement different from his dwellingplace and home. Indeed, he may have a settlement in a place in which he never had either a dwellingplace or home; as in the case of children born whilst their parents live in one town, having their settlement in another. This presents a case of a derivative settlement. But a derivative or constructive residence and dwellingplace, can hardly be what the statute contemplates, when it speaks of a person's dwellingplace and home, as fixing his settlement. Indeed, what is meant by a constructive residence and home is not readily apprehended.

The counsel for the defendants in error, in his argument, treats the words, dwellingplace and home, as if synonymous with domicil, and proceeds to argue, that one domicil continues till another is gained; and that to have a domicil a man need not have any particular place of dwelling, or for his home; and he cites numerous authorities to support his position. But the answer to them all is, that domicil, though in

familiar language used very properly to signify a man's dwellinghouse, has, in cases arising under international law, and in kindred cases thereto, a sort of technical meaning. And the authorities cited, all apply to it in this sense. It fixes the character of the individual, in reference to certain rights, duties and obligations; but dwellingplace and home have a more limited, precise and local application.

When the legislature speak of dwellingplace and home, as being requisite to establish the *settlement* of paupers, it cannot mean to use those terms in a vague and indeterminate sense. Something specific was in comtemplation. It was intended to define, so that it could not be misunderstood; and so that it should be obvious to the common sense of every man, what should constitute a settlement. Constructive dwellingplaces and homes, if there be any such, could not have been in contemplation. If a man actually has a home or dwellingplace, all his fellow townsmen can at once see and know it; but as to constructive dwellingplaces and homes, who can tell what they are, or where they are to be found, or to which of the senses they can be made obvious. In the case of *Turner* v. *Buckfield*, 3 Greenl. 229; it is expressly decided, that the words dwellingplace and home meant some permanent abode or residence, with intention to remain.

The case of *Parsonsfield* v. *Perkins*, 2 Greenl. 411, may seem to indicate a qualification of the above decision. In that case, however, the construction was extended as far as to most understandings, would be obviously proper. Some confusion in that case may have arisen from having seemingly confounded dwellingplace and home, with domicil, in international law. The Judge in delivering the opinion of the Court speaks of the domicil, instead of his dwellingplace and home, as having continued after he ceased to have any actual dwellingplace and home, in Parsonsfield, and many years after he had become a vagrant. But the Court, in that case, lay much stress upon his having dwelt many years there, formerly, with his wife and children; who still remained there, and with whom he might at any time, have united himself; and upon the circum-

stance that he had confined his ramblings almost wholly to Parsonsfield. And these are features, which do in some measure at least, distinguish that case from the one at bar. Place rambled at large; and had, seemingly no inducement to confine himself to one place more than to another, for ardent spirit was, in those days, every where to be obtained.

A home and dwellingplace do not, necessarily, continue until another is acquired. A man may break up his establishment, and divest himself of property, and become a wanderer, and there will be an end of his dwellingplace and home, as effectually as if he were to gain a home in another place. It has been held in this State, that a man may so abandon his home; and thereupon cease to have any home. *Exeter* v. *Brighton*, 15 Maine R. 58. In the case just cited, the pauper, on the 21st March, 1821, was on his way to establish his home in another place. But suppose he had wandered about, and had gone to no other place, his home would still have been broken up; and so likewise if he had abandoned his home and dwellingplace, without any design to establish himself elsewhere. It is not even necessary that he should proclaim his design to do so. His acts might speak as decisively to that effect as his words could do. To say, if a man breaks up his establishment, and actually ceases to have a home and dwellingplace, that he still has a constructive home in the place which he had abandoned, is taking ground which certainly cannot be tenable. And if a man becomes a worthless, dissolute vagabond, a wanderer from place to place, and from town to town, often depending upon the hand of charity, wherever it may be found, for relief from present suffering, could it be said that such a man, had a dwellingplace and home? To the Court it would seem to be an abuse of terms.

It is therefore considered by this Court, that the judgment of the Court of Common Pleas, be reversed, and that the plaintiffs in error recover of the defendants in error the sum of being the amount of loss sustained by the former decision.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC, JUNE TERM, 1841.

JOSEPH M. BARRY *versus* WILLIAM PALMER.

When by the terms of the contract the plaintiff was to deliver paper hangings, conforming to a momorandum annexed, "on board a Gardiner steamboat, at Boston, on her first trip in April then next," for which the defendant was to pay in paper of a certain quality and price, to be shipped "at Gardiner," on the receipt of the paper hangings for Boston, — upon the shipments by each party according to the contract — the goods sent are at the risk of the party for whose use they are thus shipped.

The stipulation in the contract, that the plaintiff was to be paid on the receipt of the goods at Gardiner, determined only the time of payment but did not impose the risk of transit upon the plaintiff.

If the goods were not sent all at one time, nor in season as required by the contract, but were received in different parcels as sent — and were paid for — it is a waiver of that part of the agreement by which the entire quantity was to be shipped at one time — and by a fixed day.

THIS was an action of assumpsit for certain paper hangings. The general issue was pleaded.

The following contracts were introduced. The schedules referred to are omitted. "The within memorandum of paper is to be delivered on board the steamboat at Boston, the first trip in April, 1838, and are to be paid for in paper, at 11 cts. per lb., to weigh 27 lbs. to the ream in the long roll, and shipped for Boston after receiving the paper hangings — the with-

in memorandum can be altered any time before the first of January next. Joseph M. Barry.

"Gardiner, 14th Dec. 1837."

"The above paper hangings are to be delivered on board a Gardiner steamboat the first trip in April, 1838, and are to be paid for in paper at 11 c. lb., to weigh 27 lbs. to the ream. It is to be made in the long roll and shipped for Boston after the receipt of the paper hangings. The above can be altered any time before the first of February next. Wm. Palmer.

"Gardiner, Dec. 14, 1837."

The plaintiff introduced certain depositions from which it appeared that the hangings in controversy were sent the latter part of May, 1838, from Worcester by the rail road to Boston, and were then shipped on board the steamer New England for Gardiner, and were lost on the passage by the wreck of the steamer.

The plaintiff introduced the following letter from the defendant.

"Gardiner, April 17, 1838.

"Mr. Barry, sir, I expected by last boat the lot of paper hangings which you agreed to send, but I have not received them. Will you inform me when you will send them — the paper you are to have is ready.

"Yours, William Palmer."

The plaintiff also read a letter of the defendant, dated June 11th 1838, in which he wrote — that he would send paper hangings any time he might be directed — and that he wished the plaintiff to send 20 rolls of his No. 30, from Boston by the steamer Huntress — also a letter dated July 20, 1838, in which he advised him, of having sent three boxes of paper according to order, which made the amount due the plaintiff for hangings which had been received.

The defendant introduced a letter from the plaintiff, dated Sept. 25, 1838, in which he advised the defendant, he should the next week send the defendant's order of paper hangings, but should make his delivery in Boston on board the steamboat

unless ordered to send them some other way, as he should not be holden for them after they were put on board of the boat or packet.

He then called Abraham Jordan, who testified, subject to all legal objection to his testimony, that after the contract was signed, the plaintiff told the defendant that he wanted the latter to exchange with him — that if he had had time he should have written the contract differently — that it was impossible for the defendant to make selections from the samples he had exhibited — that he had others at his factory — that the paper should be sent to Gardiner, and that after the defendant had inspected it and had selected such patterns as he was satisfied with, he might return the rest and pay for such only as he retained — and that to these propositions the defendant assented.

It appeared that all the paper sent, prior to that in controversy, and also a quantity sent in the month of June, 1838, had been received and paid for by the defendant. It further appeared that a short time prior to this suit, the plaintiff demanded payment of the defendant for the paper in dispute, which was refused. By comparing the prices and numbers which indicated to purchasers the patterns and quality of the paper, it appeared that some was sent, found on the plaintiff's schedule, which was not found on the defendant's counterpart — that some was sent which was not found in either schedule and that all included in the schedules had not been sent.

Upon this evidence a nonsuit was ordered by WESTON C. J. it being agreed that, if in the opinion of the Court the action is maintained by competent evidence, the nonsuit shall be set aside, a default entered, and such judgment rendered thereon as the Court may order, otherwise the nonsuit is to be confirmed.

Evans and *Emmons*, for the plaintiff. By the terms of the contract signed by the defendant, he agreed to purchase a certain quantity of paper hangings — the samples of which had been exhibited to him, — the paper was to be delivered on board a Gardiner steamboat, the first trip in April, 1838. The place

of delivery is fixed — "a Gardiner steamboat" in "Boston." This contract, if not fulfilled to the letter, has been fulfilled to the satisfaction of the defendant. None was sent the first trip of the boat in 1838, but the defendant took no advantage of this omission, he waived strict compliance — received and paid for different portions as they were sent at different times. These facts amount to an unequivocal waiver so far as time is concerned. *George* v. *Coombs*, 7 Greenl. 394; *Wyer* v. *Noble*, 7 Greenl. 342; *Brinley* v. *Tibbets*, 7 Greenl. 70; *Hayden* v. *Madison*, 7 Greenl. 176.

Further, the contract ceased to be entire. It became an agreement, not for a certain quantity — all to be delivered at one time, but for a given amount to be received in parcels as might suit the convenience of the sender. *Bowker* v. *Hoyt*, 18 Pick. 555; *Oxendale* v. *Witherell*, 9 B. &. C. 386: *Champion* v. *Short*, 1 Camp. 53; *Shaw* v. *Badger*, 12 S. & R. 275. The paper hangings were thenceforward at the risk of the defendant — the freight was to be paid for by him. The plaintiff had nothing more to do. The sale was complete. No one but the defendant could interfere or control the paper. The delivery was perfect, so far as it ever can be where goods are sent by ship agreeably to order. They were never received, the boat having sunk on its passage. The loss is the loss of the defendant.

The expression in the contract that the papers are not to be paid for until after their receipt — relates only to the *time* of payment. It is not a condition to be first performed on the part of the plaintiff. The liability attached on the delivery in Boston. *Swift* v. *Clark*, 15 Mass. R. 173; *Locke* v. *Swan*, 13 Mass. R. 79. Each had discharged his part of the contract when they had severally shipped the articles to be sent, at Boston and Gardiner.

The evidence of Jordan, tending to vary a written contract, was clearly inadmissible.

The action is properly brought. *Indebitatus assumpsit* will lie when the order has been executed and nothing remains to be done but to make payment. *Stark* v. *Parker*, 2 Pick. 73;

Burn v. *Miller*, 4 Taunt. 744. If necessary, the contract may be amended. *Thorp* v. *White & al.* 13 Johns. 53. The defendant has admitted the contract by bringing money into Court. *Huntington* v. *American Bank*, 6 Pick. 340.

F. Allen, for the defendant. The action is not maintainable. The plaintiff sues as on a contract for money — but such was not the fact. It was a contract of barter. The payment was not to be made in money. The plaintiff then should have declared on his contract and averred a readiness to perform on his part. *Preston* v. *Wright*, Doug. 665; *Rollins* v. *Otis*, 1 Pick. 368; *Goulding* v. *Skinner*, 1 Pick. 162; *Cunningham* v. *Kimball*, 7 Mass. R. 65.

There is then a variance between the declaration and the proof. *Nourse* v. *Snow*, 6 Greenl. 208; *Penny* v. *Porter*, 2 East, 2; *White* v. *Wilson*, 2 B. & P. 116; 2 Stark. Ev. 83, Yelv. R. 57, *n.*

By the terms of the contract the place of delivery was to be at Gardiner and not Boston. It was to be paid for after it was received. If a delivery at Boston was sufficient the plaintiff might have sued and attached forthwith — and the defendant would have been deprived of the right to pay in paper. However that might be originally, the contract was modified by the subsequent parol agreement testified to by Jordan; the evidence of which was legally admissible. *Low* v. *Treadwell*, 3 Fairf. 441; *Kealing* v. *Price*, 1 Johns. Cases, 22; *Radcliff* v. *Pemberton*, 1 Esp. 35; *Erwin* v. *Saunders*, 1 Cow. 249; *Fleming* v. *Gilbert*, 3 Johns. 528; Chitty on Contracts, 27.

The paper hangings here have never come into the possession of the defendant. The plaintiff therefore is bound to show a strict performance. It differs from the case where the article has been received — and a strict performance been waived.

The opinion of the Court was delivered by

Weston C. J. — The principal question, in controversy between the parties, is, at whose risk were the paper hangings, shipped by the plaintiff on board the steamer New-England, in May, 1838. This will depend upon the contract, as origin-

ally made, or as subsequently modified. The written agreement is in two parts, by which the plaintiff and defendant, respectively, became possessed of the written evidence of what the other party had assumed. From both, taken together, it appears, that the plaintiff was to deliver paper hangings, conforming to a memorandum annexed, on board a Gardiner steamboat at Boston on her first trip, in April, 1838, for which the defendant was to pay in paper of a certain quality and price, to be shipped at Gardiner for Boston, on the receipt of the paper hangings. When the plaintiff shipped the paper hangings at Boston, and the defendant the unstained paper at Gardiner, according to the contract, each would have done, what he stipulated to perform; and the paper stained and unstained would thereupon be at the risk of the party, for whose use it was thus shipped. The subsequent parol agreement, properly understood, must be regarded as having reference to other patterns, than those to be found in the memorandum, which was made a part of the contract. Such as there appear had been selected by the defendant, and he had contracted to receive and pay for them. By the parol agreement, such as he had not seen, if forwarded, he was to receive or to return, at his election.

The defendant was to pay, on the receipt of the paper hangings at Gardiner. This did not impose upon the plaintiff the risk of their transit from Boston. It only determined the time, when the defendant was to make payment. The plaintiff failed to perform on his part, in two particulars. He did not send the paper at one time, as he had agreed; nor did he send it in April, on the steamer's first trip, according to the contract. But his rights will remain unaffected, if performance in these respects was waived or excused by the defendant. And this, in our judgment, is fairly deducible from the evidence. The plaintiff having failed to send on the steamer's first trip, the defendant, in his letter to the plaintiff, of April 17th, 1838, desires to be informed when he will send the paper hangings, adding, "the paper you are to have is ready." This clearly waives strict performance, and manifests a willingness to receive the hangings subsequently, that is, as must be understood, if

shipped within a reasonable time. That the shipment in question would have been satisfactory in point of time, is apparent from the fact, that the defendant actually received and paid for hangings, shipped the following month. And the correspondence and acts of the parties are evidence, that the defendant waived his right to require, that the entire quantity, he had agreed to purchase, should be shipped at one time, and that on the first trip of the steamer, in the month of April. It results, that such parts of the hangings lost, as conformed to the memorandum, which is part of the contract, were at the risk of the defendant.

The defendant should have paid, by shipping his unstained paper, in a reasonable time, after the hangings would have been received, if the steamer had arrived in safety. This he has not done, and has refused payment generally upon demand, prior to the suit. It is objected, that whatever may be the merits of the plaintiff's claim, he should have declared specially. There may be weight in this position. But the whole cause has been tried, with reference to the contract and the subsequent facts. The account annexed disclosed in detail the subject matter of the suit. A special count for the same cause, might have been added, under leave to amend. The grounds taken in defence, upon the merits have been fully considered. It is not too late to allow the amendment; and the justice of the case requires it. The plaintiff accordingly has leave to file a special count, upon the contract. This being done, the nonsuit is to be set aside, and a default entered.

ELIPHALET KIMBALL & *als. versus* FRANCIS DAVIS, JR.

The words "Mr. officer, attach suff." on the back of a writ sufficiently indicate to the officer the wish of the plaintiff that an attachment should be made — and the officer would be responsible for omitting to attach if in his power when so directed.

If an attachment be made without written directions, the officer making it is bound to preserve and account for the property attached.

Verbal directions as to the articles or species of property to be attached, are binding on the officer, when general directions in writing to attach have been given.

The attorney is admissible as a witness, unless there be sufficient evidence of neglect to prove that he would be liable to his principal, if he should fail in the suit in which he is called to testify.

THIS was an action of the case against the defendant, as deputy sheriff, for an alleged neglect to return upon a writ against one Thomas C. Noble, certain goods said to have been attached thereon. Plea, the general issue.

It appeared upon the introduction of the plaintiff's writ against said Noble, that the only written order or direction thereon to the officer was in the following words, "Mr. officer, attach suff." below which were the names of the attorneys.

The return of the defendant recited an attachment of the real estate of said Noble, but contained no mention of the attachment of any goods or other personal property of said Noble.

The plaintiff then called R. H. Vose, the attorney in the original suit, to prove that he gave verbal directions to the defendant, on delivering him the writ against Noble, to attach a certain lot of goods as said Noble's property, and that the defendant subsequently said he had attached those goods.

The defendant objected to the introduction of parol testimony to vary or explain the written directions to the defendant — and also to prove that verbal directions had been given to attach personal property of Noble.

They further objected to the admissibility of Mr. Vose as a witness, on the ground of interest — and proved, that said Vose had neglected to levy upon a lot of land situated in the

village of Augusta, the title to which was in said Noble at the time of the attachment in the suit against him — but which was conveyed to another person before the rendition of judgment. They contended that upon these facts, the witness was *prima facie* liable to the plaintiffs for this neglect and had an interest in the suit. But these objections were overruled and the witness was permitted to testify, and did testify — that he gave verbal directions to make the attachment, and that the defendant admitted that he had made an attachment of the goods.

Emery J. who tried the cause, instructed the jury that the verbal directions with the written orders on the back of the writ were sufficient.

The jury returned a verdict in favor of the plaintiffs. Exceptions were then filed to the rulings of the presiding Judge and allowed.

J. W. Bradbury, for the defendant. The defendant was not bound to make an attachment without written directions from the plaintiff or his attorney so to do. *Betts* v. *Norris*, 15 Maine R. 468. The words written on the back of the writ do not contain any intelligible and explicit directions, such as are binding on the officer. They ought to specify the property to be attached whether real or personal. They are vague and uncertain and therefore void. *Stackpole* v. *Arnold*, 11 Mass. R. 27; *Cobb* v. *Stearns*, 14 Maine R. 472; 3 Stark. Ev. 996.

Should the Court regard the writing on the back as written directions — the *kind* of property is not specified — and the officer would discharge his duty by attaching property real or personal — and his attachment of real estate should protect him to the extent of its value. The election of the kind of property to be attached was left with him — and he elected real estate. *Layton* v. *Pierce*, 1 Doug. 15.

Parol evidence was inadmissible to vary or explain the written directions — the ambiguity was *patent* and was to be explained by itself — or it was void for uncertainty. 3 Stark. Ev. 1000; *Barker* v. *Prentiss*, 6 Mass. R. 430; *Barker* v.

Blake, 11 Mass. R. 22; *Berry* v. *Morse*, 3 N. H. R. 132. Vose was interested as a witness, and should have been excluded. 3 Stark. 768; *N. Y. State Co.* v. *Osgood*, 11 Mass. R. 60.

Vose & Lancaster, for the plaintiff. The case of *Betts* v. *Norris* was for not attaching. This is for not keeping what was attached. Having made the attachment, the officer was bound to preserve it. The directions on the writ were sufficiently clear and explicit — if ambiguous, parol evidence was properly admitted to explain that ambiguity. *Green* v. *Lowell*, 3 Greenl. 373. The attorney or agent is properly admitted. *Phillips* v. *Bridge*, 11 Mass. R. 242.

The opinion of the Court was delivered by

SHEPLEY J. — It was decided in the case of *Betts* v. *Norris*, 15 Maine R. 468, that an officer was not obliged to make an actual attachment of property without written directions to do so. It was not decided, if he should make an attachment without such directions, that he would not be holden to preserve and account for the property. Nor that it was necessary to designate in writing the particular property to be attached. By a written order to attach, the intention is communicated, that it should be an actual attachment of property of some value, and not a nominal one; and the officer thereby becomes entitled to the larger fee. All, which the statute does or was designed to require, is, that a written order should make this intention known. And the admission of parol evidence of the particular articles or species of property to be attached does not contradict, vary, or change the legal effect of such an order. There is nothing in the statute requiring, that such written direction should be signed by the plaintiff or his attorney; and when it is placed on the back of the writ it must be presumed, until the contrary is made to appear, to be rightfully there.

In this case the order was not so plainly written as might be desirable or necessary for those unaccustomed to such business; but sufficient was written, though the words were abbreviated, to make known to attorneys, officers, and others,

familiar with such business, the design. The officer appears to have understood and to have been governed by it.

Mr. Vose is not shown to have been so interested as to prevent his being a competent witness for the plaintiff. *Phillips* v. *Bridge*, 11 Mass. R. 242; *Union Bank* v. *Knapp*, 3 Pick. 96. He was admissible on the ground, that he was the agent of the plaintiffs, without sufficient evidence of neglect, to prove that he would be liable to them, if they should not recover against the defendant.

Exceptions overruled.

ALFRED HERRICK *& al. versus* WILLIAM MOORE *& al.*

The location of a road is an incumbrance for which the grantor of the land over which the road is located, is liable upon the covenants in his deed.

If after the conveyance there be a discontinuance of part of the road, and a new location, the claim of the grantee for damages upon the covenants of his deed will be limited to the remaining portion of the road.

The grantee can claim no damages for so much as is discontinued, the incumbrance being removed without expense to him.

The owner of the land over which the new location is made is entitled to compensation from the public for this incumbrance, notwithstanding the discontinuance of the original road over his land.

THIS was an action of covenant broken, and was submitted by the parties to the decision of the Court upon the following agreed statement of facts.

Prior to the date of the defendant's deed, upon the covenants of which the action is brought, a county road had been established through the land conveyed, but not opened.

Subsequently to the execution of said deed, and before action brought, an alteration of the same was established, and the road as altered, opened, over the same land, so much of the first location thus rendered unnecessary for public use being discontinued.

Previously to the alteration, eighty dollars damages were

awarded and paid to the defendant, for the first location. That sum was paid after the execution of the defendant's deed.

No damages were awarded the plaintiff for the alteration, nor was there any proof that he ever made application for damages to the county commissioners.

The road, according to the first location, was crossed by the alteration in one place, at an angle of about ten degrees. The two locations interfered in no other place upon the land conveyed, though after passing the land they coincided, forming the same road.

1. If the Court shall be of opinion that the *incumbrance* (if any) complained of, *was removed* by the discontinuance of the road as first located, the plaintiffs are to become nonsuit.

2. If the Court shall be of opinion that the incumbrance (if any) was removed by the discontinuance aforesaid, excepting as to that part of the land conveyed, occupied by both locations in common, judgment is to be rendered for twelve dollars and fifty-two cents.

3. If the Court shall be of opinion that the incumbrance, (if any,) was removed as to no part of the first location by the said discontinuance, judgment was to be rendered for the plaintiffs, for eighty dollars.

McCobb, for the defendants. The location of a road is not an incumbrance. *Whitbeck* v. *Cook*, 15 Johns. 483; 14 Viner, 352, Incumbrance; 2 Rolle, 287; *Ellis* v. *Welch*, 6 Mass. R. 246. The authority of *Kellog* v. *Ingersol*, 2 Mass. R. 97, has been doubted and is opposed by the cases cited. The road laid out may never be made—the rights of the public may never be exerted—and if not, no damages have arisen.

2. The incumbrance was removed by the alteration of the road, after the date of the plaintiff's deed. There is no incumbrance unless the road as originally located and as altered are identical. *Com.* v. *Cambridge*, 7 Mass. R. 158; *Com.* v. *Westborough*, 3 Mass. R. 406. If Herrick had applied for damages for the alteration, he would have been entitled to them. Herrick did not apply and Moor was paid. If Moor has received money not belonging to him, it is a matter between

him and the county. When land is taken for public uses it is paid for in money. *Com.* v. *Peters*, 2 Mass. R. 125. When discontinued, it reverts to the original owner. The public buy an easement and cannot compel the owner to repurchase it, if they discontinue it. *Westbrook* v. *North*, 2 Greenl. 179. It would have been no answer to a claim by Herrick for damages, that the part discontinued reverted to him.

3. The road was discontinued so far as the course of the road was changed. *Com.* v. *Cambridge*, 7 Mass. R. 158; *Com.* v. *Peters*, 2 Mass. R. 125; *Com.* v. *Western*, 1 Pick. 136.

Vose & Lancaster, for the plaintiffs. The road when laid was an incumbrance. It existed before the plaintiffs' title accrued. The right to claim damages cannot be taken away by subsequent proceedings. When the defendant gave the deed, the rights of the parties were fixed. *Harrington* v. *Berkshire*, 22 Pick. 263.

The opinion of the Court was delivered by

Shepley J. — It was the established law of the State of Massachussetts, while this State composed a part of it, that every existing right to, or interest in land granted, that deminished the value and was consistent with the passing of the fee, was an incumbrance. *Prescott* v. *Freeman*, 4 Mass. R. 627. The plaintiffs had no opportunity by an examination of the land to learn, that a county road had been legally laid out through it. It was not opened, and yet they might be subjected not only to the loss of land, which they supposed they had purchased, but to unexpected expenses in fencing it. The case forcibly illustrates the justice of the decision, which regarded a highway as an incumbrance. After the conveyance and before the suit, the county commissioners made an alteration and directed, that "so much of said road as shall be rendered unnecessary for public use by said alterations be discontinued." This had the effect to discontinue all the road over the land of the plaintiffs' as first located, except so much of it as continued to be a part of the road after the alteration;

and this was only the small part, where the road last laid out crossed the former one.

It was the existence of the public easement, which constituted the incumbrance at the time of the conveyance; and before the suit the public ceased to have any such easement; and the incumbrance consequently ceased to exist as to all that part, which was discontinued. According to the second position in the agreed statement the plaintiffs can recover only $12,50 and interest thereon; being the damages as agreed upon as compensation for the existing incumbrance.

It is said, that the word incumbrance, as there used, should be construed to mean the same as right of action. If such a construction were admissible, it could have very little influence upon the result; for the plaintiffs could recover nothing more than nominal damages for a breach of covenant by an incumbrance no longer existing and not removed at their expense. And it cannot be considered as so removed, for they had a legal right to compensation for their land taken for the road as altered. And if they fail to obtain damages for such new incumbrance since the conveyance, it must be occasioned by their neglect to apply in season or to take the proper measures to enforce their rights.

Judgment for plaintiffs.

The Inhabitants of Augusta, *versus* The Inhabitants of Windsor.

Testimony that the witness, an officer, having a writ for service, made inquiries for the residence of the defendant, and that he made a service upon him by leaving a summons at a house, specifying it, is properly admissible.

It is no objection that upon such testimony the jury might infer the answers given from the facts stated — it being no objection to competent testimony that possibly an improper use may be made of it.

Entries of a deceased physician in the regular course of his business are admissible in evidence when corroborated by other circumstances to render them probable.

It is not necessary that entries, to be admissible, should be against the interest of the deceased person making them.

This was an action of assumpsit for the support of Absalom Howes and family, as paupers, whose settlement was alleged to be in Windsor, in consequence of his having his home and dwelling there on the 21st day of March, 1821 — and to this point much testimony was introduced by both parties.

Artemas Kimball, a witness for the plaintiffs, testified that on the 15th of March, 1821, he served a writ against said Howes in Windsor — that he made inquiries of several persons where said Howes resided in said Windsor — and then left the summons at a house and from his recollection had no doubt of its being at one of two places, Trask's or Wingate's. The defendants objected to the admission of this testimony, but Emery J. who tried the cause, overruled the objection and received the testimony.

The defendants contended, that said Howes and his family resided in Pittston, before March 21st, 1821, and that he was then in the employ of one Linscott. Evidence was introduced, tending to show that said Linscott's leg was broken before that time. The time having become material, for the purpose of fixing the true date thereof, the plaintiffs offered in evidence, the defendants objecting, a day-book of Dr. Neal, of Gardiner, containing two charges against Temple Linscott, one dated Sept. 28, 1821, and the other Sept. 29, of

the same year, for reducing a fracture in his leg, and for medical attendance. It was further proved that Dr. Neal attended at Ballister's camp and set Linscott's leg — that he died in 1839,—that he was a regularly practising physician in 1820, and 1821, and that the book introduced was in his handwriting.

The jury returned a verdict for the plaintiffs and the counsel for the defendants filed exceptions to the decision of the Court in admitting the aforesaid testimony.

Wells and *H. W. Paine*, for the defendants.

1. The testimony of Kimball was inadmissible. If it were proper to state his inquiries of individuals as to the pauper's residence, it would be proper to give their answers, which would be clearly hearsay. To permit a witness to say that he made inquiries and then shut out the answer and yet at the same time permit him to say what he did in pursuance of the inquiry, is equivalent to allowing him to give the answer.

This testimony was not admissible as part of the *res gesta.* Declarations are only received because they illustrate the transaction. 1 Stark. Ev. 49. Here no transaction is illustrated. They are offered here to prove a fact, not to give color to or explain any act whatsoever.

2. The book of Neal is admissible upon no principle. It is not testimony under oath. The truth of the charges are not to be supported against the person for whom the services were rendered. There is no necessity for its admission. It is introduced as evidence of an incidental fact arising in the trial of a cause, and placed upon an equality with the testimony of a witness. If this be admissible, would not any man's books be received? How can this be distinguished from charges and memoranda made by any person at any time.

When acts of duty arising in a regular course of business require memoranda to be made for others, such memoranda are evidence after the death of the person making them. *Union Bank* v. *Knapp*, 3 Pick. 96; *Welch* v. *Barrett*, 15 Mass. R. 380; *Nichols* v. *Webb*, 8 Wheat. 326; Lord Torrington's case, 1 Salk. 285. These are all cases of charges made in the

regular course of business. There is another class of cases, where book charges have been received in evidence though the persons making them were under no obligation to others on the ground that they were against the interest of the person so making them. *Higham & ux.* v. *Ridgway,* 10 East, 108; *Doe* v. *Robson,* 15 East, 32.

In this case Dr. Neal was interested to make the charges but in making them he was under no obligations as to others. They are not directly in issue — they are hearsay. 1 Stark. Ev. 46.

Vose & Lancaster, for the plaintiffs. Kimball testified to an act done and his testimony was properly admissible. *Central Bank* v. *Allen,* 16 Maine R. 71.

The books of Neal were evidence. *Leighton* v. *Monson,* 14 Maine R. 208; 1 Metcalf & Perkins' Dig. 51, and cases cited; *McBride* v. *Watts,* 1 Mc Cord, 384; *Minors* v. *Ship Mary,* 1 Bay. 118.

The opinion of the Court was delivered by

SHEPLEY J. — The first exception taken is to the admission of the testimony of Artemas Kimball. His testimony is in substance, that he made inquiries for the residence of the pauper, and made service of a writ upon him by leaving a summons at a house in Windsor, on the fifteenth day of March, 1821. He did not state the answers of any one respecting his residence. The argument is, that the jury would infer, and be improperly influenced by such inferences. And so they might, perhaps, if he had stated only the fact of service, have inferred, that he made inquiries for his residence, and the answers. In deciding upon the admissibility of testimony, the Court cannot be governed by any consideration that an improper use may possibly be made of it. That can only be guarded against by the counsel in argument, or by the Court in committing the cause to the jury. The testimony proved circumstances which might be considered by the jury, with the other conflicting testimony as to the time when the pauper's residence was changed.

The second exception relates to the admission of the book of Dr. Neal, containing charges against one Linscott, for services as a surgeon upon his fractured leg. A witness for the defence, had testified, that the pauper resided in Pittston before the twenty-first day of March, while he was at work for Linscott during the winter of 1820–21, and that the leg was broken before he went to work for Linscott. It became material to show, that the witness had made a mistake in the year; and this could be shown by proving that the leg was not injured until the month of September, 1821.

In what cases, entries made by persons deceased on their books and papers in the course of their business, should be admitted as testimony, and on what precise principles, has occasioned no little discussion. It will be difficult to reconcile all the decided cases. In the leading one of *Warren* v. *Greenville*, 2 Stra. 1129, the book of a deceased attorney, containing charges relating to a common recovery, was admitted as tending to prove the surrender of a life estate. It appeared by the book, that the charges had been paid. And this fact seems to have been regarded, in many of the subsequent English cases, as an important consideration in the admission of like testimony. While in the report of that case the fact that the charges were marked paid, is not noticed in stating the reasons for the decision.

In the case of *Patteshall* v. *Turford*, 3 B. & Ad. 890, the plaintiff was desirous of proving the delivery of a notice to quit, and a memorandum of the fact and time of delivery had been made on a duplicate in the handwriting of an attorney deceased. And the question arose on its admission as testimony. It could not be received on the principle that it was made against the interest of the person who made it. Mr. Justice Taunton says, "a minute in writing, like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence."

Mr. Justice Parke states, that such an entry is to be received in two cases only: "first, where it is an admission against the interest of a deceased party, who makes it; and secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place." The case now under consideration would come within the rule as stated by Justice Taunton, and be included in the second class of cases named by Justice Parke; for the breaking of the limb, and the services of Dr. Neal, had been proved, and it would be reasonable to expect, that the time of performing them would appear from his books.

Whether the entry, to be admissible, should appear to be against the interest of the deceased person, who made it, is discussed by Mr. Starkie in his treatise upon evidence, and his reasons for concluding, that this circumstance does not "afford a sufficient test for the admission of such entries, and the rejection of all others," are very satisfactory. 1 Stark. Ev. 299, 300, 301, Met. ed. The Court say, in *Nicholls* v. *Webb*, 8 Wheat. 337, "We think it a safe principle, that memoranda made by a person in the ordinary course of his business of acts or matters, which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done."

It has been considered in several of the States, that neither the best administration of justice, nor any well established rule required the adoption of the limitation, that the entry must appear to have been made against the interest of the person making it; and the decisions in this country are more in accordance with those of *Warren* v. *Greenville*, and *Patteshall* v. *Turford*, than with the most of the other English cases. This Court is not satisfied with the reasoning upon which that limitation was introduced, and does not feel obliged to adopt it.

Exceptions overruled.

JOHN HOXIE *versus* CYRUS WESTON *& al.*

The bond to be given by one committed for the non-payment of his taxes under the provisions of St. 1835, c. 195, to procure his discharge from imprisonment should be given to the assessors of the town.

The requirement of the Statute that such bond should be given to the assessors does not prevent the person thus lawfully imprisoned from making a bond or contract with his creditor which will be good at common law.

A bond by one thus imprisoned, given to the treasurer or to an inhabitant of the town, is good at common law — and if the obligee accept the bond, he is regarded as assenting to the transaction and agreeing to execute the trust apparent in the contract.

Such bond is not within the provisions of St. 1821, c. 59, § 26, and though made payable to A. B., Treasurer, or his successor, &c. the suit must be in the name of the original obligee.

St. 1835, c. 195, § 17, repeals the act establishing the limits of gaol yards.

An order drawn by the selectmen in favor of the collector for certain abatements of taxes, is not to be considered an abatement which is to enure to the benefit of those named in the order, they not being parties to the drawing of the same; but is a mere order to the treasurer to release the collector in his settlement with him from accounting for the several sums specified in such order.

THIS action was debt on a jail bond, dated April 4, 1836, given to the plaintiff as treasurer of the town of Belgrade, to procure the release of the principal defendant from commitment — he having been committed to prison for the non-payment of certain taxes assessed against him in the year 1834. One of the conditions of the bond was, that he should not depart without the exterior limits of the county until lawfully discharged. The writ was dated July 18, 1837. The general issue was pleaded, and a brief statement filed, alleging that the bond was given under duress; that there was a breach of it the day it was given, and again in the May or June following; that the bond was given to the wrong obligee; that the tax, for the non-payment of which the arrest was made, had been abated before the suit was brought; and the statute of limitations.

The case was submitted to the Court upon the following facts. It was agreed that Weston was arrested by Richard Mills, the collector of taxes for the town of Belgrade, and was liberated from arrest, in the gaol office, by giving the bond in suit;

that the plaintiff was treasurer of Belgrade in 1834; that Samuel Austin was treasurer in 1835, and John S. Minot in 1836, and Samuel Page in 1837; that in May or June, 1836, said Weston went into the county of Somerset and remained there a week, and then returned to Belgrade.

The defendants introduced a book purporting to be a record of orders for Belgrade, which was objected to by the plaintiffs; but upon an affidavit of Weston, in whose possession the order had been, that the same was lost, the Court admitted said book. The order was described in said book as "an order to Richard Mills of sixty-two dollars sixty-seven cents, for the following abatements and demands"—among which was the following:

"C. Weston's tax,	17,35
Cost of committing to jail,	2,52"

This order was dated July 17, 1837.

The plaintiffs then proved, but the evidence was objected to, that on July 17, 1837, Richard Mills, the collector of taxes, by whom said Weston had been committed, applied to the selectmen for an order to the amount of $62,67, to enable him to settle with the treasurer; that said Weston had before applied for an abatement of taxes to the amount of two dollars, and it had been refused; that he was a man of wealth; and that there was no intention on the part of the selectmen to abate said Weston's tax; but that the order was granted for the purpose of enabling the collector to settle his accounts. It was further proved, that some of the taxes referred to in the order were absolute abatements.

Potter and *Wells*, for the plaintiff.

1. The suit is rightly brought. The St. 1821, c. 59, § 26, does not apply. The statute only authorizes a suit in the name of the treasurer, but does not command it. It is only cumulative. *Newcastle* v. *Bellard*, 3 Greenl. 369. This suit is prosecuted for the benefit of the town, and is a bar to any further action. The bond in this case was not given to the treasurer. It was a misnomer—an error of the scrivener—to term the plaintiff treasurer; and the suit is correctly

brought in the name of the present plaintiff. *Anderson* v. *Langdon*, 1 Wheat. 85; *Sanford* v. *Sanford*, 2 Day, 559; *Sanders* v. *Filley*, 12 Pick. 554; *Skinner* v. *Somes*, 14 Mass. R. 107.

The bond is not in conformity with the law of 1835. It is not a statute bond. The conditions not being complied with, the plaintiff can claim only debt, cost, and interest. *Winthrop* v. *Dockendorff*, 3 Greenl. 156; *Kavanagh* v. *Saunders*, 8 Greenl. 422; *Huntress* v. *Wheeler*, 16 Maine R. 290. But the bond in this suit is good at common law. *Hall* v. *Cushing*, 9 Pick. 404; *Woolwich* v. *Forrest*, 1 Pen. 120; 2 Hall's Am. Law Journal, 80; *U. S.* v. *Sawyer*, 1 Gall. 87; *Saunders* v. *Rives*, 3 Stew. R. 109. Being a good bond at common law, the question of the statute of limitations does not arise. The condition that he shall not depart, &c. not being authorized by statute, is not a valid condition, to the breach of which the statute of limitations can apply. The condition that he will surrender himself, &c. is a valid condition, for the breach of which the defendant is liable. A bond may be good in part, and void for the residue. *Kavanagh* v. *Saunders*, 8 Greenl. 422; *Newcastle* v. *Bellard*, 3 Greenl. 371; *Triplet* v. *Gray*, 7 Yerg. 17; *Baker* v. *Haley*, 5 Greenl. 240; *Winthrop* v. *Dockendorf*, 3 Greenl. 156; *Burroughs* v. *Lowder & al.* 8 Mass. R. 373; *Vroom* v. *Smith*, 2 Green's Rep. N. J. 479; *U. S.* v. *Sawyer*, 1 Gall. 99; 1 Hill. & Met. Dig. 435.

The bond then being voluntarily given, the conditions being neither unlawful nor immoral, it is binding on the obligors. Co. Lit. 206; 1 Bac. Abr. Condition N.

There has been no abatement of Weston's tax. The amount specified in the order on Mills, was for the whole of Weston's tax. But the selectmen have no authority to abate the whole. St. 1821, c. 116, § 13. Parol evidence was properly admissible to show for what purpose this was given. *Nason* v. *Reed*, 7 Greenl. 24. The order is subject to the same explanation as a receipt would be. Mills was properly admitted to testify that it was not an abatement. If it was an abatement it could not operate as a good discharge — as a con-

tract under seal cannot be discharged by parol. *Farley* v. *Thompson*, 15 Mass. R. 18; *Sewall* v. *Sparrow*, 16 Mass. R. 24; *Bond* v. *Sampson*, 11 Mass. R. 42. It is competent to prove for what purpose this order was given. *Bangs* v. *Snow*, 1 Mass. R. 181.

Vose & Lancaster, for the defendants. 1. The action is barred by the Statute of Limitations. This is a bond under the law of 1822, c. 209, § 2, for the relief of poor debtors. Section 22 provides that any person committed shall be liberated on giving bond as is provided in sec. 4. Section 21 sets forth the conditions of such bond. This Statute is not repealed by St. of 1831, c. 520. Neither is this law repealed by the law of 1835, because sec. 17, of that act provides that this act shall not be so construed as to apply to, or affect any suit or suits commenced, or rights vested under sec. 14 of the same act which prescribes the form of the oath, and substitutes, instead of commencement of the action, the assessment of the tax.

Then a commitment grounded on an assessment made prior to the St. of 1835, does not fall within its provisions — but is expressly excepted from its operations. In this case the tax was assessed and the warrant issued in 1834. *Hastings* v. *Lane & al.* 15 Maine R. 137; *Gouch* v. *Stephenson*, 15 Maine R. 129; *Wheeler* v. *Huntress*, 16 Maine R. 296. One of the conditions of this bond, was, that Weston should not go beyond the limits of the county of Kennebec — the gaol limits being confined to those limits by St. of 1828. These gaol limits existed for all cases arising prior to the passage of the law of 1835, by which they were altered, although the commitment was after. *Farley* v. *Randall*, 22 Pick. 146.

The bond in this case bears date April 4, 1836 — in the May or June following, Weston went without the county limits. The writ is dated July 18, 1837, being more than a year after the breach. Statute 1822, c. 209, § 11, limits the time within which a suit can be commenced to one year.

Whether the inhabitants of Belgrade knew of the absence of the defendant, Weston, is immaterial — they were bound to take notice when their rights accrued. *Call* v. *Hagger & al.*

8 Mass. R. 425; *Bishop* v. *Little*, 3 Greenl. 408; *Brown* v. *Houdlette & al.* 1 Fairf. 399.

If this bond is not good by Statute, it is not good at common law — there being no contracting parties authorized to take such a bond as this. *Purple* v. *Purple*, 5 Pick. 226.

2. The tax has been abated. The selectmen could only abate it for the benefit of the defendants, c. 116, § 13. This case is not within the provisions of § 59, of the Statute before referred to. Parol evidence was inadmissible to alter this abatement. *Gray* v. *Wells*, 7 Pick. 217.

No action can be maintained in the name of the present plaintiff. c. 59, § 26.

The opinion of the Court was delivered by

SHEPLEY J. — It appears, that the plaintiff was treasurer of the town of Belgrade for the year 1834. That the defendant, Weston, was an inhabitant of that town, and was assessed that year the sum of seventeen dollars and thirty-five cents. That Richard Mills was collector, and by virtue of warrant committed Weston in the year 1836, for neglecting the payment of his tax. And the bond now in suit was voluntarily made and executed by him, and by the other defendant as his surety, to relieve himself from imprisonment. It was made payable to the plaintiff, as treasurer, or to his successor in office; although he had before that time ceased to be treasurer.

The defence rests upon several objections to the bond and to the right of the plaintiff to maintain a suit upon it. In considering them it becomes necessary to ascertain, what Westons' rights and duties were, if he would relieve himself from his imprisonment. It is provided in the act for the assessment and collection of taxes, c. 116 § 52, that "any person committed to gaol for his taxes shall have the liberty of gaol yard upon his procuring sufficient bonds as is by law directed for other debtors."

The act of 1822 for the relief of poor debtors, c. 209, § 22, provided that a person committed for taxes "shall give bond to the treasurer, from whom such warrant issued." But the

section appears to embrace only that class of cases, where the commitment is by virtue of a warrant from the treasurer, and not the class where the warrant issues from the assessors to the collector, as in this case. The twenty-third section of the same act provided, that "any person standing committed to prison by virtue of any warrant for the collection of any tax, rate, or assessment," might be discharged by the provisions of that and of the twenty-fourth section. The language is sufficiently broad to comprehend those cases where a bond had been given for the liberty of the gaol yard. The act of 1828 extended the limits of the gaol yards to the bounds of the counties. The act of 1831, c. 520, contained no provisions respecting persons committed for taxes. The act of 1835, c. 195, § 14, provided, that "any person committed to prison by virtue of any warrant for the collection of any tax, shall stand in the same relation to the assessors of the city, town, parish, or plantation, as the debtor shall to the creditor in this act, and the same proceedings may be had, and the person taxed and committed shall be subjected to the same liabilities and entitled to the same benefits and immunities as debtors are in regard to their creditors, as herein provided." Provision is made in the eighth section, that the debtor imprisoned "shall give bond in double the amount, for which he is so arrested and imprisoned, conditioned, that in six months" he will cite the creditor and submit himself to examination and take the oath, or pay the debt, costs, and fees, or be delivered into the custody of the gaoler. The section is silent as to whom the bond should be given, but if the legal inference be, that it should be payable to the creditor, the bond in cases of commitments for taxes should be given to the assessors; and they must become the prosecutors and collectors in such cases. This would seem to be the only legitimate construction, and it became certain by the supplementary act of 1836, which did not take effect until after the date of this bond. If, therefore, the act of 1835, included cases of commitment by virtue of warrants for the collection of taxes issued before its enactment, the bond in this case should have been given to the assessors, and the con-

dition should have been made in conformity to the provisions of the eighth section. But it is contended, that the case does not come within the provisions of that act, for the like reasons that required the Court to decide that the final proceedings on suits commenced before that time were not embraced by it. There was, however, an express provision in the seventeenth section, that the act "shall not be so construed as to affect any suit or suits already commenced;" while the language of the fourteenth section already quoted embraces all commitments for taxes, whether the warrants issued before or after the enactment, and there is no exception relating to them. The collection of taxes is a matter of public right and policy, and the same reasons did not exist for an exception as in the case of private rights. There is no reason for believing that such was the intention, and the language is too decisive to permit the construction, that the act was to be considered as prospective in this case as well as in the case of suits between party and party. The defendant, Weston, was entitled to give a bond to the assessors in conformity to the provisions of the eighth section. He was not obliged to give any bond. He did give one, not in conformity to those provisions, and was released from prison; and the question is, whether he is legally bound by it. It was not made to accomplish any illegal purpose, but for one permitted by law. It is no valid objection to it, that it was not made in conformity to the provisions of the statute, and is not therefore a good statute bond; for it may be good at common law. *Winthrop* v. *Dockendorff*, 3 Greenl. 156. All acts prescribing and defining gaol yards and limits were repealed by the seventeenth section of the act of 1835. And the provision in the condition of the bond, that he should not depart without the exterior bounds of the gaol yard, was inoperative. It could not be the occasion of a breach of it. Its insertion did not destroy the validity of the bond. *Kavanagh* v. *Saunders*, 8 Greenl. 422.

As it is apparent, that the bond was not given to the proper persons, it is insisted, that the plaintiff cannot sue upon it. There can be no doubt, that by the common law a bond may

be good and may be enforced by a suit, although the obligee have no beneficial interest in it. Cases are common, where it appears from the condition, that a third person is the only one beneficially interested. If the obligee accept the bond in such cases, he is regarded as assenting to the transaction and as submitting to execute the trust apparent on the paper, or to allow it to be executed by the use of his name upon proper terms. The commencement of a suit is *prima facie* evidence of his assent. In the case of *Baker* v. *Haley*, 5 Greenl. 240, the bond was given to the officer, who had no interest in it. The statute did not declare to whom it should be given, and it was decided to be a good statute bond. In the case of *Anderson* v. *Langdon*, 1 Wheat. 85, the bond was given to the directors of a private association, who brought the suit after they ceased to be directors, and it was sustained. The provision of the statute, that the bond should be given to the assessors, would prevent its being considered a good statute bond, or a protection to the gaol keeper; but it would not prevent a person thus lawfully imprisoned from making a bond or contract with his creditor, which might be good at common law. And a bond thus given, is to be judged by its rules; and it need not be given to the persons designated by the statute, but may conform to the agreement of the parties. The decision in the case of *Purple* v. *Purple*, 5 Pick. 226, is not considered as opposed to these positions. The statute in that case required the bond to be given to the party from whom the goods were to be replevied, as a condition precedent; and the officer was regarded as a trespasser, "and the purpose and effect of it [the bond] were to aid and abet him in a trespass upon the attaching officer."

The plaintiff would not be precluded from maintaining the suit by reason of that clause in the bond, making it payable to him or his successor in office; for it does not come within the class of contracts which are authorized by the statute, c. 59, § 26, to be prosecuted by town treasurers or their successors in office. His rights, as obligee, are not destroyed by the insertion of those words.

The bond was forfeited only by a neglect to surrender himself within six months, and the action was commenced within the year after the forfeiture.

It is insisted, that the obligation was discharged by an abatement of the tax and costs. Disregarding all parol evidence of the intention of the assessors, as inadmissible, there is no satisfactory proof that the tax has been abated to the defendant, Weston. The order was not drawn in his favor, but in favor of the collector. The object was to release the collector from his liability to account to the treasurer for certain taxes, and to give him a credit for certain other demands, which he appears to have had against the town. The term abatement, found in such an instrument between him and them, does not prove more than an incorrect use of the word. It would be singularly used, if it were intended by it to discharge Weston from the costs of commitment. The word taxes, instead of abatements, might have more clearly expressed their intention, that the order should authorize the treasurer to allow him those taxes and demands in a settlement, leaving the taxes to be adjusted with the persons taxed, as should be thought proper. The defendant, Weston, does not appear to have had any interest in, or connection with that transaction. To this construction it is objected, that the town only could have discharged the collector from the payment of Weston's taxes, because he was not committed within a year. The section of the act relied upon, c. 116, § 54, applies to cases, where the person committed was discharged from imprisonment by taking the poor debtor's oath, and not to cases like the present. The risk of the inability of the person taxed to pay, was thought to rest properly upon the collector if he did not collect or commit within a year unless the town itself should vote to discharge him.

Judgment for the plaintiff.

RICHARD H. VOSE *versus* BENJAMIN P. MANLY.

In an action by the Judge Advocate to recover a fine imposed by a Court Martial, the plaintiff's right to recover in such capacity is admitted by the plea of the general issue — if denied, the want of authority should be taken advantage of by plea in abatement.

The original record of a Court Martial is admissible wherever a certified copy would by St. 1837, c. 276, § 10, be good evidence.

It is no defence to a suit brought to recover a fine imposed by a Court Martial for official neglect, to show that the defendant had never in fact received his commission, nor been qualified, nor acted under it. Having accepted the office, it was his own neglect if he did not avail himself of his commission.

THIS was an action of debt brought by the plaintiff as Judge Advocate to recover a fine imposed by a Court Martial. The general issue was pleaded, and a brief statement filed, denying that the Court was duly constituted or had jurisdiction.

On the trial of this cause, before WESTON C. J. the plaintiff introduced a militia order verified by Francis Davis, aid-de-camp and orderly officer; the original judgment signed by the hand of the president, and a certified copy from the Adjutant-General's office.

Dudley P. Bailey, a clerk in the Adjutant-General's office, testified that the original record which he brought into Court from the office was sent to that office by Maj. Gen. White, in Sept. 1838, in a letter.

The defendant offered to prove that in Sept. 1837, Col. Nathan Fowler brought to Waterville a captain's commission for him — that Fowler said he had one but did not show it — that Fowler went into the store of the defendant while he was engaged in another part of the store, laid the commission on the counter, and while it lay there, without having been seen by the defendant, one Getchel took it up and carried it away, and that it never came into the hands of the defendant, who was never qualified to act and never did act as captain. Upon the above evidence the defendant was defaulted, with the agreement, that if the evidence offered was admissible, and afforded matter of defence, the default is to be taken off and the action stand for trial, otherwise the default to remain.

Wells, for the defendant. The Court had no jurisdiction — By the constitution the defendant had a right to a trial by jury. Const. of Maine, Art. 1, § 20; 4 Bl. Com. 5; 1 Bl. Com. 413; *Brooks* v. *Daniels*, 22 Pick. 498. A Court Martial being a court of limited jurisdiction, the plaintiff must show that fact. Nothing will be intended in its favor. *Brooks* v. *Adams*, 11 Pick. 441; *Brooks* v. *Davis*, 17 Pick. 148; *Brooks* v. *Graham*, 11 Pick. 445; *Winn* v. *Wethers*, 3 Cranch, 333; *Mills* v. *Martin*, 19 Johns. 7; *Vose* v. *Howard*, 13 Maine R. 268. The judgment is to be certified to the Major-General. St. 1837, c. 276, § 13. The Adjutant-General's office is not the place of deposit. St. 1837, c. 276, § 10. There is no penalty for neglecting or refusing to take a commission.

Vose, *pro se*, referred the Court to St. 1837, c. 276, § 10, 39; *Brooks* v. *Daniels*, 22 Pick. 498; *Green* v. *Gill*, 8 Mass. R. 111; *Commonwealth* v. *Cutter*, 8 Mass. R. 279; *Howard* v. *Folger*, 15 Maine R. 450.

The opinion of the Court was delivered by

Emery J. — If the law, by virtue of which the suit is brought, be unconstitutional, the action cannot be sustained, and it would be unnecessary to proceed further in discussing other objections raised by the defendant's counsel. Were the question entirely new, there might be a propriety in more minutely examining the subject. It has, however, been already under our consideration, and according to our conviction we have previously decided, in the case, *Rawson* v. *Brown*, 18 Maine R. 216, in favor of the constitutionality of the provision. A proceeding, similar to that upon which this suit is founded, was held to be "a trial by martial law, being before a Court Martial, and for a military offence. Courts Martial are never attended by a jury, and they had properly cognizance of military offences, before the formation of the constitution."

Our statute, c. 276, § 10, passed March 23, 1837, provides, "That a copy of the record of any Court Martial, certified by the President of such Court, together with a duly authenticated copy of the order convening said Court, shall be conclusive

and sufficient evidence to sustain in any court, any action commenced for the recovery of any fine and costs, or part costs, or either, agreeably to the provisions of an act to which this is additional." If the copy would be good evidence, we cannot understand why the original should not be equally efficient; and that was brought into Court.

At first view, it would appear reasonable that the offered proof, "that a captain's commission was brought by Col. Nathan Fowler to Waterville for said Manley, into his store, and while Manley was engaged in another part of the store, laid on the counter, and while it laid there, without being seen by Manley, one Getchell took up the commission and carried it away, and that it never came to the hands of Manley, who was never qualified to act, and never did act as captain," should have been received. Because it would seem that if the man did not choose to serve his country in the character of a militia captain, it would be cruel to fine him for declining office and not taking the commission.

However improbable it may be, that *a person actually within a country store*, of which he was the occupant, though engaged just at that time in another part of the store, *should not well understand that so important a document of his promotion and honor, belonging to him, was within his control, brought there by the colonel, and laid upon the defendant's counter;* and astounding as it may be, that a man whose name was known, should have the *audacity* to take away from the counter such a document, *without the express or tacit approbation of the true owner*, no exertion being made by him to recover it, yet we must consider that the defendant could show what he offered to prove. The first impression in favor of introducing the proffered evidence, will be much weakened upon further examination of the militia law. It must be recollected that by the seventh section of the statute of March 8, 1834, c. 121, the captains and subalterns of companies are to be chosen by the written votes of the members of their respective companies. By the tenth section, all commissions shall be transmitted to the Major-Generals, and be regu-

larly passed down to the persons entitled to receive them; and every person *who shall be elected to any office as aforesaid, and shall not within one hour after he shall have been notified of his election by the officer who presided thereat,* excepting in case of a Major-General, who is allowed 30 days, *signify his acceptance thereof, shall be considered as declining to serve,* and orders shall be forthwith issued for a new choice. And where an *officer shall by any casualty lose his commission, upon his making an affidavit thereof before any justice of the peace for the county in which he resides, and on filing such affidavit in the office of the Adjutant General, he shall be entitled to receive a new commission of the same tenor and date as the one so lost as aforesaid.* We must therefore consider that *Capt. Manley accepted the office of captain,* to which he was elected. And if he did not avail himself of his commission, it was his own fault. *Howard* v. *Folger,* 15 Maine R. 447.

By article 8th, no resignation of any officer shall be approved, if offered between the 1st of May and the 1st of November, unless the reasons be very urgent. Nor by art. 9, shall he be discharged, except by the Commander-in-chief, on request of the officer, in writing, or by actual removal of residence out of the bounds of his command, and to such a distance that his Major-General shall think it inconvenient for him to discharge the duties of his office, or by twelve months' absence without leave of his commanding officer of his division, or by the corps to which he belongs being disbanded by law. And by art. 10, *no officer shall consider himself as exempted from the duties of his station,* except when under arrest, until he shall have been discharged by one of the methods or causes pointed out in the preceding article, or shall have received a certificate of his discharge from the Commander-in-chief.

Upon this review of the law in relation to the militia, it appears to us that the defendant could not, by the introduction of the proposed evidence, be in a better situation than if it were excluded, as it would have been entirely unavailing to

exonerate him from responsibility. The conclusive character of the sentence would not be impeached in this way.

The general issue is pleaded here, which admits the right of the plaintiff to sue. If his authority in this respect had intended to be resisted, it should have been done by plea in abatement.

The default must therefore remain, and judgment be rendered thereon in favor of the plaintiff.

WILLIAM H. STACY *versus* JEREMIAH FOSS, JR.

No action can be maintained to recover back money deposited upon a wager, unless when made recoverable by Statute, both parties being *in pari delicto*.

Where money lost on a wager has not been paid over by the stakeholder, he is liable to the loser for the amount by him deposited, upon demand and notice, as well after as before the happening of the event.

EXCEPTIONS from the District Court.

This was assumpsit, to recover the sum of twenty-five dollars, deposited with the defendant by the plaintiff, as a stakeholder, on a bet on a horse-trot.

The following facts were admitted by the defendant — that a bet was made between the plaintiff and one Rufus Hewitt, and that each deposited twenty-five dollars in his hands, to be given up to the winner, after the trial of speed was over — and that after the trot was over, the plaintiff forbade the stakeholder, the defendant, paying over the money to said Hewitt and demanded of him his twenty-five dollars, alleging that there was fraud and unfairness in the trotting — and that notwithstanding this the defendant, on receiving a bond of indemnity from the said Rufus Hewitt paid the whole fifty dollars over to him.

The plaintiff offered to prove that there was fraud and deception used by said Hewitt and his associates — and that in fact he did not win the money; but REDINGTON J. before

whom the cause was tried, rejected this evidence, and directed a nonsuit. To which ruling and direction the plaintiff filed exceptions.

E. Fuller, for the plaintiff. By the civil law, a wager between two persons not interested in the subject matter is not a valid contract. Though the common law of some States may be different it is believed that the law of this State is coincident with the civil law. *Perkins* v. *Eaton*, 3 N. H. R. 152; *Lewis* v. *Littlefield*, 15 Maine R. 233; *Amory* v. *Gilman*, 2 Mass. R. 1; *Hemenway* v. *Eaton*, 13 Mass. R. 108.

May, for the defendant. All wagers in this State are unlawful. *Lewis* v. *Littlefield*, 15 Maine R. 233. The statute against gaming gives no action against the stakeholder, but only against the winner. St. 1821, c. 18, § 2. It does not alter the liability of the stakeholder, but leaves that as at common law. By the common law, no action could be maintained by the loser against the winner. The law leaves the parties to such a contract, as it finds them. *Bent* v. *Place*, 6 Cow. 431; *Kent* v. *Knickerbocker*, 5 Johns. 334; *McKeon* v. *Caherty*, 1 Hall, 300; *Same* v. *Same*, 3 Wend. 494; *McCullum* v. *Gourlay*, 8 Johns. 147; *Greenwood* v. *Curtis*, 6 Mass. R. 381. The stakeholder is as much a party to the illegal contract as the parties to the wager. His promise is to pay as the event may turn. Before the event has happened, upon which the money is staked, there is a chance for repentance — but after that the money cannot be recovered back. *Yates* v. *Foote*, 12 Johns. 1.

The opinion of the Court was delivered by

Weston C. J. — It is conceded, that the bet out of which this controversy grew, is not a valid contract. And it has been decided by this Court, that all wagers in this State are unlawful. *Lewis* v. *Littlefield*, 15 Maine R. 233. The action however is resisted on the ground, that the stakeholder is a party to the unlawful contract, and that both plaintiff and defendant being *in pari delicto*, the law will lend its aid to neither. And a distinction is taken between notice to the stakeholder, repudiating and disaffirming the contract, before and after the hap-

pening of the event, upon which the wager is made to depend.

When the money has been once paid over to the winner, unless where made recoverable by statute, the parties being clearly *in pari delicto*, no action can be maintained to recover it back. *Howson* v. *Hancock*, 8 T. R. 575; *McCullum* v. *Gourlay*, 8 Johns. 147. But where the money has not been paid over by the stakeholder, although it has been lost, by the happening of the event, it has been held, that upon notice and demand, the stakeholder is liable to the loser, for the amount by him deposited. *Cotton* v. *Thurland*, 5 T. R. 405; *Lacaussade* v. *White*, 7 do. 535.

The case of *Yates* v. *Foote*, 12 Johns. 1, has been cited for the defendant, where it was held that after the event has happened, no action will lie by the loser against the stakeholder, upon notice and demand, while the money remains in his hands. And in *McKeon* v. *Caherty*, 3 Wend. 494, the law is stated to have been thus settled, by the case of *Yates* v. *Foot*. That was a decision of the Court for the correction of errors, fifteen to six, against the unanimous opinion of the Supreme Court, delivered by Chief Justice Kent. It was one of five cases, depending upon the same facts and principles, in one of which, *Vischer* v. *Yates*, 11 Johns. 23, the judgment of the Supreme Court is reported. KENT C. J. there reviews the English cases, and he thence deduces, that an action may be maintained against the stakeholder, upon notice and demand, before he pays over the money, as well after as before the happening of the event. To this result, as sound and correct, is added the undivided opinion of the Supreme Court of New York. The rule, that no action lies, where the parties are *in pari delicto*, was interposed. The learned Chief Justice says, "this objection is applied exclusively to the suit against the principal, or winner; and there is no instance in which it has been used as a protection to the intermediate stakeholder, who, though an agent in the transaction, is no party in interest to the illegal contract."

It best comports with public policy, to arrest the illegal proceeding, before it is consummated; and in our judgment, the opinion of the Supreme Court is better sustained, upon principle and authority, than that of the Court of errors. The nonsuit, ordered by the Court below, is not warranted by the law of the case.

Exceptions sustained.

INHABITANTS OF VASSALBOROUGH, Petitioners for *certiorari*.

The writ of *certiorari* will not be granted for every informality or illegality in the proceedings of the County Commissioners.

It will not be granted because the record of the proceedings of the County Commissioners does not show how nor by whom notice to the parties interested was given.

Nor because all the owners of land over which the road passed were not named in the return of the County Commissioners, nor said to be unknown, those only being named who claimed damages.

Nor because the report of the committee appointed to estimate damages was signed by only two, the third being present and not dissenting.

Nor because a part only of the road petitioned for, and not the whole, was accepted.

Nor because the damages sustained by certain individuals were paid by those having a deep personal interest in the establishment of the road, and thus their releases were obtained.

Nor because the road, as established, was within the limits of a town.

THIS was a petition for a writ of *certiorari*, to bring up the record of the proceedings before the court of County Commissioners, on the petition of Jacob Butterfield and others for the location of a road, &c.

The petitioners assigned the following grounds for granting the writ of *certiorari* prayed for.

1. "That it does not appear by the record of the proceedings, that any notice was given to the parties interested prior to the laying out of said highway." It appeared from the record of the doings of the County Commissioners "that all the notifications required by law had been duly and seasonably

given," pursuant to the order of the Court; but how, or by whom given, did not appear.

2. "In the return made by the County Commissioners of their doings in the laying out of the highway, the owners of the land over which the road was laid out, were not all named, nor said to be unknown."

Those only were named who sustained damages according to their return. Proof was offered that those not named claimed no damages.

3. "It does not appear that the committee agreed upon to estimate the damages sustained by the owners of the land over which said way passes, concurred in the amount to be given, or made any report of their doings."

The committee consisted of three, but the report was signed by two only. The third, it appeared, was present during the examination and appraisement, acted with the others, and expressed no dissent, though he did not sign the return.

4. "The report of the County Commissioners, in laying out the road, was accepted in part when the whole should have been accepted or rejected."

5. "The report of the County Commissioners was accepted in consideration that the damages sustained by certain individuals were remitted; the amount being paid by individuals having a deep personal interest in the establishment of said highway."

There was evidence tending to show that the damages, to a large amount, allowed to those over whose land the road passed, had been paid by those interested in the location of the road; and that they had therefore released all claim for damages, and for their costs; and that this had been done before the report had been accepted. It further appeared, that these releases had been laid before the County Commissioners without the knowledge of the counsel opposed to the location of the road, and were not before them when the question of the acceptance of the road was heard and determined.

6. "The highway established, being within the limits of the

town of Vassalborough, the County Commissioners have no jurisdiction in the premises."

The cause was very elaborately argued in writing by *D. Williams* and *Vose*, for the petitioners, and by *Emmons*, for the respondents.

For the petitioners, it was contended — 1. It is the duty of the County Commissioners to spread upon the record, specifically, the mode and manner in which notice was given — so that the Court may determine whether the notice given was in conformity with law. They had no right to determine, summarily, that notice was given, without spreading upon the record the facts upon which such decision is based. *Lancaster* v. *Pope*, 1 Mass. R. 86; *Davis* v. *Maynard*, 9 Mass. R. 242; *Wellington* v. *Gale*, 13 Mass. R. 483.

2. All the owners of the land over which the road passes, are not named, nor said to be unknown. The record is the only evidence of the location of the road, and should state the names of all interested in the location, or that they are unknown. *Com.* v. *Coombs*, 2 Mass. R. 489; 2 Smith's Laws, 607.

3. A major part of the committee have no authority to make an award. No such authority is delegated to them in express terms, nor can it be implied. All must concur and sign. By the statute of 1821, c. 118, § 2, the party aggrieved has the option of a jury or of a committee to estimate damage. In the former case, unanimity is required. There is no reason why it is not equally necessary in the latter.

4. By St. 1835, c. 168, § 1, additional powers are given the County Commissioners. It contemplates the case of an application for a road adjudged of common convenience and necessity; but which, from the excessive amount of damages awarded, it becomes necessary to reject, and the power requisite for that purpose is granted. But the whole must be discontinued, or none. No power is given to apportion the damages on any part of the way. They are to consider the damages in the aggregate. The road was laid out upon petition, and can only be discontinued in the same way.

5. If the amount of damages would present an obstacle to the acceptance and final laying out of the highway, that obstacle cannot be removed by the payment of a part or the whole of the damages awarded by those interested in the establishment of the road. The only question is, whether public convenience or necessity require it. If this be permitted, then is private property taken, not for public, but for private purposes. If this be permitted, individuals may, by their united funds, procure the location of a road not required by any public exigency, and then throw the expense of maintaining it upon the town through which it passes. *Com.* v. *Cambridge*, 7 Mass. R. 167.

6. The road established being entirely within the limits of Vassalborough, the County Commissioners had no jurisdiction; they being restricted to county roads, or roads from town to town.

For the respondents it was insisted — 1. The record shows that the Court were satisfied that notice had been given. They were not required to specify the particular person by whom — nor the particular mode in which notice was given. The fact that the order as to notice had been complied with, the commissioners judicially determined by such evidence as they had before them, and the record contains the statement of their adjudication. The law no where requires that the manner in which the order of Court in relation to notice, has been complied with, should appear in the records of the Court. *Taylor* v. *County Commissioners of Hamden*, 18 Pick. 309.

2. It may be desirable that the names of all persons, over whose land the road located passes, should appear in the return of the Commissioners, but it is not indispensably necessary. The return of the road will show its location — the courses, distances, and width. Monuments are to be placed at the angles. If the return should err as to ownership, is the real owner to lose his rights because of such error? Cannot the mistake be shown by evidence, *dehors* the deed? The line of the road is shown by the return. His title deed, will show

what lands he has, and where the locations of his boundaries are shown, it will appear whether or not the road passes over his premises. So too if a name be omitted — such omission will be no bar to a recovery of his rights.

3. The estimation of damages by the committee is a matter relating to the public. The distinction is well sustained between cases of delegated power or authority for public and for private purposes. In the former case the acts of a majority are sufficient; in the latter not. *Gundley* v. *Barker*, 1 Bos. & Pul. 229; *King* v. *Beeston*, 3 D. & E. 593; *Battie* v. *Gresley*, 8 East. 319; *Orvis* v. *Thompson*, 1 Johns. 500; *Green* v. *Miller*, 6 Johns. 39; *Barrell* v. *Porter*, 14 Mass. R. 143; *Moffit* v. *Jaquins*, 2 Pick. 331; *Munroe* v. *Reding*, 15 Maine R. 155; *Jones* v. *Anderson*, 9 Pick. 151.

4. The adjudication of the County Commissioners, that a road is of common convenience and necessity, is final and conclusive. They have unqualified authority to accept or reject a report of a committee. *Kennebunk Toll Bridge, petitioners*, 2 Fairf. 263; *Merrill* v. *County Commissioners of Berkshire*, 11 Pick. 269. By St. 1835, c. 168, § 1, power is given to the County Commissioners to accept or reject the report of committees, &c. It is argued, that they must accept or reject the whole — but this construction is too narrow. If they have authority to establish the whole, *a fortiori*, have they as to a part. This power results from their exclusive jurisdiction over roads. There may be sufficient reasons for such a course, and it will be presumed there were. *Com.* v. *West Boston Bridge*, 13 Pick. 197; *Merrill* v. *County Commissioners of Berkshire*, 11 Pick. 275; *Rutland* v. *County Commissioners of Worcester*, 20 Pick. 85; St. 1839, c. 367.

5. The record does not show that damages were released in consequence of this amount being paid by those interested in the establishment of the road. The proof taken as to these facts should not have been received, because it is contradictory to the record. 20 Pick. 76. The record does not show that the relinquishment of damages was a consideration for the adjudication made. The establishment of the road stands

upon the ground of necessity and public convenience. *Fuller* v. *County Commissioners of Plymouth*, 15 Pick. 81. If this evidence be admissible, it was competent for those interested to release damages, and for the Commissioners to accept such release.

6. The objection that the road has been located within the limits of one town, has been overruled. *New Vineyard* v. *County Commissioners of Somerset*, 15 Maine R. 21.

This is an application addressed entirely to the discretion of the Court. There is no complaint that a full hearing has not been had, before the proper tribunal; and the Court will not reverse their adjudication, unless the strongest reasons exist therefor.

Heavy expenses have been incurred — and a reversal would not place the parties in their original position. *Ex parte Weston*, 11 Mass. R. 417; *Adams, petitioner*, 4 Pick. 32; *Wilbraham* v. *County Commissioners of Hamden*, 11 Pick. 322; *Ex parte Baring*, 8 Greenl. 137.

By the Court. — There is strong reason to apprehend that some improper steps were taken to procure the acceptance of the location of the highway complained of. It is not, however, every irregularity, or even illegality, which may have arisen in such a matter, that imperatively urges the discretion of a Court to grant a *certiorari*. And in this case, it seems to us, that the weight of authorities is against our interference. The *certiorari* is therefore denied.

BENJAMIN RACKLEY *& al. versus* WASHINGTON SPRAGUE *& al.*

L conveyed two lots of land which included a mill privilege and saw and grist mill on the premises to S by deed, containing a reservation in these words, "excepting and reserving out of the same, the one half of the grist-mill and saw mill built by said S on said lots, together with one half of all the privileges appertaining to the said mills, as the improving of the mill yard, &c. Also said S has a right of raising a head of water, all seasons of the year, not damaging the owners of the land above, as also said L reserves to himself;" *it was held* that this gave a license to flow the grantor's other land; and that L, as to his part of the privilege, was to have the same right to flow the contiguous land conveyed, as S had to flow the other land of the grantor.

The administrator of a deceased respondent in a complaint for flowing, under the Statute, is not entitled to come in and take upon himself the defence of the complaint and recover costs.

THIS was a complaint under the Statute, for flowing, and is submitted to the Court for their decision upon the following statement of facts.

It was instituted against Washington Sprague and Moses Sprague, and during its pendency, Moses has deceased and Augustus Sprague administrator of the estate of Moses has appeared and assumed the defence. The original respondents claimed to be the owners of certain pieces of land in Greene, with which is connected a certain stream whereon are the dam and the mill which occasion the flowing of the land of the complainants, for which they seek redress. The title to the land and water privileges where the dam and mills are situate, in said Greene, was derived to William Sprague, father of the respondents, by two conveyances, at different times, and from different persons, viz. the first from Moses Little, by deed dated Sept. 13, 1783. This deed purported to convey "Lot No. 151, and lot No. 164, together with all the privileges and appurtenances thereto belonging, excepting and reserving out of the same, the one half of the grist mill and saw mill built by said Sprague on the said lots, together with one half of all the privileges and appurtenances to the said mills, as the improving a mill yard, &c. Also, said Sprague shall have a right of raising a head of water at all seasons of the year, not damaging

the owners of the land above, as also said Little reserves to himself."

The second conveyance was from Josiah Little, and was dated July 11, 1818. The title by divers conveyances passed to the original respondents in this case.

The complainants derive title to the land which they allege to be flowed by the respondent's mill and dam, by deed from Edward Little to themselves dated May 4th, 1837. Edward Little is the son of Josiah, and grandson of Moses — and derived his title to the land, by him conveyed to the complainants by his deed aforesaid, through the said Moses and Josiah. The complainants derive their title to the land flowed, from the same source from which the respondents derived their title to the land and stream, whereon the dams and mills are situate, and at the time of the deeds from Moses and Josiah respectively to William Sprague as aforesaid — the said Moses and Josiah were respectively seized of the land which the complainants allege to be injured by the flowing of the original respondents' dam and mill. The dam of the original respondents was erected prior to 1808. The dam is not now nor has it been at any time since 1808, higher than it was at that time. The land of the complainants has not at any time since July 11, 1818, been flowed higher, than was the custom of the owners of the mill and dam to flow the same from 1808 to 1818. The aforesaid dam flows the land of the complainants to their injury.

If the Court should be of opinion from the facts above stated, and the construction of the several deeds therein referred to, exclusive of a memorandum on the deed of July 11, 1818, (for the terms and effect of which, see *Rackley* v. *Sprague*, 17 Maine R. 281,) that the complainants have no right to recover damages of the respondents for flowing, then said complaint is to be dismissed with costs; but otherwise, judgment is to be rendered against the respondents, and commissioners are to be appointed to estimate the damages, and the complainants are to have their costs. And the Court are also to determine whether Augustus Sprague can come in as

administrator and take upon himself the defence of the complaint — and to make such decision thereon as may be deemed proper.

Wells, for the complainant.

Emmons, for the respondents.

The opinion of the Court was delivered by

WESTON C. J. — When this case was under consideration on a former occasion, the construction of the deed of July, 1818, from Josiah Little to William Sprague, was settled, without reference to any prior deed. Same case, 17 Maine R. 281. We see no reason to change the view we then took of the rights of the parties, so far as they depended upon that instrument. In the agreed statement of facts now before us, a new deed is presented, that of Moses Little to William Sprague, dated Sept. 13, 1783. It remains to be determined, whether the complaint can be sustained, both deeds being considered together.

The deed from Moses Little conveyed two lots of land, which included the mill privileges in question, with a saw and grist mill, then standing on the premises. The deed, however, contained a reservation in these words: "Excepting and reserving out of the same, the one half of the grist mill and saw mill, built by said Sprague on said lots, together with one half of all the privileges appertaining to the said mills, as the improving of a mill yard. Also, said Sprague has a right of raising a head of water, at all seasons of the year, not damaging the owners of the land above; as also said Little reserves to himself." By the owners of the land above, must be understood, other owners. It was a clause introduced by way of precaution, intended to protect Little from any implication, that he might be held answerable to other owners above, by the head of water which Sprague might raise. If it had intended to apply to the lands of the grantor, the language would have been, without doing damage to my other land, or that of any owner above. To construe the words as they stand to

include the grantor's land, would leave the clause, expressly granting to Sprague the right of raising a head of water, at all seasons of the year, without legal effect. He had a right to flow the lands, passed by that conveyance, without the license of the grantor. To give that license any sensible meaning, it must be held to apply to the grantor's other lands. The meaning of the other part of the reservation is, that Little, as to his half of the privilege, was to have the same right to flow the contiguous land conveyed, as Sprague had Little's other land, which he retained.

Upon this construction, which we are satisfied must be the true one, Sprague derived the same right from that deed, which it was before decided he did from the deed of Josiah Little of the other half of the mills and privilege, which his father, Moses Little, reserved. In the last deed, the land, which Sprague might flow, is more explicitly limited to the land of Little. Josiah, the son, besides being privy in estate, was conversant of his father's previous conveyance, having witnessed the deed; and he was well aware that Sprague had a right to flow the Little lands, and was equally desirous to avoid any implication, that he was to be liable to others. According to the agreement of the parties, the complaint is to be dismissed, and the surviving respondent to be allowed his costs.

FRANCIS NORRIS *versus* ISAAC BLETHEN.

The plaintiff, a deputy sheriff, attached personal property and took receiptors therefor. The suit was prosecuted to final judgment, and execution issued thereon; but the property was not demanded within thirty days from the rendition of judgment. The plaintiff, under the assertion of legal right on the part of the creditor in the execution, made a payment to him in discharge of his supposed liability for the goods attached. Such payment is to be considered as made under a mistake of law and not of fact, and cannot be recovered back.

EXCEPTIONS from the District Court.

This is an action of assumpsit to recover of the defendant a sum of money, which had been paid to him by the plaintiff on account of personal property, attached by him on a writ, *David Betts* v. *Jabez Leadbetter & al.* The general issue was pleaded and joined. In proof of his claim the plaintiff called Silvanus W. Robinson, who testified that Sprague & Robinson, of which firm he was a member, were employed by the defendant to institute the said action, *Betts* v. *Leadbetter & al.*, that they caused the writ to be put into the hands of the plaintiff for service as a deputy sheriff, that as such he served said writ, and by virtue of it attached personal property and took a receiptor therefor, that in the month of October, 1833, said Sprague and Robinson brought an action for the plaintiff upon the receipt aforesaid against one Bridgham, that some time in the spring of 1835, by the express direction of the defendant, witness called upon the plaintiff, to pay for the personal property attached as aforesaid, and told him that unless he would pay one hundred dollars, the witness was directed by defendant to sue, and should sue him on account of not having the said personal property to be applied on execution, *Betts* v. *Leadbetter & al.* That subsequently, on the 31st day of March, 1835, the plaintiff paid the witness one hundred dollars for the defendant, which sum he passed to his credit, in the account of Sprague & Robinson, against him, and that he has since this suit was commenced sued him for the balance due Sprague & Robinson, after allowance on said account of said payment

of the sum of one hundred dollars aforesaid; that witness never had any communication with David Betts in relation to said demand against Leadbetter & Lane, and that within thirty days from rendition of judgment, in action of *Betts* v. *Leadbetter & al.*, the witness procured the execution therein to be put into the hands of George W. Stanley, a coroner, the office of sheriff being then vacant, that Stanley was made acquainted with the fact that plaintiff had attached personal property, and taken a receiptor therefor — that witness did not direct the coroner to make a demand upon Norris, for the personal property, but that the officer did call upon and demand the property of the receiptor — that the witness did not consider it necessary, and such was the opinion of the profession generally to make a demand upon Norris in order to make him liable for the personal property. It was in proof that the judgment, in action of *Betts* v. *Leadbetter & al.* was rendered in S. J. Court, June Term, 1834, and it appeared by the execution and the return thereon, which were produced in evidence by the plaintiff, that no indorsement was made on said execution of the hundred dollars paid to Robinson, the witness, for the defendant, as aforesaid, and the officer did not return on said execution that he had made a demand upon the plaintiff for the personal property which he had attached as aforesaid; and no evidence was produced by the defendant that any such demand was in fact made by said officer on the plaintiff. It was admitted that the plaintiff in his action, on his receipt of personal property, recovered only nominal damages, in consequence of not being able to prove therein a demand upon him for the personal property attached. It was not denied that Blethen was the assignee of said judgment and had ever since the levy of the execution dealt with the property levied upon, as his own. It appeared that said Robinson was with the coroner at the time of the levy of said execution.

Upon the foregoing facts, REDINGTON J. who presided at the trial, ruled the action was not maintainable; whereupon a nonsuit was ordered, and the plaintiff filed exceptions to the ruling of the presiding Judge.

Emmons, for the plaintiff. The plaintiff claims to recover on the following grounds:—

The money sought to be recovered in this action, was paid in ignorance of the facts, and without any just claim on the part of the person for whose benefit the payment was made. A demand, though not made on him, might have been made on the sheriff, and that would have been binding. *Phillips* v. *Bridge*, 11 Mass. R. 247; *Norris* v. *Bridgham*, 14 Maine R. 429. It is not enough that the facts might have been known; the party paying must know them himself, else he is not prevented from recovering. *Waite* v. *Leggett*, 8 Cow. 195; *May* v. *Coffin*, 4 Mass. R. 342; *Warder* v. *Tucker*, 7 Mass. R. 452; *Freeman* v. *Boynton*, 7 Mass. R. 487; *Haven* v. *Foster*, 9 Pick. 112; *Bize* v. *Bartenshlag*, 1 T. R. 287; *Lazell* v. *Miller*, 15 Mass. R. 207; *Union Bank* v. *U. S. Bank*, 3 Mass. R. 74.

The money was paid by compulsion. The plaintiff had sued Bridgham, and could not maintain that suit unless he admitted his own liability; and he did not know but that the liability of the sheriff had been fixed. Actual violence is not necessary to constitute *duress*. *Chase* v. *Dwinal*, 7 Greenl. 134; *Astley* v. *Reynolds*, 2 Strange, 916; Dane's Abr. c. 180, art. 7.

The money being paid under a misapprehension of the rights and obligations of the parties, may be recovered back. 1 Story's Eq. 144.

The suit is brought against the proper party. None could have been maintained against Robinson. Story's Agency, 464; 1 Camp. 379; *Passmore* v. *Mott*, 2 Bin. 201; Bull. N. P. 133; *Sadler* v. *Evans*, 4 Burr. 1984.

Wells, for the defendant. Money paid with a full knowledge of the facts, cannot be recovered back. *Norton* v. *Marden*, 15 Maine R. 45. If money be paid under the threat of a suit, it cannot be recovered back. *Chase* v. *Dwinal*, 7 Greenl. 134; *Gilpatrick* v. *Sayward*, 5 Greenl. 465; *Mariot* v. *Hampton*, 7 D. & E. 269. Betts being the party to the

record, the money must be considered as paid to him. *Freeman* v. *Cram*, 13 Maine R. 255; *Dennett* v. *Nevens*, 7 Greenl. 399.

The opinion of the Court was delivered by

SHEPLEY J. — The plaintiff, to avoid a suit, voluntarily paid to the attorneys of the defendant, under the assertion of a supposed legal right, the amount now reclaimed. He must have known whether a demand had been made upon him for the property attached on the original writ within thirty days after the judgment. It was recovered at the June term of this Court, 1834, and if a demand had been made upon the sheriff within the thirty days, it must be presumed, that he would have notified his deputy in season and long before he paid the money on the thirty-first of March, 1835. There is no proof, that the payment was made under a misapprehension, that such a demand had been made upon the sheriff, or under any mistake of facts. The parties appear to have acted, however, under a mistake of the law, the plaintiff supposing that upon the known facts he was obliged to pay to the creditor the value of the property attached, and the party in interest, that he was entitled to call upon him to make the payment. The general rule in such case is, that the person paying is not entitled to reclaim the money paid. Although there may be found in the works of elementary writers many reasons, and in the reported cases some decisions to the contrary, the remark made in *Norton* v. *Marden*, 15 Maine R. 45, that it was well settled, that money paid under a mistake of the law could not be reclaimed, was fully justified. Mr. Justice Story says, it may be affirmed of the rule, "that the exceptions to it are few and generally stand upon some very urgent pressure of circumstances." 1 Com. on Eq. c. 5, § 137. This case does not come within any of the received exceptions. It cannot be considered as a payment by compulsion. *Chase* v. *Dwinal*, 7 Greenl. 134. It may be admitted, that it can be classed among what are sometimes called hard cases; such as the loss of a debt, when one through ignorance of the law releases one of two joint

obligors, or a loss by an indorser, who has no claim on any one responsible, and pays a bill, from which he was by law discharged, having a full knowledge of the facts. Decisions, which in accordance with the principles of law produce such results are not liable to the charge of being unjust. The claims of justice can only be answered by judicial tribunals proceeding upon well established rules, without accommodating them to cases of hardship, whether apparent or real. One may suffer serious loss through ignorance of the law and of his rights, and yet have no just cause to charge the law with injustice for not protecting him against it, or relieving him from it.

Exceptions overruled.

DUDLEY FOGG *versus* URIAH H. VIRGIN *& als.*

Where the makers of a note describe themselves in the body thereof as trustees of a voluntary association, but affix their own names, those words are to be considered as merely descriptive; and they are personally responsible.

If the makers of the note are likewise members of the voluntary and unincorporated association, they are liable as such members; and if they would take advantage of the non-joinder of their associates, it should be by plea in abatement.

THIS is an action of assumpsit upon a note of the following tenor:—

"For value received, we, the trustees of the Wayne Scythe Company, promise to pay Asa Gile, or his order, one hundred and seventy-three dollars $\frac{37}{100}$, to be paid in one year from date and interest.

URIAH H. VIRGIN,
COMFORT C. SMITH,
EZRA FISK."

The defendants pleaded, jointly, that they never promised. The parties thereupon agree to the following statement of facts, viz. — That the defendants signed the note declared upon; that Gile duly indorsed it to the plaintiff; that in the spring of 1838, the defendants, with several other persons, associated themselves together, under the style of the Wayne Scythe Company, for the purpose of carrying on the business

of manufacturing scythes; that that was not an incorporated company; that said associates, at their first organization, chose the defendants "trustees" of said company, in which capacity they acted for one year; that said note was given by them during said year; that the original capital stock of said association was $4000; that the defendants were owners of a part of said stock, having paid in their respective proportions thereof; that they continued members and part owners as aforesaid, until after this note was given; and that the association were in the habit of recognizing and paying notes, given by the defendants, in the form of this note. Upon the foregoing facts, the case is submitted to the Court for its decision.

Emmons, for the defendants. This is not the note of the defendants, but of the Wayne Scythe Company. The Company have recognized similar notes. If the note had been given without authority the agent would be bound; as when the principal is not bound the agent must be. But here the principal by repeated recognitions of similar acts of agency, must be considered as bound. From the face of the note it appears that the defendants acted in a representative capacity and that they did not intend to bind themselves. The principal should always be bound by the acts of the agent and the agent be personally exonerated from liability, if it can be done in accordance with the rules of law. Story on Agency, 143; *Long* v. *Colman*, 11 Mass. R. 97; *Ballou* v. *Talbott*, 16 Mass. R. 461; *Danforth* v. *Schoharie Turnpike Comp.* 12 Johns. 227; *Mott* v. *Hicks*, 1 Cow. 513; *Dutchess Cotton Man. Comp.* v. *Davis*, 14 Johns. 238; *Rathbon* v. *Budlong*, 15 Johns. 1.

Howe, for the plaintiff. If the defendants are agents they are bound to express that fact clearly. Bailey on Bills, 48; Chitty on Bills, 27. The defendants have not done that. *Mayo* v. *Pierce*, 11 Mass. R. 54. The Wayne Scythe Comp. are not bound; there is no promise in their behalf. *Stackpole* v. *Arnold*, 11 Mass. R. 27; *Goupy* v. *Hardin*, 7 Taunt. 159; *LeFevre* v. *Lloyd*, 5 Taunt. 749; *Rheinhold* v. *Dutzell*, 1

Yates 39; *Thatcher* v. *Dinsmore*, 5 Mass. R. 299; *Foster* v. *Fuller*, 6 Mass. R. 58; *Ring* v. *Thom*, 1 T. R. 487; *Eaton* v. *Bell*, 5 B. & A. 34; *Burrill* v. *Jones & al.* 3 B. & A. 47; *Appleton* v. *Binks*, 5 East, 148; *Hills* v. *Bannister*, 8 Cow. 31; *Taft* v. *Brewster*, 9 Johns. 334.

The defendants are members of the Company — are parties to the note — are parties to this suit — and if not the only parties, they should have pleaded that fact in abatement.

The opinion of the Court was delivered by

WESTON C. J. — The defendants sign as individuals, affixing to their names nothing, indicating a representative capacity. They describe themselves, in the body of the instrument, as trustees of the Wayne Scythe Company; but they do not profess to promise in their behalf. It is a mere description of themselves, of which many examples may be found, where the persons, signing or executing instruments, have been held personally bound. *Thatcher & al.* v. *Dinsmore*, 5 Mass. R. 299; *Foster* v. *Fuller*, 6 do. 58; *Taft* v. *Brewster & als.* 9 Johns. 334; *Stone* v. *Wood*, 7 Cow. 453; *Hills* v. *Bannister & al.* 8 Cow. 31; *Burrill* v. *Jones & al.* 3 B. & A. 47; *Eaton* v. *Bell*, 5 do. 34.

In the cases cited for the defendants, it is manifest, that the actual signers of the instruments, adduced in evidence, were acting in behalf of others, whom they intended to bind, without assuming any personal responsibility. The distinction is well illustrated in the case of *Barker* v. the *Mechanic Ins. Co.* The defendants were attempted to be charged on a note, in these words, "I John Franklin, President of the Mechanic Fire Insurance Company, promise to pay to the order, &c. for value received. John Franklin." He was held personally bound, and not the company. And it was further held, that the legal effect would have been the same, if the same description of himself had been added to his signature. The Court say, "he describes himself as president of the company, but to conclude the company by his acts, he should have contracted in their name, or at least in their behalf."

But if the company are bound here, and such was the intention of the contract, the plaintiff is entitled to judgment. The company are not incorporated, and have therefore no corporate name, by which they can sue and be sued. They are a voluntary association of individuals. The case finds, that the defendants were members of the company, at the time the note was made. If other members should have been sued, they should have disclosed their names, and taken advantage of the objection, by a plea in abatement. *Trustees of ministerial and school fund in Dutton* v. *Kendrick*, 3 Fairf. 381.

Judgment for the plaintiff.

PAYSON PERRIN & *al. versus* CHARLES KEENE & *al.*

A copartner, with power to settle and adjust the affairs of the copartnership, has no authority to use the name of the firm in such settlements to create new contracts or liabilities.

A note given in pursuance of such authority in settlement of an outstanding account against the firm, is not binding upon the other members, and is not a discharge of such claim.

In a suit upon a note so given, leave was granted to amend by filing a new count for the original claim.

THE parties in this action agree to submit it to the full Court for their decision, upon the following agreed statement of facts: — This was an action of assumpsit brought upon three notes of hand, each bearing date, Boston, May 23d, 1838, and payable to the firm of Perrin & Ellis, (plaintiffs) or order, and each signed "Keene & Weston, by Wm. K. Weston," the first for $850,12, due in six months, with interest, the second for $850,13, due in twelve months, with interest semi-annually, and the third for $850,12, due in eighteen months, with interest semi-annually. Upon the first note was the following indorsement, "Boston, Nov. 26, 1838. Received five hundred dollars in part pr. rect. $500" It was agreed, that the plaintiffs were merchants and partners in trade in the city of Boston at the date of said notes. That the defendants were formerly

merchants and partners in trade in Augusta, doing business under the style and firm of Keene & Weston, and so continued until Nov. 12, 1837, when they dissolved their partnership, according to the first public notice thereof in the Age, Dec. 6, 1837; that the said Weston was in Boston at the date of said notes, and then and there, with the plaintiffs, settled the account for merchandize sold and delivered by the plaintiffs to the said defendants, while said defendants were in partnership, by giving the notes in suit for the balance due on said account, and signed them as above stated; that said Weston was authorized to close up and settle the affairs of the late partnership; that said Weston had no authority from said Keene to sign the partnership name, unless the Court should be of opinion that he had authority upon the facts herein contained. — This action was commenced for, and entered at the last June term of this Court, and on the first day of this term, and upon the defendants denying the authority of Weston to sign the firm name as aforesaid, the plaintiffs' attorney moved to amend their writ and declaration by the insertion of a count in indebitatus assumpsit upon the account annexed, which motion was resisted by the defendants' counsel, but not ruled upon by the presiding Judge, and was withdrawn for the purpose of submitting the whole case to the full Court. If upon the facts aforesaid, the Court should be of opinion, that the defendants are liable to pay said notes, or if, in their opinion, the plaintiffs can in law be permitted to amend their writ and declaration in manner aforesaid, the defendants are to be defaulted for the amount due upon said notes, otherwise the plaintiffs are to become nonsuit.

J. H. Williams, for the plaintiffs. The notes in suit are binding upon Keene, because, upon the dissolution, Weston was authorized to close up and settle the affairs of the firm. *Casco Bank* v. *Hills*, 16 Maine R. 155; *Murray* v. *Mumford*, 6 Cow. 442. The payment made is to be presumed to have been made with the knowledge and consent of Keene. *Graves* v. *Merry*, 6 Cow. 701. Admissions made by one partner, after a dissolution, are received as evidence of indebt-

edness to bind all the members of the expired firm. *Parker* v. *Merrill*, 6 Greenl. 47; *Cady* v. *Shepherd*, 11 Pick. 400; *Bridge* v. *Grey*, 14 Pick. 60; *Getchell* v. *Heald*, 7 Greenl. 26. There is no essential difference between admitting a cause of action in the form of a note, and producing the same effect by verbal admissions.

If the notes are void for want of authority, still the claim against the old firm remains in full force. *Wilkins* v. *Reed*, 6 Greenl. 221. And the amendment prayed for should be allowed, for it is consistent with the original count, and for the same cause of action. *Greenwood* v. *Curtis*, 4 Mass. R. 93; *Eaton* v. *Whitaker*, 6 Pick. 465; *Clarke* v. *Lamb*, 6 Pick. 512; *Anderson* v. *Anderson*, 4 Greenl. 100; *Parker* v. *Parker*, 17 Mass. R. 376; *Castro* v. *Bennett*, 2 Johns. 295; *Warren* v. *Ins. Co.* 16 Maine R. 449; *Mixen* v. *Howarth*, 21 Pick. 215; *Tenney* v. *Price*, 4 Pick. 385; *Bishop* v. *Williamson*, 2 Fairf. 500; *Ball* v. *Claflin*, 5 Pick. 303; Howe's Pr. 389.

Vose & Lancaster, for the defendants. One partner cannot bind his copartner after dissolution, though authorized to settle the affairs of the firm. Gow on Partnership, 76; *Whitman* v. *Leonard*, 3 Pick. 177; *Parker* v. *Macomber*, 18 Pick. 503; *Sanford* v. *Nichols*, 4 Johns. 224; *Hackley* v. *Patrick*, 3 Johns. 528; *Walden* v. *Sherburne*, 15 Johns. 224.

The writ was not amendable. *Vancleef* v. *Therasson*, 3 Pick. 12; *Ball* v. *Claflin*, 5 Pick. 303.

By the Court. — Weston had no right to sign the notes in suit in the name of the firm, unless he derived it from the authority given him to settle and adjust the copartnership business. This does not give him any power to make new contracts, or to create new liabilities, binding on the firm. No such power can be derived from the agreement that Weston should settle and close the business of the firm. The notes, then, are made and delivered without authority and are not valid against the firm.

Is the account still existing and may it properly be introduc-

ed into the writ by way of amendment, by adding a new count for that purpose? In England and New-York a note given on the settlement of an account is not a discharge of such account. In this State and in Massachusetts it is otherwise. But in these States it is held to be only *prima facie* evidence of a discharge, and, of course, is open to explanation. Hence, in *Vancleef* v. *Therasson*, 3 Pick. 14, it was held that when a note was given in New-York, in discharge of an account, and the suit was commenced on the account in New-York, that the plaintiff could not, under leave to amend, file a count on the note, because it was a new and distinct cause of action. The note, by the law of New-York, not being a payment, did not discharge the account. But in *Ball* v. *Claflin*, 5 Pick. 303, with perfect consistency, it was held that the giving of a new note is not a payment, and that both may be considered as the same cause of action. So in this State, in *Newell* v. *Hussey*, in the county of Lincoln, it was held that when an account is sued and a note had been given for it, that the note could not come in by way of amendment, being a new cause of action.

This note, given without authority, does not extinguish the account. If it did, it would be a new cause of action. If not, then the account remains the same subsisting demand and may be brought in by way of amendment. 5 Pick. 303. If the notes were given without authority, they were not a payment of the debt, and the account remains undischarged. It may be said, that the note binds the agent or partner who made it, even if he undertakes to use the copartnership name without authority. The answer is, it can bind him alone, and the plaintiffs did not intend to take the note of Weston alone. They meant to have the security of the copartnership. The note, then, being the note of Weston alone, the presumption of payment is rebutted.

The notes having been declared on as the contracts of the parties sued, and being for the same subject matter as the account, and not having the legal effect to discharge the account, the amendment may be rightfully made.

The defendants must be defaulted.

CYRUS SPRINGER *versus* JOSEPH HUTCHINSON.

The contract of guaranty is in its nature special — and not negotiable — and no suit can be maintained upon a guaranty except by the party with whom this contract is made.

THIS was an action of assumpsit. The original count was against the defendant as guarantor. A second count against him as indorser was added, subject to all legal objections.

The note in suit is as follows: "Fayette, March 27, 1834. For value received, I promise to pay Joseph Hutchinson, or order, seventy-five dollars in six months from date and interest." This note was signed by one Zachariah Damon, Jr. and was sold by the defendant to one Samuel Thompson. On the back of the note is the following writing, "I guaranty the payment of the within note without demand or notice."

"Joseph Hutchinson."

This guaranty was made to said Thompson and not to the plaintiff who purchased the note of Thompson.

Upon these facts, the rights of the parties are submitted to the decision of the Court.

Morrill, for the plaintiff. The amendment was properly made. *Tenney* v. *Prince*, 4 Pick. 385. Upon this indorsement the defendant is liable as on a common indorsement. The note did not lose its negotiability by this indorsement; and having been assigned, the plaintiff has a right of action against the defendant as indorser. *Upham* v. *Prince*, 12 Mass. R. 14.

May, for the defendant. The contract is that of guaranty. *Gilman* v. *Lewis*, 15 Maine R. 452; *Cobb* v. *Little*, 2 Greenl. 261; *Farmer* v. *Rand*, 14 Maine R. 225. The word "guaranty" has acquired a legal meaning and having been used by the parties, it must be considered as having been used in that sense. *Oxford Bank* v. *Haynes*, 8 Pick. 423. The guaranty is not negotiable — and having been made to the said Thompson and not to the plaintiff, this action cannot be sustained. *Tyler* v. *Binney*, 7 Mass. R. 479; *Lamourieux* v. *Hewett*, 5 Wend. 307; *True* v. *Fuller*, 21 Pick. 140;

McDoal v. *Yeomans*, 2 Law R. 198. The liability of the defendant being that of guarantor, the law raises no implied responsibility against him as indorser.

The opinion of the Court was delivered by

WHITMAN C. J. — The view we have taken of the merits of this case, renders it unnecessary for us to consider whether the amendment, objected to by the defendant, was admissible or not.

The action is upon a guaranty, endorsed upon a negotiable note, by the payee, at the time he negotiated it to one Thompson. The guaranty is in the following words, viz. "I guaranty the payment of the within note without demand or notice." The plaintiff, not having been a party to this agreement, and no demand and notice having been proved to have been made and given, according to mercantile law and usage, cannot recover. The contract of guaranty is regarded as, in its nature, special; and not negotiable; although placed, by the payee or indorser, upon the back of a negotiable note, and having reference to its contents. *Tyler* v. *Binney*, 7 Mass. R. 479; *Upham* v. *Prince*, 12 Mass. R. 14; *True* v. *Fuller*, 21 Pick. 140; *Lamourieux* v. *Hewett*, 5 Wend. 307; *Campbell* v. *Vaughan*, 8 Martin, 682; 2 Law Rep. 198, (in Penn. 1829.)

Plaintiff nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN, JUNE TERM, 1841.

JOHN BRANNIN *versus* JOSEPH JOHNSON.

In trespass for an injury done to property, the value of the property at the time of the injury, with interest therefrom, is the measure of damage.

The jury are not authorized to estimate the probable, or speculative loss, which the plaintiff may have sustained from the detention of the property taken.

EXCEPTIONS from the District Court.

This was an action of trespass for taking three cows. The general issue was pleaded, and a brief statement filed justifying the taking of the cows by William Wyman, a deputy sheriff, under the defendant, who was sheriff of the county, as the property of one James Kennedy, on a writ of attachment against him in favor of one Abraham Wing.

WHITMAN J. who tried the cause, directed the jury that if they found a verdict for the plaintiff it would be reasonable that they should give him in damage, the value of the cows at the time they were taken, and something for the detention of said cows since they were taken. The jury returned a verdict for the plaintiff. The defendant's counsel thereupon filed exceptions.

Belcher, for the defendant. Damages were assessed in this case upon an erroneous principle. The correct rule is, that the plaintiff should be allowed the value of the property at the time of the taking, and interest from that time to the time of

the finding of the verdict. *Soule* v. *White*, 14 Maine R. 436; *Swift* v. *Barnes*, 16 Pick. 194; *Boyden* v. *Moore*, 11 Pick. 363; *Boyd* v. *Brown*, 17 Pick. 453.

Goodenow & Stubbs, for the plaintiff. The act complained of was wrongful. If the defendants were dissatisfied with the instructions given they should have requested more explicit instructions. *Butman* v. *Nash*, 3 Fairf. 474; *Colman* v. *Southwick*, 9 Johns. 45; *Tillotson* v. *Cheatham*, 2 Johns. 63; *Finch* v. *Brown*, 13 Wend. 601.

The Court will not grant a new trial if justice has been done. *Brazier* v. *Clap*, 5 Mass. R. 1; *Jones* v. *Fales*, 5 Mass. R. 101.

The opinion of the Court was delivered by

WESTON C. J.—In certain actions, such as those brought for an assault, for libel or defamation, there can be no fixed or settled scale of damages. In such cases, Courts do not interfere with the verdict of a jury, unless the damages given are decidedly and manifestly excessive. Some of the cases, cited for the plaintiff, are of this class. But for an injury done to property, such as trespass *de bonis asportatis*, which is the case before the Court, the value of the property at the time of the injury, is the measure of damages. There may be circumstances, enhancing that value to the party injured, which may be properly taken into the account.

The Judge instructed the jury, that they should give the plaintiff the value of the cows at the time they were taken. To this value, interest might be added, as a part of the indemnity, to which the plaintiff was justly entitled. If the damage for detention could be so understood, the instruction might be justified. But as the term, interest, was not used, and probably not intended, as the limit of damages for detention, the jury were at liberty to go into an estimate of the probable or speculative loss, the plaintiff might have sustained, upon this ground. In our judgment the instruction was too vague and loose, and had a tendency to mislead the jury.

Exceptions sustained.

EZEKIEL PORTER *& al. versus* HARRISON O. READ.

A delivery of a deed with an indorsement on the back, by the grantee, that he has transferred the within deed upon certain conditions, conveys no legal title to the person to whom the delivery is made. His rights rest only in contract, and are to be enforced in equity.

One having an interest by virtue of a contract, not under seal, in real estate subject to a mortgage, is not entitled to redeem by virtue of St. 1821, c. 39, § 1, and if in possession of the premises, cannot insist in a suit against him, that a conditional judgment shall be rendered for the plaintiffs.

THIS was a writ of entry for a tract of land in Strong. The writ was dated August 13, 1838. The general issue was pleaded and joined.

The plaintiffs, to prove their title to the demanded premises, read in evidence a quit claim deed for the consideration of ten dollars from Nathan Cutler to the plaintiffs, of the demanded premises, dated July 6th, 1838, describing them as the same conveyed by Andrew H. Bonney, to Amos C. True, and by said True mortgaged to Harvey Bonney, which said mortgage had been assigned to said Cutler; likewise a mortgage deed from Amos C. True to Harvey Bonney of the demanded premises, dated Sept. 23d, 1837, conditioned for the payment of the sum of three hundred dollars, in one, two and three years from Jan. 7, then next, and interest, on the payment of which this deed, as also three certain notes bearing even date with these presents, given by the said Amos C. True, and James True, to the said Harvey Bonney, to pay the sum and interest at the time aforesaid, shall both be void — on the back of which was an assignment from Harvey Bonney, to Nathan Cutler, dated Oct. 6th, 1837. The plaintiffs also read a warrantee deed from Amos C. True, to them for the same premises, dated July 6th, 1838.

The defendants then offered in evidence a deed of the demanded premises from Andrew H. Bonney to Amos C. True, dated Sept. 23d, 1837, on the back of which, was an indorsement in these words.

"Freeman, May 9, 1838. I hereby certify that I have this day transferred the within deed with all its contents to Har-

rison O. Read of Strong, provided he, the said Read, takes up and delivers to me, Amos C. True, three several notes of one hundred dollars each, payable annually to Harvey Bonney of Strong. Amos C. True."

At the time the last deed was given to the defendant, he gave to Amos C. True a writing of which the following is a copy.

"Freeman, May 9, 1838. I hereby certify that I will take up and deliver unto Amos C. True of Freeman, three notes of hand signed by Amos C. True and James True of Strong, unto Harvey Bonney of Strong, one hundred dollars each, given Sept. 23, 1837, payable in January annually.

"Harrison O. Read."

It appeared from the testimony of said True, that after the papers were executed, that Read promised to take up the notes and deliver them to James True, within a week or ten days, and that he entered into possession of the premises.

It was likewise proved that on the maturity of the two first notes, the defendant tendered the amount due to the plaintiffs, who declined accepting it — and that the plaintiffs knew that True had delivered over to Read a deed with a writing upon it; but that True denied Read had complied with the contract on his part.

There was other evidence introduced, but as it was not material in the decision of the cause, it is not reported.

Upon the whole evidence, Emery J. who presided at the trial, instructed the jury that the defendant had made out no legal defence to the action, and directed them to render their verdict for the plaintiff.

The jury returned their verdict for the defendant — and in reply to certain questions propounded by the Court, made answer that the plaintiffs had full knowledge at the time of the conveyance of Amos C. True, of his previous conveyance and assignment to the defendant and that the defendant had entered into the premises under this assignment; and that the amount due on the two first notes made by Amos C. True, to Harvey Bonney was duly tendered to the plaintiffs as they became payable.

R. Goodenow, for the demandants. The evidence admitted for the defendant should have been excluded. The deed from Bonney with the indorsement thereon should not have been received. No consideration appears for the indorsement. The deed and indorsement could not confer a title to the plaintiff. The indorsement had none of the characteristics of a conveyance of real estate. St. 1821, c. 36, § 1. A deed is a writing sealed. Co. Lit. 35, b.; 2 Hill. Abr. 279. Conveyance is a term of equivalent meaning. *Dudley* v. *Sumner*, 5 Mass. R. 472; *Livermore* v. *Bagley*, 3 Mass. R. 487; *Dudley* v. *Sumner*, 4 Mass. R. 478. There was then no conveyance to the tenant.

There was no assignment. That must be by deed. *Perkins* v. *Parker*, 1 Mass. R. 117; *Wood* v. *Partridge*, 11 Mass. R. 488; *Cutts* v. *Perkins*, 12 Mass. R. 206.

No title can be shown by parol. But if the indorsement be admitted, it is upon condition; and it is of no avail unless the condition has been performed. That has not been done. The parties fixed upon a term within which the notes were to be taken up; but it was not done. This agreement is binding upon the parties. *Cocker* v. *Franklin H. & F. Man. Co.* 3 Sum. 530.

If the defendant is the mortgagor, or in the place of the mortgagor, there is nothing to prevent the plaintiff's recovery; there being no agreement by which he is to remain in possession.

Tenney and *Belcher*, for the tenant. The jury have found that the plaintiffs purchased with knowledge of the rights of the tenant — and that the tenant has paid the True notes as they severally became due. The contract between the parties was in writing; and conveyed an equitable interest so that the defendant is entitled to have the conditional judgment rendered against him. To convey an equitable title, a deed is not necessary. Here the written agreement was followed by the possession and occupation of the premises. The tender of the amount due was equivalent to a payment, the defendant having a right to redeem — the conditional

judgment should be rendered against them, and thus justice will be done.

The opinion of the Court was delivered by

SHEPLEY J. — It appears, that Andrew H. Bonney formerly owned the demanded premises, and on the twenty-third day of September, 1837, conveyed them to Amos C. True, who on the same day conveyed them in mortgage to Harvey Bonney, to secure the payment of three promissory notes of one hundred dollars each, made by him and James True, and payable to Harvey Bonney, who on the sixth of October following assigned his mortgage to Nathan Cutler, who caused the deed and assignment to be recorded the twenty-fourth of March, 1838, and on the sixth of July following conveyed by deed of release to the demandants; who on the same day obtained a conveyance from Amos C. True, by deed of warranty, and thereby obtained the entire title to the premises; unless the operation of the last of these conveyances was defeated by the following contract written on the back of the deed from Bonney to him and signed by Amos C. True on the ninth of May, 1838. "I hereby certify, that I have this day transferred the within deed with all its contents to Harrison O. Read, of Strong, provided the said Read takes up and delivers to me, Amos C. True, three several notes of one hundred dollars, each payable annually unto Harvey Bonney of Strong." Read at the same time entered into a contract in writing to take up and deliver the notes to True. The jury found, that the demandants purchased of True with the knowledge, that he had before contracted to sell to the tenant. It is admitted, that the verdict for the tenant must be set aside and one entered for the demandants; but the counsel for the tenant contend, that their judgment on it should be a conditional one upon the title in mortgage only. In this State, the legal title to real estate cannot be conveyed by a personal contract not under seal, although it may be in some cases by the vote of a corporation, or by proceedings in conformity to certain statute provisions. It was decided in *Warden* v. *Adams*, 15 Mass. R.

233, that a delivery of a mortgage deed under a parol contract to assign it, would not convey an interest in the estate. While in equity it has been held, that an assignment of the debt will draw the land after it. *Green* v. *Hart*, 1 Johns. 591. In this case the attempt was not to assign the mortgage but to transfer the title to the estate subject to it. The rights of the tenant exist only in contract. He has acquired no legal interest in or title to the land. And if thus situated he is not entitled to redeem, he cannot insist on a conditional judgment. It is provided by Statute c. 39, § 1, that "the mortgagor or vendor, or other person lawfully claiming under them, shall have right to redeem." The intention was, that such person should be one lawfully claiming under the title, for the same section makes provision, that the person receiving payment should restore the possession and convey by deed all his right "to the person making such tender, having lawful right to redeem the same, or cause satisfaction and payment to be entered in the margin of the record." The tenant may be enabled in equity to preserve and enforce his rights under the contract with True. 2 Fonb. Eq. b. 2, c. 6, § 2, note (i). *Taylor* v. *Stibbert*, 2 Ves. jr. 437. But they cannot be recognized and enforced here. True, who denies that he has fulfilled the contract on his part, is not a party to this suit, and is entitled to be heard before there can be a decision against him. The verdict for the tenant is to be set aside, and a verdict and judgment thereon is to be entered for the demandants.

JOHN W. KEENE *versus* EPHRAIM HOUGHTON.

In the sale of the lands of non-resident proprietors for taxes by virtue of the provisions of St. 1821, c. 166, § 39, the collector is authorized to deed only to the highest bidder, and cannot legally substitute the name of another for that of the purchaser.

A sale not in conformity with the statute gives no title; and an agreement with the collector of taxes to pay the amount bid by another and receive a deed by way of substitution, is void for want of consideration.

EXCEPTIONS from the District Court.

This is an action of assumpsit for money had and received, according to the account annexed. The general issue having been pleaded, the action was opened to the jury; and the plaintiff proposed to prove, that being a collector of taxes of the town of Weld, on the fifth day of May, 1838, he exposed to sale by public auction, sundry lots of non-resident lands, taxed in the bills committed to him to collect, for the year 1836, said land being situated in said Weld, the plaintiff having advertised the same according to law; that at the time and place of sale, James Brown was appointed by the plaintiff to make a record of the proceedings; and that the land was struck off to Isaac Tyler for the taxes and costs, that being the highest bid. Immediately after and before record was made of the sale by said Brown, the defendant came to the place and inquired if the land had been sold, and was told by the plaintiff that it had been struck off to Isaac Tyler for the amount of taxes and costs due on the lands; that the defendant replied he was sorry; that the plaintiff then told him he could have it at the bid, if he wished; that the defendant agreed to take it at the bid; and said Brown made a record of the sale in writing, specifying the number of lots, &c. as struck off to the defendant, for the amount of taxes and costs; that a deed of the land was made out, in due form, and offered to the defendant, who said to the plaintiff that he would take the deed and show it to a lawyer, and if it was right he would pay the amount; that he then took the deed, and subsequently told the plaintiff that the lawyer to whom he showed the deed, said it was in due form, but that it should have been made out to Tyler, and

a deed from Tyler to defendant, which was the only objection the defendant made to the deed.

WHITMAN J. who presided at the trial, considering the aforesaid evidence, proposed to be offered by the plaintiff, insufficient in law to support his action, directed a nonsuit. To which ruling and direction the plaintiff excepted.

R. Goodenow, for the plaintiff, contended that the substitution of Houghton for Tyler was proper. The direction that land is to be sold to the highest bidder, is for the protection of the public. No particular form is necessary to constitute a bidding. Tyler's bid was a good one, and the defendant came in before the proceedings were closed, and assumed his bid. The owner of the land does not suffer by this.

This is not within the statute of frauds. The terms of sale were published. The auctioneer had his clerk, by whom a record of the proceedings was duly kept, so that there is not the danger of parol testimony. The auctioneer is the agent of both parties. *Cleaves* v. *Foss*, 4 Greenl. 1.

Belcher. The title to be acquired by the purchaser of lands sold for taxes, is a statute title. The collector cannot sell at private sale. It does not appear from the report of the case, that the defendant was present at the sale to Tyler, or that Tyler consented to this arrangement. The collector, by the statute, is to sell, and make a deed, &c. to the purchaser. The defendant could derive no title from such a deed as was offered, he not having purchased. This was in fact a mere private sale, which the collector has no authority to make.

The opinion of the Court was delivered by

SHEPLEY J. — The statute authorizing the sale of the lands of non-resident proprietors to obtain payment of the taxes assessed on them, c. 116, § 30, provides, that the collector, after having given notice in the manner prescribed, "shall proceed to sell at public auction, to the highest bidder, (after waiting two hours from the time appointed for said sale,) so

much only of said lands as shall be sufficient to discharge said taxes and the necessary intervening charges."

In the execution of a power given by a statute, there must be a strict conformity to its provisions, or the proceedings will be ineffectual. The person so authorized cannot adopt a different mode of proceeding, which he may judge would accomplish the same object in a different manner, and be more beneficial to those interested. The collector, in this case, is authorized to deed only to the highest bidder; that is, to the person who would bid the highest price for the land by taking the least quantity of it, and pay the amount due. And he only could acquire a title to the land by such a sale; for a sale not in conformity to the provisions of the statute, could not give a title. The bill of exceptions states, that Isaac Tyler was the purchaser at the sale. And it does not appear that he refused to comply with the conditions of sale, or that he acted as the defendant's agent, or assented to the transfer of his bid to the defendant. And the plaintiff had no right to substitute the defendant for Tyler as the purchaser. If the defendant should be required to pay, he would have no equivalent, and his agreement must be considered as made without consideration, and void. *Exceptions overruled.*

DANIEL BURNHAM *versus* WILLIAM TOOTHAKER.

It appeared that one S requested the plaintiff to purchase a hog for him, proposing to pay therefor in lumber; that the plaintiff purchased two sows, and left them in the possession of said S, by whom the same were killed — and that the increase were sold to the defendant. The question whether it was the intention of the plaintiff and said S, that the sows and their increase should belong to said S, was held to have been properly submitted to the jury.

Upon exceptions, the Court will not consider the correctness of the finding of the jury.

EXCEPTIONS from the District Court.

This was an action of trover, in which the plaintiff claimed to recover the value of four shoats. The plaintiff, to prove his title to the property, introduced a bill of sale, from David and Moses Morrison, dated March 16th, 1839, of two shoats. Said shoats were sows, and were, by direction of the plaintiff, taken to mills in Rangely, owned by himself and one David Webster; and left in the possession of Enoch Staples, who was then carrying on said mills at the halves. It was further proved that said Staples was a poor man, and unable to purchase a hog; that he requested the plaintiff to buy one for him — which he promised to do — that thereupon, he purchased said sows, and sent them to him — that when said Staples applied to the plaintiff to buy him a hog, the plaintiff in answer to his inquiry, as to how he could pay for it — replied that he would take pay in lumber, or any thing else; that said Staples kept said sows, till they had a litter of pigs — that in the fall, he killed the sows and sold the pigs to the defendant — which were the pigs in dispute. It was likewise proved, that the plaintiff spoke of having bought said sows for said Staples.

WHITMAN J. who tried the cause, instructed the jury, that the said Staples, having said pigs in his possession, had one index of ownership of them, and taken in connexion with the other facts proved in the case, they would consider, whether it was reasonable for them to believe that it was the intention

of the plaintiff, and said Staples, that the sows with their increase should be the property of said Staples or not; and if they should be satisfied of the affirmative, that the defence was well made out.

The jury returned a verdict for the defendant; and the plaintiff filed exceptions, which were allowed.

J. Randall, for the plaintiff.

Sherburne, for the defendant.

By the Court. — It is no part of our duty, under these exceptions, to determine the correctness of the finding of the jury, upon the evidence adduced. The question submitted to our revision is, whether the instructions of the presiding Judge were erroneous in point of law. He left it to the jury to decide, whether at the time the defendant bought the swine in question of Staples, the property was in him, which they found in the affirmative. If there was no evidence leading to this conclusion, the cause ought not to have been so left. But it does appear to us, that there was such evidence. The case finds, that Staples requested the plaintiff to buy a hog for him, proposing to pay the plaintiff therefor in lumber, or in some other way, that the plaintiff thereupon bought two sows, of which the swine in controversy were the increase, and put them into the hands of Staples. The request was to buy one, but two were purchased and received, and if the testimony stopped there, it might fairly be insisted, that only one was intended for Staples. But it was in proof that the plaintiff often spoke of having bought both the sows for him. If such was the fact, which the jury must have found, his subsequent possession was evidence of property. The circumstances of that possession and the connexion between Staples and the plaintiff, were before the jury. Mere possession, as Staples was carrying on the plaintiff's mill on shares, would have weighed little or nothing in the scale, if the plaintiff had not declared, that he purchased the swine for Staples. We do not perceive any sufficient legal ground, upon which to declare the instructions of the Judge erroneous. *Exceptions overruled.*

SAMUEL DAGGETT, Treasurer, *versus* JOSIAH EVERETT, JR. *& al.*

By St. of 1821, c. 116, § 47, it is the duty of an officer having arrested a delinquent collector of taxes, by virtue of a treasurer's warrant of distress, to commit him to prison; and this provision is not repealed by St. 1836, c. 245, § 6.

A bond given by a delinquent collector of taxes, who has been arrested by virtue of a treasurer's warrant, to procure his discharge, but not committed to gaol, is unauthorized by statute, and void.

EXCEPTIONS from the District Court.

This was an action of debt. The general issue was pleaded and joined.

It appeared from the plaintiff's declaration, that the defendant, a collector of taxes in the town of New Vineyard, having been arrested at New Portland, by virtue of a warrant of distress issued against him by the plaintiff, the treasurer of said town, for the balance due on the tax bills assessed on school district No. 5, in said New Vineyard, which were committed to him for collection, he gave a bond, without being committed to gaol, running to the plaintiff, as treasurer of said town, or his successor, &c., the conditions of which had not been performed.

WHITMAN J. who tried the cause, considering the plaintiff's declaration as insufficient in law to sustain his action, ordered a nonsuit — to which order of the Court exceptions were duly filed and allowed.

R. Goodenow, for the plaintiff. The objects of the statutes of 1835–6, were to afford speedy relief to persons arrested on final process without their commitment. Being designed for the benefit of the debtor, it should be liberally construed. Therefore the statute provision that the collector, when committed, shall give a bond, applies equally to the case of arrests. The warrant, in general terms, directs a commitment.

Webster, for the defendants. The sheriff had no right to take a bond without committing to gaol. St. 1836, c. 245, § 6; St. 1821, c. 116, § 44, 47. This being a statute provision, unless the remedy provided by statute be strictly pursued, the proceed-

ings are void. That has not been done in this case. Before St. 1836, no bond could be taken without commitment; but the statute makes no provision for taking a bond of the collector, arrested on a treasurer's warrant. The repeal of § 47, of c. 116, is not a repeal of the provision requiring him to be committed to gaol; and the bond, having been given without commitment, is void.

The opinion of the Court was delivered by

Weston C. J. — By the statute of 1821, c. 116, concerning the assessment and collection of taxes, § 47, a constable or collector, to whom tax bills had been duly committed for collection, and who had been delinquent in the discharge of his duty, was made liable to be arrested on a warrant of distress, and committed to prison, with the privilege of being admitted to the liberty of the gaol yard upon giving bond, as then required by law. Under this law, it was the duty of the officer, who had arrested such delinquent collector, on a warrant of distress, to commit him to prison.

The statute of 1836, c. 245, § 6, provides, that when such delinquent collector is committed to prison, upon such arrest, he shall be subject to the provisions of that statute and of that to which it is supplementary, and such part of § 47, of the act first cited, as is inconsistent therewith is repealed. The officer took the bond in suit, without first committing the collector. And this, in our opinion, was unauthorized. It may be said, that the commitment is a useless formality, attended with expense and inconvenience to no purpose, and could not have been intended by the legislature. We can gather their intention only from the words used, where they are plain and intelligible. And as they have expressly based the proceedings, provided for in the last statute, upon the actual commitment of the collector to gaol, we are not at liberty to dispense with this condition. *Exceptions overruled.*

The Inhabitants of Phillips *versus* The Inhabitants of Kingfield.

A witness who is introduced to prove that another witness is unworthy of credit, should be examined as to the general character of such witness for truth and veracity.

The character which a witness has acquired for truth is to be proved as a fact in the case, from which, combined with all the various matters in the testimony tending to establish or impair it, the jury will form their own opinion respecting the credit due to his statements.

The proper inquiry is, whether the witness knows the general character of the witness attempted to be impeached; and if so, what is his general reputation for truth?

On the cross-examination, the inquiry should be limited to the witness's opportunity for knowing the character of such witness; for how long a time and how generally such unfavorable reports have prevailed, and from what sources they have been derived.

It is not allowable to inquire of the impeaching witness whether he would believe the witness attempted to be impeached upon oath.

In our pauper laws, there is a marked distinction between the place of residence, or home, and the place of legal settlement. The latter cannot be changed without acquiring a new one. The former may be abandoned without evidence that another residence has been secured.

The expression of opinion by the presiding Judge, on the state of the facts of a case, is not a matter of legal exception.

This was an action of assumpsit for supplies furnished the wife and daughter of one Isaiah Wood, who was alleged in the plaintiffs' writ to have his legal settlement in the town of Kingfield. The general issue was pleaded and joined. The plaintiffs introduced evidence tending to show that the said Wood had resided and had his home in his father's family a year previous to, and was residing and had his home in Kingfield on the 24th day of January, 1816, the day of the incorporation of said town; and also that he had his residence there on the 21st day of March, 1821. The defendants introduced evidence tending to show that on neither of those days was the residence of said Wood in Kingfield; but that on both of those he was not only personally absent, but was residing and had his home in some other place. The defendants further introduced evidence tending to show that he resided and had his home in

the town of Westbrook for more than five years together after the 21st of March, 1821. It appeared that said Wood was much absent from his wife and family, and that in the year 1820, or within a year of the 21st of March, 1821, he being absent, laboring from home, a small amount of supplies was furnished by the overseers of the poor of the town of Kingfield, where she then was found in destitute circumstances.

Said Wood was introduced as a witness by the plaintiffs, and the defendants introduced evidence tending to show that the character of said Wood was not good for truth and veracity. It was in evidence that said Wood left Kingfield at different times, but whether with the intention of changing his residence or not, and whether he took up a new residence with the intention of remaining, were facts contested, and a great variety of conflicting testimony in relation to all the facts in controversy was introduced, and the whole submitted to the jury. EMERY J. who presided in the trial, gave the following instructions and opinions, viz. —

1. Where a party attempts to impeach a witness, that party can ask only what is his general character for truth and veracity; but the other party *may ask his character under oath*, and to the belief which the one testifying would entertain of the one under oath, who is attempted to be impeached, and confine it to that.

2. If a man has a home, a temporary absence to seek employment, does not take it away.

3. If a man go away with a determination of taking up a permanent residence in a particular place, and does so take up his abode, his former residence is changed.

4. The testimony of the supplies furnished the wife of said Wood, is of no other use than as helping to show an intention to abandon his wife in leaving her unprovided; because the mere circumstance of supplies would not change the effect of the act of 1821, inasmuch as he had no control over the members of his family at the time.

To which opinions and instructions of the Court, the counsel of the defendants filed exceptions, which were allowed.

Tenney, for the defendants, cited the following authorities. *People* v. *Mather*, 4 Wend. 257; 1 Phil. Ev. 229; 1 Stark. Ev. 147; *Chelsea* v. *Malden*, 4 Mass. R. 131; *Townsend* v. *Billerica*, 10 Mass. R. 411; *Canton* v. *Bentley*, 11 Mass. R. 441; *Hallowell* v. *Saco*, 5 Greenl. 143; *Greene* v. *Windham*, 13 Maine R. 225; *Exeter* v. *Brighton*, 15 Maine R. 58; 2 Kent's Com. 346; *Arnold* v. *United Ins. Co.* 1 Johns. Cases, 66; *Harvard College* v. *Gore*, 5 Pick. 370; *Poland* v. *Wilton*, 15 Maine R. 363.

Wells, for the plaintiff, referred the Court to *Baring* v. *Norton*, 2 Fairf. 350; *Greene* v. *Buckfield*, 3 Greenl. 136; *Dixmont* v. *Biddeford*, 3 Greenl. 205; *Hallowell* v. *Saco*, 5 Greenl. 143.

The opinion of the Court was delivered by

Shepley J. — One of the questions presented relates to the manner of examining a witness, who is introduced to prove that another witness is unworthy of credit. The authors of the elementary treatises on evidence do not perfectly agree in this matter; and the cases upon which they rely for their statements, are generally those arising at *nisi prius*, where there was little examination or discussion of principle. The rule as stated by Peake is, that "*viva voce* evidence to destroy the credit of a witness must be that of persons, who have known his general character, and who take upon themselves to swear from such knowledge, that they would not believe him upon his oath." Peake's Ev. 88. The rule as stated by Phillips, is in substance the same. He says, "the regular mode is to inquire whether they have the means of knowing the former witnesses's general character, and whether from such knowledge they would believe him on his oath." 1 Phil. Ev. 229.

Starkie says, "the proper question to be put to a witness for the purpose of impeaching the general character of another is, whether he could believe him upon his oath? When general evidence of this nature has been given to impeach the character of the witness, the opposite party may cross-examine as to

the grounds upon which that belief is founded." 1 Stark. Ev. ed. by Met. 182. It will be perceived, that the language of the last rule does not limit the witness to his knowledge of the character of the former witness for truth, but permits him to form his opinion from any knowledge, belief, or reputation, that the former witness has committed some crime, or been guilty of some immorality. And accordingly it has been held in North Carolina and Kentucky, that a party is not confined to the reputation of the former witness for veracity, but may impeach his general moral character. Under a literal application of the rule as stated by Starkie, the witness can form a law to suit himself as to what degree of moral delinquency shall be sufficient to destroy the credit of the former witness, and can apply his own law as his personal prejudices, errors, griefs, or interest, may dictate. And if the opposite party may inquire into the grounds, upon which his belief is founded, the result is, that every description, and every act of private vice and immorality and the prevailing suspicion of them, even if slanderous, may be introduced into a court of justice, and that against one who is neither called upon, nor prepared to meet them. It is however a well established rule, that no particular acts of immorality or crime can be stated. It would be productive of much wrong to individuals, as well as degrading to the administration of justice to expose within its halls the private vices and immoral acts by reputation connected with the characters of witnesses.

In the case of *Carlos* v. *Brook*, 10 Ves. 50, the Lord Chancellor says it had been decided to be competent to examine any witness to the point, whether he would believe that man upon his oath. It is not competent, even at law, to ask the ground of that opinion, but the general question only is permitted.

The rule, as stated by Swift, is more satisfactory and less liable to abuse in practice. He says, the only proper questions to be asked are, whether he knows the general character of the witness in point of truth among his neighbors, and what that character is, whether good or bad. And states, that his

testimony must be founded on the common repute as to truth, and not as to honesty. Swift's Ev. 143.

One acquires a character for truth or the reverse, as he does for honesty, or chastity, or temperance, or the reverse. And it is this trait of character as a fact, that should be placed before a jury for their consideration in weighing the testimony. The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely upon any such opinion instead of exercising their own judgment, taking into consideration the whole testimony. When they have the testimony that the reputation of a witness is good or bad for truth, connecting it with his manner of testifying, and with the other testimony in the case, they have the elements from which to form a correct conclusion, whether any and what credit should be given to his testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions, and feelings of that witness, to form, in part at least, the elements of their judgment. To authorize the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It moreover would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision.

The observations of Justices Gibson and Duncan, in the case of *Kimmel* v. *Kimmel*, 3 S. &. R. 336, are just and appropriate. Mr. Justice Gibson says, "there is danger from the proneness so often observable in witnesses, to substitute their own opinion for that of the public, whose judgment cannot be

so readily warped by prejudice or feeling as that of the individual; and hence the policy of not requiring any intimate degree of knowledge respecting the person himself, or of bringing the witness too close to the scene. The reputation of the neighborhood is the only thing that is competent; and if the witness has acquired a knowledge of it by the report of the neighborhood, he is exactly qualified to be heard." Mr. Justice Duncan says, "opinion will not be evidence, for if it were, no witness would be safe from the shafts of calumny. No man is to be discredited by the mere opinion of another."

In *Wike* v. *Lightner*, 11 S. & R. 198, Tilghman C. J. says, "the law on this subject is accurately laid down in *Kimmel* v. *Kimmel*. In order to discredit a witness, you can examine only to his general character;" and again, "you must never depart from general character." As to the question, whether he would believe the other witness on oath, he says, "a direct answer would not be objectionable, provided the belief was founded on the witness's knowledge of his general character; otherwise, it would be nothing to the purpose." The mischiefs have to some extent been already stated, which might arise from permitting the witness to give his own opinion; and this remark of the Chief Justice is at variance with those before quoted from the case of *Kimmel* v. *Kimmel*, where the law is said to be accurately stated.

In *Gass* v. *Stinson*, 2 Sum. 610, Mr. Justice Story says, "where the examination is to general credit, the course in England is to ask the question of the witnesses, whether they would believe the party sought to be discredited, upon his oath. With us, the more usual course is to discredit the party by an inquiry, what his general reputation for truth is, whether it is good, or whether it is bad."

In the case of the *People* v. *Mather*, 4 Wend. 257, the subject is discussed, and it is said, "the rule, which, every thing considered, has been found safest on this subject, is to allow general evidence to be given of general character."

The true principle appears to be, to allow the character, which a witness has acquired for truth, to be proved as a fact

in the case, from which, combined with all the various other matters in the testimony tending to establish or to impair it, the jury will form their own opinion respecting the credit due to his statements. The words of the interrogatory, by which such testimony is to be extracted, are not very material. Perhaps as short and useful a form as any, might be to inquire, whether he knows the general character of the witness? and if the answer be in the affirmative, what is his general reputation for truth? And on the cross-examination, the inquiry may extend to the witness's opportunity for knowing the character of the other witness; for how long a time, and how generally the unfavorable reports had prevailed; and from what persons he has heard them. This will present the whole facts respecting the character for truth to the jury, and that is all that can be legitimate or useful. Every thing else is much better suited to mislead, than to instruct them; and after this decision has been regularly published, will in our practice be excluded.

It does not appear, that the presiding Judge did more in this case than make certain remarks respecting the proper course to be pursued in the introduction of testimony of this description; or that any proper testimony was excluded, or that the party was in any other way injured by them. And they do not, therefore, whether correct or not, afford sufficient reason for setting aside the verdict.

The second proposition is not the subject of complaint.

In our pauper laws, there is a marked distinction between the place of residence, or home, and the place of legal settlement. The latter cannot be changed without acquiring a new one. The former may be abandoned, without evidence that another residence has been secured. The third proposition relating to this subject is correct. And if, as the counsel assert, it was material to know whether a residence might be abandoned without evidence of a new one acquired, a specific instruction might have been obtained by a request. If the fourth proposition be objectionable, it is so, rather as an expression of an opinion on the state of the facts, which is not a matter of

legal exception, than as an exhibition of the law arising out of them. It assumes, that it was clearly established by the proof, that the husband had no control over the members of his family when the supplies were furnished; and if he had no such control, the instruction was fully authorized by the case of *Greene* v. *Buckfield*, 3 Greenl. 136. If the counsel thought that the assumption was unauthorized and injurious to the rights of the defendants, they might have requested instructions, that if the jury should find, that the supplies were furnished to those under his care and protection, he would not acquire a settlement in that town by the act of March 21, 1821.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1841.

CYRUS BRYANT *versus* HENRY TUCKER.

An attachment and subsequent levy of real estate, of which the debtor was in the quiet enjoyment, puts the judgment creditor, as against his debtor, in the seizin of the premises, as much as if the tenant had at that time given a deed of the same at the time of the attachment.

After such levy, the debtor becomes the tenant at will of his creditor, and if he resists the entry of the judgment creditor, he may treat him as a disseizor, at his election.

The tenant in a real action, when the demandant has made out a *prima facie* case, if he would avoid such title, he should distinctly set up in his brief statement the title of the real owner.

THIS was a writ of entry, for a small lot of land, and buildings thereon in Fairfield. Plea, the general issue. The tenant also filed a brief statement that he was not a tenant of the freehold at the time of the commencement of this suit, nor at any time since. The writ was dated Oct. 21st, 1839.

On the trial, before WESTON C. J. the plaintiff proved that on the 30th of May, 1837, he attached the demanded premises, on his writ against the defendant, and prosecuted the suit to final judgment, within thirty days from which, to wit, on the 19th of July, 1838, he caused his execution on said judgment to be levied on the demanded premises, and on the same day seizin and possession were delivered him by the officer. The entry by the register of deeds upon the record of the officer's return of said levy, was dated on the 26th of

July, 1838. The register of deeds being called, exhibited a book in which he kept a memorandum of the return of levies to be recorded, which shew that the entry was made on the 26th of July, 1838. The plaintiff's counsel then moved to amend the record accordingly, but the question was reserved for the opinion of the full Court.

The plaintiff further proved, that the defendant at the time of this attachment and levy, and for about five years, was in the actual possession and improvement of the demanded premises and so continued to the present time. He further read in evidence a warranty deed of the premises from Russel O. Ellis to the tenant, dated Feb. 7, 1833, and also a warranty deed of the same from David Gulliver to Ellis, dated August 20th, 1831, and proved that Gulliver had been in the actual occupation and possession of the premises for a long time before his deed to Ellis. Improvements have been made on the premises since Gulliver conveyed to Ellis.

The defendant offered in evidence a deed from John Hancock, to David and Peter Page, dated 15th March, 1826, of half of the demanded premises with covenants of warranty except possessory titles. Also a deed from Williams Emmons to A. Redington, dated Feb. 8, 1827, of the other half, and from said Redington to the said Pages of the other half, and from said Peter to David Page of his undivided half of the premises, dated Oct. 30th, 1839, also a quit claim from David Gulliver to D. Page, dated Feb. 19, 1820, and a mortgage from D. Page to the defendant, dated June 10th, 1837, which was assigned to Jonathan Tucker in Sept. 1838.

The plaintiff read in evidence a warranty deed of the premises, dated June 10, 1837, from David Page to the defendant. David Page being called as a witness, testified that the whole lot described in the deeds above mentioned, contained seventy acres; that the demanded premises are about three fourths of an acre; that he never had actual possession of the lot or any part of it; that until he had been shown a recorded copy of D. Gulliver's deed, of Feb. 19, 1820, he had forgotten that he had ever had such a deed; that he had no recollection of

having paid to Gulliver any thing for the deed and he thought, Gulliver being then embarrassed, that it was given to prevent his creditors from attaching the land; that he claimed title under the deed from Emmons and Hancock, and that it was understood between him and Gulliver, that if Gulliver should pay the notes, as they became due, he was to convey the land to him; that Gulliver did not pay the notes, as they became due; that Gulliver has since paid them to him, but that he, Page, never conveyed the land to Gulliver. He further testified, that he took the deed by consent of Gulliver.

The presiding Judge being of opinion that these facts constituted no defence, the defendant was defaulted. If the whole Court should be of a different opinion upon the evidence, so far as it is competent, the default is to be taken off and the plaintiff to become nonsuit.

Wells, for the defendant. At the time of the attachment the tenant had no attachable interest in the premises, but the title was in Page; so that the plaintiff acquired nothing by his levy. The defendant was not tenant of the freehold at the date of this suit, Oct. 21, 1839. On the 10th of June, 1837, the tenant conveyed the premises to Page, who, on the same day, gave a mortgage back to him, which, in Sept. 1838, was assigned to Jonathan Tucker, whose tenant the defendant is.

The levy purports to be recorded before it was made — and no amendment can be made to affect the rights of third persons. *Means* v. *Osgood*, 7 Greenl. 146; *Howard* v. *Turner*, 6 Greenl. 106; *Bannister* v. *Higginson*, 15 Maine R. 73; *Gilman* v. *Stetson*, 16 Maine R. 124. This is a public record, over which the Courts have no control.

Boutelle and *H. Smith*, for the plaintiff. The plaintiff having received seizin and possession, has a title as against the defendant. *McGregor* v. *Brown*, 5 Pick. 170; *Wyman* v. *Brigden*, 4 Mass. R. 150; *Waterhouse* v. *Gibson*, 4 Greenl. 230; *Fairbanks* v. *Williamson*, 7 Greenl. 101; *Makepeace* v. *Bancroft*, 12 Mass. R. 474. The moment the levy is shown, the plaintiff's title is established. The sheriff's return is conclusive, as to all the parties to the execution. *Bott* v. *Burnell*,

11 Mass. R. 163. Had the plaintiff replied that he was tenant of the freehold, and that he was in possession, it would have maintained the issue on his part. *Heard* v. *Hall*, 16 Pick. 457; Jackson on Real Actions, 97.

The amendment of the levy, as between these parties, is immaterial. Recording is necessary only by way of notice, and that the tenant had. *Gorham* v. *Blazo*, 2 Greenl. 232.

The opinion of the Court was delivered by

Weston C. J. — When the demandant made his attachment, the tenant, the judgment debtor, was in possession of the demanded premises, claiming to hold the same in fee. He held under a deed of warranty from Russell O. Ellis, dated February 7, 1833, who had a deed of warranty from David Gulliver, dated August 20, 1831, Gulliver being at that time in actual possession. Under these deeds Ellis and the defendant successively entered and quietly occupied, up to the time of the demandant's attachment. That attachment and the subsequent levy, whatever error there may have been in the registry, put the demandant, as against the tenant, in the seizin of the premises, as much as if the tenant had at that time given him a deed of the same. And his acceptance of a mortgage from Page, between the attachment and the levy, could not impair the rights of the demandant.

After the levy, as between the parties, the tenant became the tenant at will of the demandant. If he resists his entry, the demandant may treat the tenant as a disseizor, at his election. Whatever right Jonathan Tucker may have derived, from the assignment to him of the mortgage from Page to the tenant, it does not appear that he has entered as mortgagee, or interfered in any manner. The demandant has made out a *prima facie* case. If he would have avoided his title, he should have set up distinctly, in his brief statement, title in another, which he has not done. The demandant at his election may treat him as a disseizor. It is no defence for him to allege, that he is not tenant of the freehold, at least without averring in whom the freehold is. The tenant having made out no available de-

fence, we are not called upon to determine who may have the better title, as between the demandant and Jonathan Tucker. It will be time enough to determine that question, when the parties are before us.

Judgment for the demandant.

INHABITANTS OF SMITHFIELD *versus* INHABITANTS OF BELGRADE.

Where a part of one town has been annexed to another, a pauper residing on the part annexed with one who had contracted with the town to support him, but whose residence had, prior thereto, been in a part not annexed, is not thereby transferred to the town to which the annexation is made — such residence being merely temporary, and not established in that part of the town in which it is.

The settlement of a pauper which is in a part of a town which is annexed to another, though he has removed from such part before the annexation, is transferred to the new town by virtue of St. 1821, c. 122, § 2, which provides that a person so circumstanced "shall have his legal settlement in that town wherein his former dwellingplace or home shall happen upon such division."

The family of a pauper, in his absence and without his assent or knowledge, moved into that part of a town which was subsequently incorporated with part of another as a new town, and received assistance before such incorporation; the pauper returned to his family after the act of incorporation; *it was held*, that such incorporation did not affect his settlement, he having conceived no intention of removal previous thereto.

ASSUMPSIT, for supplies furnished Oliver Stevens, and Timothy Staples and family, paupers, whose settlement was alleged to be in the defendant town.

The parties agreed to submit the cause to the whole Court for their decision, upon the following statement of facts.

Oliver Stevens, a *non compos* boy, had his legal settlement in that part of Dearborn now Smithfield. About six years ago his father died and the family was broken up. Since that time he has been a town pauper, but never resided in that part of Dearborn annexed to Belgrade, until May 1st, 1838, prior to said annexation, which took place by the act passed 22d March, 1839, when he was taken by Jacob Maine, a resident

in that part of Dearborn annexed to Belgrade, on a contract for one year, and actually lived with said Maine until the first of May following the annexation, when he went back to that part of Dearborn now Smithfield, and was there at the time of the incorporation which was on the 28th of Feb. 1840, being supported by said town as a pauper; of which Belgrade was notified by Dearborn, but their liability was denied by said Belgrade.

Timothy Staples and family had a legal settlement in that part of Dearborn annexed to Belgrade, but had left that part prior to said annexation. His family lived in that part of Dearborn that was incorporated into Smithfield at the time of said incorporation, but Staples himself went to Massachusetts in April, 1839, and returned to his family in 1840. Said family moved into that part of Dearborn now Smithfield, in Sept. 1839. Two months after this, they became chargeable, upon which Dearborn notified Belgrade, which town forthwith denied their liability.

It was admitted, that the overseers of the poor of Smithfield gave legal notices of the situation of the paupers, and that they were chargeable, and requested that they should be removed, and did every thing necessary to charge the defendant town, if the paupers, or any of them, had their legal settlement therein; and that the action was seasonably brought; and that the inhabitants of Belgrade returned in due season answers denying their liability to support said paupers, or either of them.

The expenses incurred for the support of Oliver Stevens are forty-one dollars, and for the support of Timothy Staples and family are ten dollars.

Judgment is to be rendered for the sum or sums aforesaid, according as the Court shall determine the liability of the town of Belgrade.

Tenney, for the plaintiffs. The annexation of part of Dearborn to Belgrade, has the same effect as the incorporation of a new town. *Hallowell* v. *Bowdoinham*, 1 Greenl. 129. But it transfers none except those who dwell and have their home on the part set off, at the time of the separation, and have their

legal settlement there. *Fitchburg* v. *Westminster*, 1 Pick. 144; *Sutton* v. *Dana*, 4 Pick. 117. Stevens being a *non compos*, did not prevent his having a home where he dwelt. *Lubec* v. *Eastport*, 3 Greenl. 220. His being a pauper did not prevent his gaining a settlement in Belgrade. The law embraces all persons; making no distinction between those who are and are not paupers. *Windham* v. *Portland*, 4 Mass. R. 384; *Groton* v. *Shirley*, 7 Mass. R. 156. Here, by the agreement, the pauper was settled in Dearborn, before the annexation, and dwelt and had his home on the annexed part. When Smithfield was incorporated, it took no part of Belgrade. Incorporating one town out of several others, did not relieve those towns from liability. The new town is liable only for those who dwell and have a legal settlement within their limits. But here the pauper had no legal settlement in any town. *New Portland* v. *Rumford*, 13 Maine R. 299.

The residence of Staples was in the part annexed to Belgrade. His family had removed to Smithfield in his absence. If his home was in Dearborn, the removal of his family will not affect his residence. *Sidney* v. *Winthrop*, 5 Greenl. 123; Special Laws, c. 553.

Boutelle, for the defendants. The language in the two acts of incorporation, is the same in each case, and does not vary from the 6th mode in c. 122, § 2. The *non compos* had no intention; he could have none; not having the intention, which is the essence of home, or domicil, he had no home; he had a settlement in Dearborn, but the statute requires a home in the part set off. *Upton* v. *Northbridge*, 15 Mass R. 237. He was a mere boarder, residing with Maine for a temporary purpose. *St. George* v. *Deer Isle*, 3 Greenl. 390; *Knox* v. *Waldoborough*, 3 Greenl. 455; *Hallowell* v. *Gardiner*, 1 Greenl. 93. A slave gains no home, and the condition of a *non compos* is no better. Two circumstances must concur — a settlement in the town, and a home on the part annexed, to bring a case within the sixth mode of gaining a settlement by virtue of St. c. 122, § 2.

Staples was absent only for temporary purposes, and aban-

donment is not to be presumed. He returned to his family, and his settlement is to be referred to that of his family. *Richmond* v. *Vassalborough*, 5 Greenl. 396.

The opinion of the Court was delivered by

WESTON C. J. — By the sixth mode of gaining a settlement under the Statute of 1821, c. 122, § 2, it is provided, that upon the creation of a new town, out of a part of one or more old towns, "all persons legally settled in the town or towns, of which such new town is so composed, and who shall actually dwell and have their homes within the bounds of such new town, at the time of its incorporation, shall thereby gain legal settlements in such new town." And it has been decided, that where a part of one existing town is annexed to another, the effect is the same, as to the transfer of settlements, as if a new town had been created out of the two towns. *New Portland* v. *Rumford*, 13 Maine R. 299, and the cases there cited.

By the general law, therefore, if Stevens dwelt and had his home in that part of Dearborn, which was annexed to Belgrade, at the time of the annexation, his legal settlement being before in Dearborn, it was thereby transferred to Belgrade, and not otherwise. He then was, and had been for several years, a town pauper. He had never resided on that part of Dearborn, annexed to Belgrade, until about ten months prior to the annexation, when he was put to live with Jacob Maine, who had his residence on that part of Dearborn so annexed, who had contracted with the town of Dearborn to support him. And we are of opinion, that a temporary residence, under these circumstances, did not establish his home in that part of the town. The effect of an opposite construction would be to transfer all the paupers of Dearborn to Belgrade, if Maine's had been appointed as their temporary residence. A different result is not deducible from the special act of 1839, c. 553, which provided for the annexations, "the inhabitants having a legal settlement" in that part of Dearborn, must be understood to mean such as dwelt, and had their home there at the time.

With regard to Timothy Staples and family, he had left that part of the town, at the passage of the act, and was therefore not transferred in virtue of its provisions. His settlement was in Dearborn. He had removed from there, at the time of the annexation; but his former home was in that part of Dearborn, annexed by that act to Belgrade. His case then falls under another clause of the sixth mode, before referred to, which provides that a person so circumstanced, "shall have his legal settlement in that town, wherein his former dwellingplace or home shall happen to fall upon such division." The settlement of Staples then, and of his family derivatively from him, was transferred to Belgrade, and there remains, unless he subsequently acquired a settlement in Smithfield.

It appears that in September, 1839, the family of Staples moved into the part of Dearborn, now Smithfield, he himself having gone the April before to Massachusetts. Two months after their removal, the family became chargeable to Dearborn, and Staples himself joined them the following April, somewhat more than a month after the incorporation of Smithfield. By the act of incorporation, which passed Feb. 29, 1840, Special Acts of 1840, c. 27, a part of Dearborn, "with the inhabitants having a legal settlement thereon," with parts of other towns, and East Pond plantation, were incorporated into a town, by the name of Smithfield. Staples had at that time never resided in that part of Dearborn. His family had gone there, but whether with his privity or assent, does not appear. They went destitute; becoming in a short time actually chargeable to the town. He joined them the April following the incorporation; but it is not stated that he conceived the intention of doing so at an earlier period. He found them paupers, and he has become chargeable himself. Upon these facts, we cannot regard it as proved, that he was, at the time of the incorporation, an inhabitant of that part of Dearborn, having his legal settlement there. He had then in truth no settlement in Dearborn, his settlement having been legally transferred to Belgrade, before the removal of his family.

Upon the facts agreed, the defendants are liable for the support of Staples and his family, but not of Stevens.

BAXTER CROWELL *versus* OTIS S. MERRICK.

In robberies and larcenies, the civil remedy in behalf of the party injured is suspended, until the criminal prosecution is disposed of; and no suit can be maintained in behalf of the party injured, till after the termination of the criminal prosecution.

EXCEPTIONS to the rulings of REDINGTON J.

This was an action of trover for a number of sheep. Plea, the general issue. It was admitted that the sheep, sued for in this action, if taken by the defendant, were feloniously stolen by him, and that a criminal prosecution is now pending against him for said larceny.

The presiding Judge thereupon ruled that the action could not be maintained, and directed a nonsuit, to which ruling and direction exceptions were filed.

Mason, for the plaintiff. The English rule on the subject is based on the principle, that the goods of the offender are forfeited, in cases of felony. But here there is no such forfeiture; and the consequences of felony, as known to their jurisprudence, do not attach here. *Boardman* v. *Gore*, 15 Mass. R. 336; Big. Dig. Felony, 308; 4 Bl. Com. 94; 4 Bl. Com. 6.

James Adams, for the defendant, argued, that the rule requiring a prosecution in behalf of the public before private remedies were allowed, was based on principles of public policy. *Foster* v. *Tucker*, 3 Greenl. 458; *Boody* v. *Keating*, 4 Greenl. 164.

D. Goodenow, in reply. An injury has been done to an individual, for which he is entitled to a remedy, if he complies with the duties incumbent on him as a citizen. By the constitution of Maine, Art. 1, § 1, 9, 19, 21, property is protected, unusual punishments and forfeitures abolished, and remedies given for all injuries done. The rights of the plaintiff have been invaded. All that the public interests require is, that the public prosecuting officer shall be advised of the offence committed. If the plaintiff's suit be continued till the public prosecution is terminated, that sufficiently protects the public.

By the Court. — By the settled law, as understood in England, and in this State, the nonsuit was properly ordered. *Boody* v. *Keating*, 4 Greenl. 164. As stated by Parker C. J. in *Boardman* v. *Gore & al.* 15 Mass. R. 331, the rule that a civil action, in behalf of the party injured is suspended, until the criminal prosecution is disposed of, is limited to larcenies and robberies. It is contended, that this rule has obtained in the English law, because these offences are there regarded as felonies; and that we have no felonies in this State. Upon whatever recondite reasons, now obsolete, a certain class of offences have been called felonies, they are well known to our law under that appellation. Where the common law has been adopted in this country, we are not at liberty to disregard it, because the reasons, in which it originated, no longer exist. Much of the law in relation to real estate, as at present administered, can be explained only by reference to institutions, and to a state of society, very different from ours; but until changed by the legislative power, it must be regarded as the law of the land. There do however still exist reasons for the rule in question, which are adverted to in the case of *Boody* v. *Keating;* and in our judgment it is still in force, as part of the law of this State.

Exceptions overruled.

AURIN Z. LITTLEFIELD *& al. versus* NATHAN WINSLOW.

Where the defendant had given a bond to convey a tenth of a certain tract of land to the plaintiffs, on certain conditions, and the plaintiffs had agreed to build a dam on said tract, "and that all moneys expended by them for said W. the defendant, are to go towards payment for their tenth of the within named township," and the plaintiffs had not complied with the conditions of their bond, they were not permitted to recover for building the dam.

The term "moneys expended," &c. does not embrace claims for services performed, or moneys expended prior to the date of the agreement in which it is used.

In the construction of contracts, the language used must be limited by the subject matter of the contract.

THIS was an action of assumpsit for services performed and moneys expended in building a dam, one third part of which the plaintiffs claimed to recover; also, for their services in exploring a township of land belonging to the defendant, at his request.

It was agreed, that the plaintiffs could prove that they had performed the services and expended the moneys set forth in their exhibits; but the defendant contested their right to recover of him therefor.

The plaintiffs introduced the following agreement:

"Portland, June 30, 1835.

"This may certify, that I agree to pay one third of the expenses of damming and improving the head of the Austin stream, provided it be done in the best and most permanent manner during my owning the Bald Mountain township. And further agree, if I sell, to take an obligation from the purchasers to do the same. NATHAN WINSLOW."

"To Littlefield & Kerswell."

The dam was built upon a part of this township. The plaintiffs were to have the privilege of being interested in the Bald Mountain township, to the amount of one tenth, at two dollars per acre. The plaintiffs had no legal title to the land, but their right was secured by a bond, dated March 7, 1835, executed by the defendant and Isaac Winslow, which upon its expiration was renewed March 4, 1836, and an extension given.

It did not appear that the plaintiffs had executed any instrument to the defendant, whereby they had obligated themselves to complete the purchase of this land by fulfilling the conditions of the bond.

The defendant introduced the following paper, signed by the plaintiffs:

"Boston, June 24, 1835.

"Mr. Nathan Winslow: You are hereby authorized to sell our interest in the Bald Mountain township, being one tenth, (which you bonded us,) at such price as you sell your part for, and we will be at our part of the expenses attending the same, and allow you what is customary for selling.

"LITTLEFIELD & KERSWELL."

On the back of which was the following writing:

"Portland, June 30, 1835.

"Littlefield & Kerswell are to build a dam to flow Austin pond four feet, and all moneys expended by them for said Winslow is to go towards payment for their tenth, &c. &c.; and it is understood that the land is not to be sold for less than five dollars per acre, on usual credit.

"LITTLEFIELD & KERSWELL."

Upon this evidence, WESTON C. J. before whom the cause was tried, instructed the jury that the services and expenditures upon the dam, were, by their agreement, to go in part payment of one tenth of the land, and that they could not therefore maintain their action against the defendant to recover the same in money.

The counsel for the defendant insisted, that the agreement afforded the same defence to their services and expenditures in exploring the township; but the presiding Judge ruled otherwise, and for this part of their claim the jury returned a verdict in their favor. The jury found that the dam was not built according to contract, and that it was worth $1500.

Tenney, for the defendant, argued, that the memorandum of June 30, 1835, constituted a full defence to the suit. There was to be no liability for making the dam, except in part fulfil-

ment of the bond. *Johnson* v. *Read & al.* 9 Mass. R. 78; *Cook* v. *Jennings*, 7 D. & E. 381; *Cutler* v. *Powell*, 6 D. & E. 328; *Carling* v. *Long*, 1 B. & P. 637; *Appleton* v. *Crowninshield*, 3 Mass. R. 443; *Gray* v. *Blanchard*, 8 Pick. 284; *M'Gaunter* v. *Wilbur*, 1 Cow. 257; *Green* v. *Reynolds*, 2 Johns. 207; *Gazley* v. *Price*, 16 Johns. 267; *Cunningham* v. *Price*, 10 Johns. 213.

The promise being conditional, the plaintiffs cannot recover, unless they show a performance on their part. *Faxon* v. *Mansfield*, 2 Mass. R. 147; *Hayward* v. *Leonard*, 7 Pick. 181; *Hill* v. *Milburn*, 5 Shep. 316; *Norris* v. *Windsor*, 3 Fairf. 393. If the plaintiffs are entitled to recover, they are to be paid in land and not money. The several agreements are to be taken together. *Makepeace* v. *Harv. College*, 10 Pick. 30; *Sibley* v. *Holden*, 10 Pick. 250. The memorandum of June 30 is a defence likewise to the other claims. All was to be paid for in land. It refers to "all moneys, &c." and embraces all claimed. In the construction of contracts, the situation of parties, and the subject matter of the contract, are to be taken into consideration. *Sumner* v. *Williams*, 8 Mass. R. 214; *Fowle* v. *Bigelow*, 10 Mass. R. 379; *Hopkins* v. *Young*, 11 Mass. R. 302; *Wilson* v. *Troup*, 2 Cow. 195; Com. on Contracts, 25.

Wells, for the plaintiffs, insisted, that the agreement of the plaintiffs could not refer to the claim for exploring land, for that was past. "All moneys expended," means moneys to be expended. This phrase refers to past or future expenditures, not both. As it was uncertain whether the plaintiffs would take the land, the true construction of the agreement is, that if taken, then the labor, &c. on the dam was to be accounted for in part payment of the land. By renewing the bond, the former contract is at an end; the defendant remaining debtor for the dam.

The opinion of the Court was delivered by

Shepley J. — The two contracts bearing the same date on the thirtieth day of June, 1835, should be considered together.

They provide in substance, that the plaintiffs should build a dam, in the best and most permanent manner on the Bald Mountain township, to flow the Austin pond four feet, and that the defendant should pay one third part of the expense by allowing it in part payment, for one tenth of the township which he and Isaac Winslow had contracted to sell to them. The plaintiffs contend, that they are entitled to recover the amount thus expended for the defendant, notwithstanding the clause, "and all moneys expended by them for said Winslow are to go towards payment for their tenth of the within named township." The effect of such a construction would be to annex a condition, that the money expended should be so applied, provided they concluded to make the payments and become the purchasers. It appears by the restriction, which the plaintiffs placed upon their license to the defendant to sell their interest at not less than five dollars per acre, that they could not have doubted at that time, that they should make the payments by a sale of their interest or otherwise. They speak of it as" their tenth part, "shewing that they had decided to become the purchasers. And the defendant evidently designed to protect himself against a payment in cash. From an examination of all the papers as well as from the express language of that clause, the intention of both parties is apparent, that the money expended for the defendant in building the dam should be applied to pay in part for their tenth of the land. The memorandum made on the fourth of March following to prolong the time for six months, during which the plaintiffs might make the payments and obtain a title, cannot be considered as a waiver by the defendant of any other right.

The defendant on the contrary contends, that the same clause protects him from the payment in any other manner of other claims, which the plaintiffs may have against him for services or expenses not connected with the building of the dam. And that the parties intended, that the words "all moneys expended by them for said Winslow," should include all moneys expended for all purposes, as well before as afterward. Per-

sons often use general language when speaking of the subject on which the mind is then employed. If another subject be presented to the mind in connexion with it, the language usually gives some indications of it. And when it does not, if general language were not limited to the subject then under consideration, it would occasion mischiefs not only in the common business of life, but in the construction of contracts, and even in judicial proceedings. It was so clearly perceived that the language used should be considered as applicable to the subject of thought only, that it introduced the maxim, *sensus verborum ex causa dicentis accipiendus est, et secundum subjectam materiam.* There is nothing which indicates that services and expenses incurred in exploring the land were the subject of conversation or of thought at that time; and the language must be limited by the subject matter of the contract.

Judgment on the verdict.

STATE *versus* OTIS S. MERRICK.

Possession by the accused, in a prosecution for larceny, of the articles stolen soon after the larceny was committed, raises a reasonable presumption of guilt.

If a reasonable doubt is thrown upon a *prima facie* case of guilt, the party accused is not proved guilty, beyond a reasonable doubt.

The accused, even when the stolen goods are found in his possession, and under his control within a short time after the larceny is committed, and a presumption of guilt is raised, is not bound to show to the reasonable satisfaction of the jury, that he became possessed of them, otherwise than by stealing; the evidence may fall far short of establishing that, and yet create on the minds of the jury a reasonable doubt of his guilt.

EXCEPTIONS from the District Court.

This was an indictment for feloniously stealing, taking and carrying away sixty-three sheep, the property of Baxter Crowell. The defendant pleaded that he was not guilty.

Evidence was introduced by the government, tending to show that the sheep belonged to said Crowell, and were stolen

from him on Friday the twenty-fifth day of October, 1839, after a late hour in the afternoon of that day, and that the same were found in the possession of the defendant afterwards on the evening of the same Friday, he claiming them as his own, and exercising acts of dominion over them; and that he drove them that evening and all that night toward Bangor, at which place he sold them the next day. The defence set up by the defendant was, that he bought the sheep on said Friday evening of a stranger, who was driving them along the road toward Bangor; and evidence tending to prove that fact, was introduced by the defendant. REDINGTON J. who presided at the trial, instructed the jury, that if the government had succeeded in removing from their minds all reasonable and substantial doubts, that the sheep were Crowell's property, and were stolen from him on said Friday evening, and afterwards on the same evening were found in the possession of the defendant, he claiming ownership, and exercising acts of dominion over them; that these facts raised a legal presumption that the defendant had stolen them, sufficient to entitle the government to a verdict, unless the evidence also showed to the reasonable satisfaction of the jury, that the defendant became possessed of the sheep otherwise than by stealing them; that after such legal presumption of guilt had been raised, the burden of proof was upon the defendant to repel that presumption; and if the evidence had failed to produce upon the minds of the jury reasonable satisfaction that the defendant came by the sheep otherwise than by stealing them, the verdict must be against him.

The evidence proved that the larceny (if any larceny there was,) was committed in Pittsfield, in the county of Somerset. The jury returned a verdict of guilty, and the counsel for the defendant, filed exceptions, which were allowed.

Tenney, for the defendant. The facts to which the charges of the Judge apply may all be true, and yet the defendant be innocent. The Judge said the jury were bound to draw the inference of guilt. The facts proved are entitled to consider-

ation; but must the inference of guilt be compulsorily drawn unless the defendant proves his innocence?

There are infinite gradations between guilt and innocence. Before they are authorized to find guilt, all doubts must be removed. Here the jury were directed if they were not satisfied of his innocence to find the defendant guilty — that he must take the burthen, and prove his innocence to their satisfaction. On the contrary the direction should have been to leave the facts proved to the consideration of the jury, whether they were sufficient or not to warrant a conviction. 3 Dane's Abr. 503; 2 Stark. Ev. 840; 1 Phil. Ev. 117. A mere probability that the larceny was committed by another, would authorize an acquittal — but the Court required more, that the defence should be proved. The jury are judges of law and fact. Here the law was taken from their consideration, and they merely directed to draw a certain inference from the facts proved, unless the defence set up, should be established. 4 Bl. Com. 359.

Attorney General, contra. The circumstances proved, established a *prima facie* case on the part of the government. That being established, the burthen of proof, which applies to criminal, as well as civil cases, changes. The defence, whatever it may be, must then be made out to the reasonable satisfaction of the jury. East's Pl. C. 657; Ros. on Cr. Ev. 15.

The opinion of the Court was delivered by

Weston C. J. — In prosecutions for larceny, where the goods are proved to have been stolen, it is a rule of law, applicable in these cases, that possession by the accused, soon after they were stolen, raises a reasonable presumption of his guilt. And unless he can account for that possession, consistently with his innocence, will justify his conviction. "Evidence of this nature is by no means conclusive, and it is stronger or weaker, as the possession is more or less recent." 2 Stark. 449. Such evidence is sufficient to make out a *prima facie* case, on the part of the government, proper to be left to the jury. In the absence of all opposing testimony, *prima facie*

evidence in civil cases, becomes conclusive and cannot be disregarded, without calling for correction on the part of the Court. *Kelley* v. *Jackson & al.* 6 Peters, 622.

When by opposing testimony, reasonable doubt is thrown upon a *prima facie* case of guilt, it can no longer be said that the party accused is proved guilty, beyond a reasonable doubt. The jury are to judge upon the effect of the testimony, taken together. It was in our judgment too strong, to instruct the jury, that they must convict the accused, unless he had proved to their reasonable satisfaction, that he came by the sheep otherwise than by stealing. Proof of good character, may sometimes be the only mode by which an innocent man can repel the presumption of guilt, arising from the recent possession of stolen goods. As for instance, where the party really guilty, to avoid detection, thrusts, unobserved in a crowd, the article stolen into the pocket of another man. This may be done, and the innocent party be unconscious of it at the time. And yet good character is not proof of innocence, although it may be sufficient to raise a reasonable doubt of guilt.

The case finds, that the defendant did adduce evidence, tending to prove that he bought the sheep of a stranger. It may be easily conceived, that this proof may have been strong enough, to create in the minds of the jury a reasonable doubt of his guilt; and yet fall short of establishing the fact beyond a reasonable doubt, that he did so purchase them. In such a case, the instruction required a conviction, although every one of the jury might entertain reasonable doubts of his guilt.

Exceptions sustained.

WILLIAM MARSHALL *versus* JOHN BAKER.

The rule, that parol evidence is not to be received to vary a written instrument, excludes all previous and contemporaneous declarations; but it does not exclude independent and collateral agreements, made after the contract is completed, whether on the same occasion or at a subsequent time.

Such testimony is received to prove that the written contract to which it refers, has become inoperative by reason of a subsequent and independent one.

If a fact, proper for the consideration of the jury, has been submitted to them, their verdict will not be set aside unless there is satisfactory evidence that justice has not been done.

ASSUMPSIT on a note for $26,98, payable to the plaintiff or order, dated Aug. 14, 1830, in one year from date with interest, and signed by said Baker and Eben Vose. To this note there was a subscribing witness. Plea, the general issue. By leave of Court, the name of Vose was stricken out of the writ, there having been no service on him. The defendant introduced a receipt of the following tenor:

"Hallowell, 9 Sept. 1830. Rec'd of Thomas Arnold ten dollars in part of the amount which I paid as his bail in the action in favor of Brooks & Means against him. Also, four dollars in part of the costs of suit. WM. MARSHALL."

The defendant then called Joseph Cutler, who testified that said note was given for a debt in which Vose and Marshall were bail for Thomas Arnold to said Brooks & Means; that said Marshall wanted Vose to secure him for the money he had paid as Arnold's bail, said Marshall having paid the whole debt and costs; and that said Vose procured the defendant to sign the note in suit; that after said note was signed, and before they separated, said Baker asked said Marshall if he would give him up said note if he would show him property of said Arnold, and that Marshall replied that he would. This testimony was objected to, but received.

It appeared from the testimony of Samuel Nelson, that the plaintiff brought him a writ in his favor against one Arnold, in the fall of 1830, he being then constable of Hallowell; that the defendant came with Marshall; that Marshall requested

him to attach some iron as Arnold's property on the writ, which he did, and held the iron in his custody during the day; that by the direction of Marshall or his attorney, he released the iron, they having adjusted the suit, as they said; that Arnold denied the iron belonged to him, but said it belonged to one Sylvester; that Baker told Marshall to hold on to the iron, and said, as was the impression of the witness, that he would indemnify him if he failed. The iron was worth from thirty to forty dollars.

Upon this evidence, WESTON C. J. by whom the cause was tried, instructed the jury that if the note in suit was received by the plaintiff as collateral security for the money he paid for Arnold, he might still pursue his remedy against him; but if as payment, that debt was discharged. That it appeared that the parties supposed that the plaintiff had still a right to call on Arnold, and that if he agreed with Baker that he would give him up his note if he would show him property of Arnold's, it must be understood that the property thus to be shown should be made available to the plaintiff in payment of his debt. That if they were satisfied from the evidence of Nelson that Baker did show the plaintiff property of Arnold, that the plaintiff attached it, and that afterwards the suit was adjusted by a payment of the plaintiff's demand, the note was thereby, by his agreement, discharged, and the plaintiff was not entitled to be paid a second time. That if the amount of the receipt was all the plaintiff realized by this attachment, that amount only was to be allowed the defendant. He further left it to the jury to determine what was to be understood from the statement of the deponent that the suit was adjusted. The jury returned a verdict for the defendant.

If the testimony of Cutler, which was objected to, ought not to have been admitted, or if the instructions given were erroneous, the verdict is to be set aside, and a new trial granted; otherwise, judgment is to be rendered thereon.

Wells, for the plaintiff. The evidence of Cutler should not have been received. It does not show payment, but only a different contract made at the time of giving the note. The

assumption in the instructions that the note was received as collateral, had no foundation in the testimony. The debt which Marshall held against Arnold was discharged, however the parties might consider it. This note was negotiable, and was intended as payment to the plaintiff, it being for the amount due him. The expression, that the suit was adjusted, is no evidence of payment. The receipt given implies that the note was not paid.

Tenney, for the defendant. The giving of the note did not discharge the liability of Arnold. Marshall gave no discharge to Arnold. He might look to the note. He was not compelled to look to Arnold. The agreement then was made, that if property were shown which could be attached, he should, as bail, look to Arnold for the benefit of the defendant. Whether performance of the agreement made could have been compelled, is immaterial, inasmuch as having been performed, it constitutes a good defence.

The meaning of adjusted, if used alone, should be explained by the Court; but here, the word is to be taken in connexion with all the attendant facts in the case, and its meaning was properly submitted to the jury.

The opinion of the Court was delivered by

Shepley J. — The witness, Cutler, states, that the promissory note in suit, was made by Ebenezer Vose and the defendant, as his surety, to the plaintiff to secure him for money which he had paid as bail for Thomas Arnold. Whether the plaintiff became bail at the request of Vose, and received the note for the whole amount paid, or only jointly with Vose at the request of Arnold, and received the note for the half, which Vose should have paid, the case does not clearly state. The testimony of Cutler would seem rather to favor the former supposition, for he does not speak of the note as given for any portion of the amount paid, but "to secure him for the money he had paid as Arnold's bail." Cutler also states that "Baker asked Marshall, that if he would show him property of said Arnold he would give him up said note, and said

Marshall replied, that he would." It is insisted, that this testimony was inadmissible because it varies the terms of a written agreement and makes a different contract for the parties. This parol agreement is stated by Cutler to have been made "after said note was signed and before they separated." The rule, that parol evidence is not to be received to vary a written instrument, excludes all previous and contemporaneous declarations, but it does not exclude independent and collateral agreements made after the contract is completed, whether on the same occasion or at a subsequent time. Such testimony is not used to vary the terms of the written contract, but to prove, that it has become inoperative by reason of a subsequent and independent one. The plaintiff, after he had obtained the note, might agree to deliver it up on the performance of some act by the defendant, and the testimony that he did so, could not be legally excluded. And such an agreement, proved and executed on the part of the defendant, would prevent a recovery on the note.

It is said, that the presiding Judge was incorrect in assuming, that the note might have been taken as collateral security for the amount, which the plaintiff had paid for Arnold, and that he should not have submitted it to the jury, whether they would so find. It appeared from the testimony, that the plaintiff had consented to treat it as collateral by making an agreement with the defendant to proceed against Arnold on his original claim, and by actually bringing a suit against him after receiving the note and collecting a part of the amount of it. This was sufficient to justify, if not to require the submission of that question to the jury.

The instructions relating to the attachment of the property and to the adjustment of the suit submitted the question properly to the jury, whether the whole or a part only of the debt had been paid. The testimony, that the whole was paid, is not very satisfactory. It rests principally on the testimony, that property of sufficient value to pay the debt and costs was attached, and that the suit was settled by the plaintiff or by his order. It might not be in the power of the defendant to

prove the terms of that settlement. While the plaintiff might be presumed to be able to prove the amount, which he actually received. The receipt of the 9th of September, is supposed to exhibit it, but it does not without explanation necessarily prove, that no more was obtained by that suit and attachment. The defendant having shown, that sufficient property was attached and that there was apparently no difficulty in causing it to be applied to the payment of the original claim of the plaintiff, and that he caused the suit to be settled; the Court is not authorized to set aside the verdict, for there is no satisfactory evidence that justice has not been done.

Judgment on the verdict.

JOSEPH J. WEBB *versus* SAMUEL WILSHIRE.

The surety on a promissory note tainted with usury, which has been paid, is admissible in a suit, between the original parties, to prove the usury.

By St. 1834, c. 122, § 4, an action for money had and received may be maintained to recover back the usurious interest paid, the statute not prescribing the form of the action.

This suit may be maintained against the lender, when the note tainted with usury has been negotiated and the money paid by the maker to the holder.

THIS was an action of assumpsit. The declaration contained only a count for money had and received. The plaintiff claimed to recover the amount of a promissory note of hand, dated Nov. 1, 1838, for $14,15, payable to said Wilshire or order, the first day of June, 1839, and interest after, signed by the plaintiff and Isaac F. Ames, who was in fact surety on the note, though not so described therein. It was admitted that the defendant, after the note became due, indorsed it to John Wilshire, who paid the defendant the amount due on the note. The plaintiff paid the amount to said John Wilshire, and then commenced this action to recover the money so paid.

It is admitted that the plaintiff can prove by Isaac F. Ames, the surety on said note, if he can be legally admitted as a

witness, that the note in suit originated from a note for thirty-five dollars, held by the defendant against the plaintiff, and was given to the defendant with Ames, as surety, for usurious interest on said note of thirty-five dollars and was wholly usurious.

Upon these facts the cause was submitted to the decision of the presiding Judge of the District Court, with liberty to except to his decision. REDINGTON J. thereupon ruled that the plaintiff was entitled to maintain his action, to which ruling exceptions were filed and allowed.

Leavitt, for the defendant, contended, that the plaintiff could not recover in this form of action. That as the right to recover was given by Statute, he should have declared upon the Statute, or have set forth in his declaration, the illegal contract. *Livermore* v. *Boswell*, 4 Mass. R. 437; *Harvard College* v. *Soper*, 1 Pick. 177; *Peabody* v. *Hoyt*, 10 Mass. R. 36.

Ames was not a competent witness, as his testimony tends to show the note void in its inception. *Churchill* v. *Suter*, 4 Mass. R. 156.

The suit should have been commenced, if at all, against John Wilshire, to whom the money was paid, and cannot be maintained against the present defendant. St. 1834, c. 122, § 4. This Statute gives the right to recover back the money to the person who paid, and against him who received it. The Statute being penal should be strictly construed. The plaintiff then should recover nothing, if he has made no payment to the defendant. John Wilshire took the note when over due, and subject to any existing defence, and the plaintiff has resisted payment in his hands.

L. Johnson, for the plaintiff. The action is brought under the provisions of St. 1834, c. 122, § 5. Money had and received is the proper form. 2 Stark. Ev. 119; *Morton* v. *Chandler*, 8 Greenl. 9; *Worcester* v. *Eaton*, 11 Mass. R. 375.

The testimony upon legal principles, is receivable. 2 Stark. Ev. 17. The note to which he was a party, is not in suit, nor

here to be impeached. His exclusion would be an extension of the rule of law in this respect. *Buck* v. *Appleton*, 14 Maine R. 284.

The opinion of the Court was delivered by

SHEPLEY J. — The surety on the promissory note, which has been paid, can have no interest in the event of this suit. If he be excluded, it must be because he was a party to it. The rule asserted in the case of *Churchill* v. *Suter*, would not exclude him; for the controversy here is not between an innocent holder of negotiable paper and a party to it, but between the original parties. And to such a case the rule does not apply. *Fox* v. *Whitney*, 16 Mass. R. 118; *Van Schaack* v. *Stafford*, 12 Pick. 565. In this case, the note can hardly be said to be even collaterally in controversy between them. The plaintiff paid the illegal interest secured by the note to John Wilshire, who had paid it to the defendant. The fourth section of the Statute of 1834, c. 122, did not require, that the payment should be made by the plaintiff to the defendant in the action without any intervention. It is sufficient, that the party against whom the suit is brought, being the lender of the money, should have received the illegal interest; and that the party, who institutes the suit, should have paid it. The one who suffers the loss, is allowed to reclaim the amount of it from the one who has been the gainer by it. Having been thus illegally received, it may be recovered back in an action for money had and received, for the statute does not prescribe the form of the action. *Exceptions overruled.*

Nancy Corson *versus* Van R. Tuttle *& al.*

Where a bond was given under a prosecution for the bastardy act, conditioned that the defendant should appear and abide the order of the Court, and there was an order of commitment upon the failure of the defendant to comply with the order of Court, for the maintenance of the child, and to furnish further security, by virtue of which he was committed, and subsequently discharged by due course of law, by taking the poor debtor's oath; *it was held*, that this was not a compliance with the condition of the bond, and that his sureties were not discharged.

St. 1831, c. 487, provides only for the enlargement of the accused from prison, when committed, but does not affect his bond.

Unless the principal be surrendered by his bail, in pursuance of St. 1836, c. 210, the bail are not discharged. It is not enough that he is taken in custody by the sheriff.

This was an action upon a bond given by order of the magistrate before whom the defendant, Van Rensalaer Tuttle, was brought, upon the complaint of the plaintiff under the bastardy act, and was submitted to the Court upon the following agreed statement of facts: —

The bond was dated Aug. 6, 1839. The condition of the bond, after reciting that the plaintiff, upon her examination on oath, had accused the principal defendant, &c. &c. and that the justice had ordered him to give sureties for his appearance at the next term of the District Court, &c. is as follows:— "Now if the said Van Rensalaer Tuttle shall appear at the said Court, and answer to the said accusation and abide the order thereon, this bond shall be void; otherwise, shall remain in full force and virtue, &c. "V. R. Tuttle, (L.S.)

"Wentworth Tuttle." (L.S.)

The complaint referred to in the bond was prosecuted to final judgment. The defendant was convicted, and adjudged to be the father of the child, and ordered to make certain payments specified in the order of the Court, and to give bonds to the plaintiff in the sum of five hundred dollars, and to the inhabitants of Canaan, of which town the plaintiff was an inhabitant, for the same sum. At the time of the rendition of said judgment and the passing of said order, the defendant,

V. R. Tuttle, being in Court and failing to comply with its terms, was ordered into the custody of the sheriff without any objection on his part.

He had not been surrendered in Court at any previous term on his original bond. The sheriff took him into his custody, and he was committed to gaol, whence, after remaining three months, and complying in all respects with the provisions of the act of Feb. 5, 1831, St. 487, § 1, he was discharged by taking the oath before two justices of the peace and the quorum, according to said act.

Hutchinson, for the plaintiff. The bond in suit was taken by virtue of the provisions of St. 1821, c. 72, § 1. It does not require the Court to commit on their final adjudication. If the respondent is committed, it does not discharge the surety. *Taylor* v. *Hughes & al.* 3 Greenl. 433. Before the passage of St. 1831, c. 487, there was no mode by which a person committed could be released. This statute was passed to enable him to obtain his liberty; but was not a repeal of the prior legislation on the subject. When committed by order of the Court, it provides for his release from imprisonment. St. 1836, c. 210, § 2, provides, that the surety on the bond may in certain cases surrender the principal; but not having done it, he is unaffected by his discharge.

Tenney, for the defendants. The defendant, not complying with the order of Court, was then ordered into custody and committed. The statute of 1831, c. 487, was enacted to obviate the effects of the decision in *Taylor* v. *Hughes & al.* But if the terms of the act are complied with, the plaintiff contends that it does not relieve the sureties. In *Taylor* v. *Hughes & al.* the putative father was not ordered into custody; the only order was to pay, give bonds, &c. and the decision rests on the fact of there being no such order. Here, there being a failure to comply with the first order, the last was substituted therefor. Both orders cannot subsist together; nor can the plaintiff resort to the bond.

By act of 1836, c. 210, § 2, the body of the putative father may be surrendered, and it is immaterial by whom. It

is an idle ceremony for the surety to be present at the surrender. The principal may equally well surrender himself. The object of this statute was to give sureties the same rights as bail at common law. *Champion* v. *Noyes*, 2 Mass. R. 481.

The opinion of the Court was delivered by

WESTON C. J. — The true construction of the condition of such a bond, as is in suit in this case, received the consideration of this Court in *Taylor & ux.* v. *Hughes & al.* 3 Greenl. 433. It was there held expressly, that the condition was not performed, unless the party charged complied with the order of Court, for the maintenance of the child, and for the giving of such security, as is required by law. That case is, in our judgment, a just exposition of the condition of the bond. In that case there was no order of commitment, based upon the failure of the defendant to comply with the order for maintenance, and for further security.

Such an order was made here, which was carried into effect. And it is contended that this was a substituted order, a compliance with which fulfilled the condition, and discharged the sureties. But it appears to us to have been, not a substitution for the first order, but as ancillary to it, and made expressly for its enforcement. It might aid, but could not injure, the sureties. The power of the Court was thereby brought to act upon the principal, to compel him to perform what they had undertaken he should do. If it proved effectual, they were thereby discharged; but if not, they were placed in no worse condition. In the case before cited, it is very manifest from the opinion of MELLEN C. J. that a mere order of commitment would not have the effect to relieve the sureties from their liability.

Nor do we find any thing in the statute of 1831, c. 487, which can affect the bond under consideration. It does not refer to the bond of the accused, or to his sureties. It provides only for his enlargement from prison, where he has been committed, in the manner, and upon the conditions, there prescribed. As the commitment was by order of Court, his discharge therefrom by order of law, varies not the obligation

of the bond, which was required and executed for the benefit of the complainant.

The statute of 1836, c. 210, did provide a mode, by which the sureties might be discharged, upon surrendering their principal, at any time before final judgment. This was not done; and we have no authority to extend the relief there afforded, upon any supposed analogy between their liability and that of bail in civil actions. That analogy would not have discharged them upon such surrender, but for express legislative enactment.

Judgment for the plaintiff.

DAVID COLBY *versus* EDWARD P. NORTON *& al.*

A mistaken location of the line between the owners of contiguous lots, is not conclusive between the immediate parties to such location, but as between them the mistake may be corrected.

If one making such erroneous location, sees a third person take a conveyance for a valuable consideration, according to the monuments by him located, he will be concluded thereby.

Ignorance of the true state of his own title, will not excuse a party who by his own representations has misled, though innocently, a purchaser.

THIS was an action of trespass *quare clausum.* Plea, the general issue. A brief statement was filed, in which De Have Norton, as the owner of the premises in dispute, and Edward P. Norton, his servant, defended the several acts for which this suit was brought. The parties were owners of contiguous land, the boundary of which was the question in dispute.

From the report of the case by WESTON C. J. who tried the cause, it appeared that the range lines of the lots in the town of Madison, where the premises were situated, had been surveyed and marked, but the checks on said lines were not run. In the range which embraced the lot in dispute, the corners were marked and numbered on the west line, but not on the east line. The plaintiff, to prove his title, read in evidence a deed dated Feb. 23, 1818, from Peter Sanborn and others, of

part of lot No. 71, beginning at the south-east corner of the same, and thence running north sixty rods.

The north and west lines, and the south-west corner of 71, as delineated in the plan made of the premises in dispute, were proved. The plaintiff was the owner of land south of lot 71. The deed before referred to, conveyed to the plaintiff that part of the lot east of the road on the plan, which passed diagonally through the lot.

William Allen, the surveyor, testified, that from the acknowledged south-west corner of No. 71, to the north line, the distance was one hundred and three rods, and four fifths; that from the same south-west corner he followed an old line easterly, and the same course being pursued, brought him to L on the plan. It appeared, that the old line, leading to L, was run and marked by the plaintiff. The line from the S.W. corner to K, is parallel with the north line, making each end of the lot of equal width. If the sixty rods conveyed to the plaintiff commenced at L, it would give him half of the *locus in quo;* if at K, the whole of it. Forty-nine rods measured from the acknowledged north-east corner, would fall short two or three links of the monument at which the defendant's fence commenced.

The defendants introduced a deed from Thomas Jenness, in whom the title then was, to Sam'l C. Walker, dated June 11, 1824, conveying "part of lot 71, beginning on the north side of said lot, thence carrying the whole length of said lot 49 rods;" also, a deed from said Jenness, (to whom the land had been re-conveyed by Walker,) to John G. Neil, "of all that part of said lot unconveyed to David Colby, and is to be laid out forty-nine rods in width, the whole length of the lot:" also, a deed from said Neil to Edward P. Norton, dated March 5, 1830, "of the part of lot No. 71, which I own by conveyance of Thomas Jenness, according to his deed, dated Nov. 10, 1829;" also, a deed of release from David Colby to John G. Neil, dated March 5, 1830, "of the north part of lot numbered seventy-one, and is all that part of said lot unconveyed to me by Thomas Jenness, and is that part of said lot conveyed

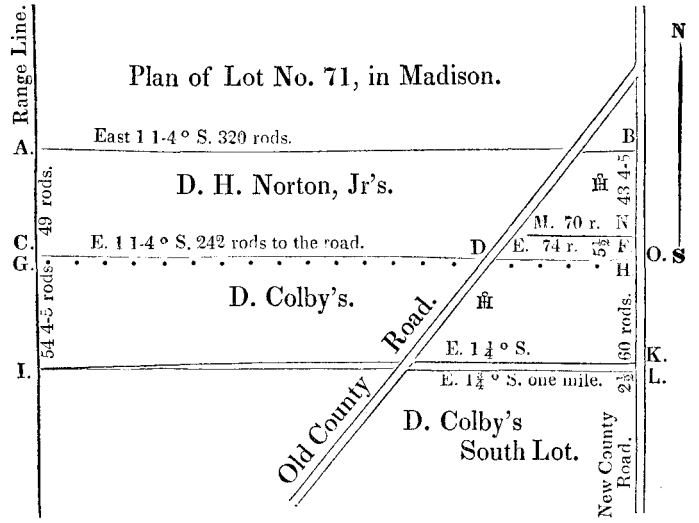
to John G. Neil by Thomas Jenness;" also, a deed from Thomas Jenness to David Colby, dated Sept. 5, 1827, of part of lot numbered 71, "beginning at the County road, running westward to the south-west corner of said lot, thence north about sixty rods to land that I sold to Sam'l C. Walker, thence eastwardly on said Walker's line to the County road, thence on said road to the first mentioned bounds; it being all the land I own in lot 71."

William Thurston testified, that Jenness and the plaintiff, in June 1824, called upon him to run out the land first conveyed to the plaintiff; that Jenness might ascertain how much he had left on the northerly side, to convey to Walker, who with De Have Norton, and others were present; that Jenness submitted it to the plaintiff to determine where the starting point should be, namely, the south east corner of the lot; that the plaintiff shew a corner from which they started, and he measured off for him sixty rods at the east end of the lot, and put up a monument at its termination; he then measured the space from the monument to the north line; that he found the distance two or three feet from forty-nine rods; that Jenness conveyed to Walker by deed, that day, forty-nine rods, to which the plaintiff made no objections.

The plaintiff then called Nathaniel Blackwell, who testified that he measured the west end of the lot and found it one hundred and four rods wide. Both parties were present, and said that on the west side of the road, Norton owned forty-nine rods, and the plaintiff the remainder, and on the east side, the plaintiff owned sixty rods and Norton the remainder.

John Holbrook testified, that in June 1824, he was one of Thurston's chain-men; that Jenness called upon the plaintiff to point out the starting point; that the plaintiff hunted round for the corner, but witness did not recollect seeing any monument; that plaintiff pointed out a spot from which he directed them to start, saying that he knew of no point nearer; that they measured off sixty rods, and put up a monument, a part of which is still standing and is the starting point of the defendants' fence; that they then measured the space thence to

the north line, and found it a few feet short of forty-nine rods, but Jenness said it was so near, he would deed to Walker, forty-nine rods; the plaintiff objecting to his conveying more than there was.



E. F. on which the trespass is alleged to have been committed is claimed by both parties. Colby has enclosed the west half, and Norton the east half by fence.

This plan A, B, I, K, represents the lot No. 71, in Madison, being one mile in length, and one hundred and three rods and twenty links in breadth, according to the lines run by the surveyor, at the request of David Colby, and the dividing line as claimed by him is from C to D, and from M to N, giving De Have Norton, jr. the northerly part of the lot, 49 rods in width, on the west side of the old county road, and $43\frac{4}{5}$ rods wide on the east side of the road.

De Have Norton, jr. admits that the corners A, and B, and the line C, D, are correct unless he is entitled to one full half part of the lot, in that case he claims to the dotted line G, H; but claims at least 49 rods in width the whole length, making C, D, O, the dividing line; he also claims to have the south line of the lot run from I to L, making the east end of the lot $2\frac{1}{2}$ rods wider than the west end. The piece E, F, being about $72\frac{1}{2}$ rods long and $5\frac{1}{2}$ rods wide, is claimed by both parties.

The defendants then produced the record of a former suit for a trespass on the same land, in favor of the plaintiff against De Have Norton, one of the defendants, in which the defendant prevailed.

A nonsuit was entered by consent, subject to the opinion of the Court — and it is agreed that from the foregoing evidence, the Court may draw such inferences as the jury might do; and if in the opinion of the Court the action is sustained the nonsuit is to be set aside — the defendants defaulted, and judgment to be rendered for the plaintiff, for ten dollars damages and costs, otherwise the nonsuit is to stand.

Tenney, for the plaintiff. The plaintiff's title accrued in 1818, six years after Jenness sold to Walker, at which time there was an admeasurement of the land to be conveyed, at which the plaintiff was present, but in which he had no interest. He then pointed out the south-east corner of the lot but in so doing was mistaken. He is not bound by such mistake. Lands can only be conveyed by deed — a mere verbal statement, especially when the party making it is mistaken, cannot pass the title to real estate. *McMillan* v. *Eastman*, 4 Mass. R. 383; *Kimball* v. *Merrill*, 4 Greenl. 368; *Vose* v. *Hardy*, 4 Greenl. 322; *Bott* v. *Burnell*, 11 Mass. R. 163; 1 Stark. Ev. 138; 3 Stark. Ev. 995; *Gove* v. *Richardson*, 4 Greenl. 327; *Linscott* v. *Fernald*, 5 Greenl. 496.

The release of Colby to Neil conveys no portion of the land derived from Jenness and others. The intention of the parties, as ascertainable from their situation, and from the subject matter of the contract, must govern. *Sumner* v. *Williams*, 8 Mass. R. 214; *Fowle* v. *Bigelow*, 10 Mass. R. 379; *Wallis* v. *Wallis*, 1 Mass. R. 218; *Hopkins* v. *Young*, 11 Mass. R. 302; *Ellis* v. *Welsh*, 6 Mass. R. 246; *Leland* v. *Stone*, 10 Mass. R. 460; *Worthington* v. *Hylyer*, 4 Mass. R. 196; *Wilson* v. *Troup*, 2 Cow. 195; *Watson* v. *Boylston*, 5 Cow. 411; Com. on Contracts, 23. Jenness could not have intended to convey to Walker or Neil any portion of the lot previously conveyed. He expressly says, "all that part unconveyed to Colby." So Colby, by his deed of release, uses

the same form of expression, releasing all unconveyed, &c. He did not thereby intend to diminish his sixty acres. Neil, the same day, conveys what he acquired from Jenness to the defendant, but he did not thereby intend to convey any portion belonging to the plaintiff. The plaintiff should have, his deed being first, the number of rods therein described — and the residue only should belong to the tenants.

Wells, for the defendants. The boundary between the parties is determined by the survey of 1824, at which the plaintiff was present and when he fixed the starting point from which the location was made. Those from whom the defendants derive title, purchased, relying on the correctness of the monuments then established, and it would be a fraud in them to permit the plaintiff now to recover. *Hatch* v. *Kimball*, 13 Maine R. 146. This, if not conclusive, is at any rate very strong evidence of the true boundaries of the parties. *Gove* v. *Richardson*, 4 Greenl. 327 ; *Dryden* v. *Jephersen*, 18 Pick. 390. If there was a mistake, the plaintiff must be bound by it. The record of the former judgment was admissible. 1 Stark. Ev. 206 ; *Eastman* v. *Cooper*, 15 Pick. 276.

The opinion of the Court was delivered by

Weston C. J. — The plaintiff, at the time of his purchase from Sanborn and others, was the owner of the adjoining land south. If therefore he extended the southerly line of his new purchase, on number seventy-one, farther south than it ought to go, he thereby restricted the limits of the land he owned before. Jenness, who was one of the grantors in his deed, and the owner of the residue of seventy-one, being about to sell part of it, was desirous of ascertaining how far the plaintiff was entitled to go northerly. Thereupon his sixty rods were measured off, from a starting point shown by himself, and a monument put up at their termination in his presence. In this location, Jenness relied upon the plaintiff, who lived on or near the premises. It was the establishment of bounds between the owners of contiguous lands, which ought not lightly to be disturbed. If, however, a mistake can be clearly shown, which

may be considered as having been done in the present case, a location thus made is not conclusive between the immediate parties. A correction of the mistake between the plaintiff and Jenness, could take nothing from the latter, which in justice and equity he ought to retain. But as against the grantee of Jenness, the case is differently presented.

The monument was put up for the avowed purpose, and this known to the plaintiff, of apprising Walker, the purchaser from Jenness, how far he would be entitled to go southerly. Jenness thereupon conveyed to Walker, by a general deed of warranty, the northerly part of number seventy-one, extending from the north line, southerly, forty-nine rods in width. This conveyance was made on the same day the monument was put up, and without objection on the part of the plaintiff. It is now found, by actual admeasurement, that forty-nine rods, from the northerly line, will terminate at the monument. And to that point, from which their fence runs, by a continuous line westerly, Walker, and those who held under him, have extended their cultivation and improvement. The plaintiff assumes to know how far his land extended northerly, he proceeds to locate it in his own way, he assists in putting up a monument marking its north-easterly limits. In pursuance of this location, he sees a third person take a conveyance, for a valuable consideration, of the owner of the land adjoining, extending to that point. If he had witnessed such a conveyance, and had been merely passive, it has been held, that he would have been concluded. 1 Johns. Ch. 344; *Hatch* v. *Kimball*, 16 Maine R. 146.

If it should be said the plaintiff acted under a mistake, there are cases, where ignorance of title will not excuse a party; "for if he actually misleads a purchaser by his own representations, though innocently, the maxim is justly applied to him, that where one of two innocent persons must suffer, he shall suffer, who, by his own acts, occasioned the confidence and the loss." 1 Story's Com. on Equity, 377, § 387, and the cases there cited.

But there is strong proof of the acquiescence of the plaintiff in this location, under his hand and seal, made sixteen years after Walker's purchase, he and those holding under him, in the mean time having claimed and occupied the forty-nine rods. In November, 1829, Jenness, who had re-purchased of Walker, conveyed to John G. Neil the north half part of number seventy-one, "all that part of said lot unconveyed to David Colby, and is to be laid out forty-nine rods in width, the whole length of the lot, to contain ninety-eight acres more or less." And in March, 1830, the plaintiff, by his deed, released to Neil, with warranty against all persons claiming under him, all that part of lot, number seventy-one, unconveyed to him by Thomas Jenness, "and is that part of said lot, conveyed to John G. Neil by said Jenness, containing ninety-eight acres more or less." It may be contended, that the controlling part of the description is, that it embraced what Jenness had not conveyed to him. But it referred to and confirmed the deed from Jenness to Neil. That declared the land conveyed to be forty-nine rods wide in its whole length. That accorded with the uniform actual possession. Nobody but the plaintiff could restrict its width. He took an active part in the location, when it was first made. He had acquiesced in its continuance ; and finally by deed, ratified the conveyance by Jenness to Neil, describing the land, in its whole extent, to be forty-nine rods wide. In our judgment he ought not now to be permitted to disturb a line, established from the beginning with his privity and assent. The effect of the deed from the plaintiff to Neil, under whom the defendant claims, is not impaired upon the ground, that it may have been made with a view to extinguish any color of title, the plaintiff may have derived from other sources.

Nonsuit confirmed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT, JUNE TERM, 1841.

JEREMIAH P. FOWLES *versus* SIMON PINDAR *& als.*

The admission, on the back of the receipt, by the receiptors of personal property which had been attached, of a "due and legal demand," is not sufficient proof of the continuance of the lien upon the property, or that the demand was made within thirty days from the rendition of judgment. [EMERY J. dissenting.]

Where by the terms of the receipt, a demand on one is to have the same effect as if made upon all, whether the admission of one upon other points should be conclusive upon the other receiptors — *quære.*

THIS was an action of assumpsit upon a receipt for property attached by the plaintiff, as a deputy sheriff, in a suit in favor of *Samuel H. Blake* v. *Samuel McGaffy & al.* and dated July 8, 1836.

The plaintiff introduced a receipt, in the usual form, signed by the defendants, for certain property attached in the suit, *Blake* v. *M'Gaffy & al.* which was returnable to the next October term of the S. J. Court, by which they promised safely to keep the property attached, and return the same to said Fowles, or his successor; and further agreed that a demand on any one of them should be binding on the whole.

On the back of this was the following indorsement:

"Sept. 29, 1837. I hereby acknowledge a due and legal demand made by the within named Fowles, for the property mentioned in the within receipt; and also a demand made by

A. H. Hitchcock, deputy sheriff, he having the execution present at the time. Samuel McGaffy."

Upon this evidence, EMERY J. before whom the trial was had, instructed the jury that the admission of McGaffy on the back of said receipt, was sufficient proof of the defendants' liability, and that the measure of damages was the value of such of the property attached, as was really the property of the debtor, and interest from the demand, and from the admission they were authorized to presume and infer that all necessary steps had been taken to charge the receiptors.

The jury returned a verdict for the plaintiff and the defendants filed exceptions to the above ruling of the Court.

Rogers, for the defendants. There is no proof that there was a judgment; or if one, when it was obtained, or when execution issued thereon, if at all. It does not appear that the execution issued within thirty days from the rendition of judgment. The plaintiff here seeks to recover without showing any liability over. The language of the indorsement imports no more than that a demand has been made. It does not prove the existence of a judgment or the issuing of an execution. Those facts can only be proved by the records of the Court.

Blake, for the plaintiff. A "due and legal demand" is admitted. Legal would have no meaning unless it were made within the thirty days from the rendition of judgment. Fowles had all the notice necessary to protect himself, and to fix the liability of the defendants. *Carr* v. *Farley*, 3 *Fairf.* 329; *Jewett* v. *Torrey*, 11 Mass. R. 219.

The opinion of the Court (EMERY J. dissenting,) was delivered by

WESTON C. J. — A receipt given to an officer, upon the attachment of personal property, is an instrument much in use, and has often been presented to the consideration of the Court. It is designed for the security of the officer, and for that alone. Hence if the attachment is dissolved, and the property has gone back to the debtor, the officer can recover

only nominal damages upon the receipt. *Norris* v. *Bridgham*, 14 Maine R. 429, and the cases there cited.

In order therefore to hold the receiptors liable for the value of the property, to respond the judgment of the attaching creditor, a demand therefor is to be made within thirty days from the rendition of judgment, by an officer having the execution, which issued thereon. A demand upon one, is by the terms of the receipt in question, to have the same effect, as if made upon all. It may admit of question, whether the admission of one, upon other points should be conclusive upon the other receiptors. If false in fact, they should be permitted to disprove the admission, as fraudulent and collusive. But taking all the admissions, indorsed on the receipt, to be true, they are not sufficient to show the liability of the plaintiff to the creditor. "A due and legal" demand is thereby admitted, both by the plaintiff and by the officer having the execution. If it could have been obtained, while remaining the property of the debtor, the officer to whom the service of the execution was confided, was bound to seize and sell it, according to law. And it may have been duly and legally demanded for this purpose, although the thirty days from the judgment had then elapsed. It is contended, that the admission of the continuance of the lien, is implied by the terms, due and legal. This may have been intended; but a majority of the Court do not regard it as sufficiently explicit to amount to affirmative proof, that the demand was made, within the thirty days. If such was the fact, it may be shown on another trial. *New trial granted.*

Emery J. — Here was no proposition to disprove the admission as fraudulent and collusive. In the receipt, it was agreed by all the signers of it, "that a demand on any one of them for said property shall be binding on the whole." And on the 29th of Sept. 1837, Samuel McGaffy, one of the signers of the receipt, in writing by him signed, on the back of the receipt says, "I hereby acknowledge a due and legal demand, made by the within named Fowles for the property

mentioned in the within receipt, and also a demand made by A. H. Hitchcock, deputy sheriff, he having the execution present at the time."

From this it appears to me, that the jury were authorized to presume and infer that all necessary steps were taken to charge the receiptors; especially as there was no opposing evidence. It constituted a *prima facie* case for the plaintiff. *Carr* v. *Farley*, 3 Fairf. 328.

In my judgment a new trial ought not to be granted.

WIGGINS HILL *versus* JOEL HILLS and STILLWATER CANAL CORPORATION, Trustee.

An appeal from the judgment of the District Court in a matter of law, without any exceptions being filed and allowed, is irregularly brought into this Court, and must be dismissed.

THIS was an appeal from the judgment of the District Court, charging the trustee. No exceptions to the decision of the Court below were filed or allowed.

I. Washburn, for the trustee.

H. Warren, for the plaintiff.

The opinion of the Court was delivered by

SHEPLEY J. — This case appears to have been brought into this Court by appeal from a judgment of the District Judge, adjudging the corporation to be chargeable as the trustee of the defendant without any exceptions filed and allowed. And the only appeal on a question of law, permitted by the Statute creating that Court, is to be made after exceptions are filed and allowed. The action having been irregularly brought into this Court must be dismissed.

DAVID S. SUTHERLAND *versus* NEHEMIAH KITTRIDGE.

Exceptions to an amendment made by leave of Court, must be presented to the Court granting the same, before its adjournment; and if not so presented, the Court will not regard the question of the legality of the amendment, as regularly before them.

Where the defendant and another employed a third person to drive a quantity of lumber at a certain stipulated rate *per* M, to be paid by each party in proportion to their interest, and agreed that such person might employ the plaintiff on their account, and that his services should be deducted from the stipulated price, — the certificate of such third person, directed to the defendant, as to the number of days the plaintiff labored with him, is not admissible as evidence to charge the defendant; though it is proved that the other owner of the lumber settled for his proportional share of the expense upon that basis, and communicated the fact to the defendant, who made no objection.

EXCEPTIONS from the District Court, CHANDLER J. presiding.

This was an action of assumpsit on an account annexed. The writ was made returnable to the October Term of the Court of Common Pleas, 1837, and was, when sued out, in the name of James Sutherland, and purported to be indorsed by him. At the October Term of the Common Pleas, 1838, the plaintiff moved for leave to amend, which was entered on the docket. The writ, when produced in the trial of the cause, at the October Term of the District Court, 1839, appeared to have been amended by striking out the name of James and inserting instead thereof the name of David S. Sutherland, while the indorsement was unaltered.

The counsel for the defendant stated, that at the time of the proposed amendment, the presiding Judge was informed of the amendment desired, but that the question was not discussed, and no judgment was passed upon it, but leave to amend was entered on the docket, without any particular specification of the amendment; and he claimed a right to object to the amendment.

The counsel for the plaintiff asserted that the amendment was made in pursuance of leave granted to make this specific alteration — and that the defendant was not entitled to his objection. The presiding Judge, under these circumstances declined interfering, and ordered the cause for trial.

The plaintiff, to prove his claim, called one Barzillai Brown, who testified that the defendant and he owned each a lot of logs in the Penobscot, and that one Orne was employed by them, to drive said logs to the boom, for which he was to receive a stipulated sum per thousand feet; and that it was further agreed between him (Brown,) Kittridge and Orne that Brown and Kitteridge might employ the plaintiff to aid him in driving, and such sums as they should have to pay him for his services, should be deducted from the sum which would otherwise be due said Orne, and that they, Brown and Kittridge, were to pay the plaintiff for his services in proportion to the quantity of logs respectively owned by each; that the defendant owned two thirds, and the plaintiff one third of the logs driven; that the plaintiff handed him a letter purporting to be signed by said Orne, and which the witness testified to be his signature, and directed to the defendant, in which was specified the number of days that the plaintiff had worked for him; that he, Brown, settled with the plaintiff for his share, according to the time specified in said paper, and paid him for the same; of which fact the defendant was informed. The paper signed by Orne was offered and read to the jury, subject to exception by the defendant's counsel.

The jury returned a verdict for the plaintiff; and exceptions were filed to the ruling of the Court.

Rowe, for the defendant. The amendment made was not within the provisions of St. of 1821, c. 59, § 16. The writ was right originally. The account sued for, was one due James Sutherland, who indorsed the writ. The amendment was the substitution of one plaintiff for another; and of one cause of action for another. The defendant was compelled to answer to a new plaintiff, and was deprived of the defence which he had to the suit, as it was when commenced. *Redington* v. *Farrar*, 5 Greenl. 379; *Tinkham* v. *Arnold*, 2 Greenl. 120; *Haynes* v. *Morgan*, 3 Mass. R. 210. The letter of Orne was hearsay, not under oath, and on no principle should it have been received. Orne was a competent witness, and should have been called.

J. Appleton, for the plaintiff. A misnomer can only be taken advantage of by plea in abatement. *Stafford* v. *Bolton*, 1 B. & P. 44; *Morley* v. *Law*, 2 B. & B. 34; 1 Chitty's Pleading, 440.

The amendment was properly made. *Gilbert* v. *Nantucket Bank*, 5 Mass. R. 99; *Sherman* v. *Conn. Bridge*, 11 Mass. R. 335; *Boughton* v. *Freese*, 3 Camp. 99; *Coleman* v. *Collins*, 2 Hall's R. 569; *Crawford* v. *Satcheverill*, 2 Str. 1218; *Seeley* v. *Boon*, Coxe's R. 138; *Smith* v. *Patten*, 6 Taunt. 115; *Fogg* v. *Greene*, 4 Shep. 282; *Tobey* v. *Claflin*, 3 Sum. 379.

The certificate of Orne, he being the agent of the defendant, as to the amount of labor done by the plaintiff, was rightly received. *Hood* v. *Reeve*, 3 C. & P. 532.

The opinion of the Court was delivered by

Weston C. J. — The amendment of the writ, which is objected to, was made and allowed three terms before these exceptions were taken. If the amendment was exceptionable, the counsel for the defendant should have pursued the course prescribed by law, which provides, that the party aggrieved at any opinion, direction or judgment of the Court may except thereto, but his exceptions must be presented to the Court before its adjournment, and if conformable to the truth of the case, they are to be allowed; and thereupon all further proceedings in that Court are to be stayed. Statute of 1822, c. 193, § 5; Statute of 1839, c. 373, § 5. As the case is presented, we cannot regard this point as regularly before us.

With respect to the certificate of David Orne, we do not perceive upon what legal principle it could be received in evidence. He should have been called as a witness. It was not the act of an agent, in the discharge of his agency. The silence of the defendant, when apprised by Brown that he had settled with the plaintiff, according to that certificate, does not necessarily charge him with its adoption. He had no control over Brown, who was acting independently, with regard to his own proportion. *Exceptions sustained.*

JOSEPH WHIPPLE *versus* THOMAS GILPATRICK.

Where property is sold and delivered upon the condition that the title is not to pass till payment be made, and the conditional vendee sells the same without performance of the condition, trover may be maintained by the first vendor against the last purchaser, without demand upon and refusal by him to surrender the same.

TROVER for a horse. The writ was dated Oct. 6, 1836. From the report of SHEPLEY J. who tried the cause, it appeared that the plaintiff formerly owned the horse, and that in Jan. 1836, he let one Edmund Webber have the horse.

There was testimony tending to prove that Webber purchased the horse, and was to have paid one hundred and thirty dollars for the same, by a pair of oxen, to be appraised and delivered in April then next, the remainder to be paid in June or September following, and that the horse was not to be Webber's unless he paid according to agreement; and there was testimony tending to prove that the horse was sold to Webber unconditionally.

It appeared by the testimony of said Webber, that he had the oxen ready to be delivered at the time and place agreed upon for delivering the same, and for more than a year after; and that the plaintiff never called upon him for the same, or for any thing in payment of the horse.

The defendant was proved to have been in possession of the horse, claiming to have purchased him of Webber, prior to the suing out of the plaintiff's writ. There was testimony introduced tending to show a demand and refusal upon the defendant, and that there was no refusal.

The cause was submitted to the jury with instructions to find for the plaintiff, if they believed, from the evidence, that it was agreed that the horse should continue to be the plaintiff's property, unless paid for; and if not, to find for the defendant; and to return, with their verdict, whether there was or was not, a demand and refusal.

The jury returned a verdict for the plaintiff, and found that there was no refusal on the part of the defendant to deliver up

the property demanded; which verdict was to be set aside, if the plaintiff, on the whole finding, was not entitled to recover.

J. Appleton, for the defendant. The agreement between the plaintiff and Webber is a mere personal one, and not binding upon the property. *Howes* v. *Ball*, 14 Eng. C. Law R. 90. Webber is not proved to have been in fault. No suit could be maintained against him without demand. The defendant came rightfully into possession by delivery from him.

The instruction of the presiding Judge assumed the sale to be conditional. If so, the conditional vendee acquired the property subject to the condition annexed. He had rights in it. Whatever were his rights, thus acquired, they might be transferred. It is incident to any right of contract, that it may be transferred. The property being sold, the purchaser succeeded to the rights of his vendee, and held a defeasible estate in the property thus purchased. *Shepherd's Touchstone*, 118, 120; Story on Bailments, 257. In the case of real estate, where the estate is forfeited for the non-performance of a condition, entry is necessary to take advantage of condition broken. *Canal Co.* v. *Rail Road Co.* 4 Gill & Johns. 121; *Willard* v. *Henry*, 2 N. H. R. 120. An action cannot be maintained without entry. *Gray* v. *Blanchard*, 8 Pick. 284; *Chalker* v. *Chalker*, 1 Conn. R. 79. Analogous to entry in real, is demand in personal estate. The defendant, succeeding to the rights of Webber, could not be divested of his purchase without demand and notice, and an opportunity to comply with the terms of the purchase. *Davis* v. *Emery*, 3 Law Reporter, 436. The property coming into the hands of the defendant by delivery from one having the lawful possession, trover cannot be supported unless there has been a demand and refusal. *Nelson* v. *Merriam*, 4 Pick. 250; 3 Stark. Ev. 1495. By no other rule of law can the rights of all parties be protected, and those of no one injured.

I. Washburn, for the plaintiff. The sale of Webber was tortious. A demand and refusal, in that case, was unnecessary. *Tibbetts* v. *Towle*, 3 Fairf. 341; *Sawyer* v. *Shaw*, 9 Greenl.

47; *Badlam* v. *Tucker*, 1 Pick. 397; *Lunt* v. *Whitaker*, 1 Fairf. 310; *Parsons* v. *Webb*, 8 Greenl. 38; *Woodbury* v. *Long*, 8 Pick. 544; *Hunt* v. *Holton*, 13 Pick. 216; *Galvin* v. *Bacon*, 2 Fairf. 28. The mere readiness to pay, on the part of Webber, even if proved to exist, constitutes no defence. There was no payment, nor offer to pay. The oxen were never appraised, nor set apart for the plaintiff. They never vested in him. *Bean* v. *Simpson*, 16 Maine R. 49; *Wyman* v. *Winslow*, 2 Fairf. 398.

By the Court. — In the present case, the title of Webber to the horse was conditional, and in case of the non-performance of the condition, upon which alone his title depended, he had none. To have entitled him to the property, he should have shown performance, or an offer to perform. The oxen, which were to go in payment, either in part or in the whole, for the horse, were neither tendered nor appraised. It was the duty of Webber to take the first step. He has done nothing; and by his omission to do his duty, he has forfeited all claims to the property conditionally sold. The plaintiff, there having been no performance of the condition, was entitled to the possession of the property sold; and the defendant, as against him, has no right to retain the same. The defendant having the possession without title, no demand was necessary.

Judgment on the verdict.

MARY KINSLEY *versus* WILLIAM ABBOTT, Adm'r.

Land conveyed to two in mortgage, as security for a debt due them, is held by the mortgagees before foreclosure as joint tenants.

In case of the death of one of the mortgagees the survivor is entitled to possession of the mortgage and notes.

When one of the co-mortgagees, having possession of the notes, had collected a portion of them, and retained the money collected, and then died insolvent — it was *held*, that the survivor had a right to the possession of the mortgage securities, and might, from the proceeds of the residue, retain sufficient to equalize the amounts collected by each.

THIS is an action of assumpsit, for money had and received by the defendant's intestate, during his lifetime, and by the defendant, as administrator, after his death, which is submitted to the decision of the Court on the following statement of facts, with an agreement, that the Court may determine the several questions of law arising upon those facts, without reference to the form of the action or the party plaintiff.

On the 27th of Nov. 1838, Enoch Brown and Samuel J. Gardiner purchased and took a deed of a tract of land in Bangor, called the Leavitt Place, which was surveyed and divided into fifteen lots. These lots were sold previous to the death of Enoch Brown, who died in Jan. 1839, insolvent, except lots No. 13 and 14, and mortgages were taken to secure the purchase money. Gardiner having advanced the cash for the original purchase, Brown repaid him this advance by assigning to him the mortgages and notes taken for lots No. 1, 8 and 15. The mortgages and notes were left in the hands of Brown, who made collections, as well of the mortgages which were the sole property of said Gardiner, as of those which were the common property, and from time to time paid over the money collected to Gardiner. On the 24th of July, 1837, Brown and Gardiner made a partial settlement, at which time Brown gave him his note for $172, 34, which remains unpaid in the plaintiff's hands. Previous to the death of Brown, Gardiner, with his knowledge and assent, assigned all his interest in the notes and mortgages to the plaintiff. The collections were mostly made before this assignment. At the death of Brown there

was a balance in his hands, of money collected, both on account of the mortgage notes belonging to Gardiner alone, and from those which belonged to him and Brown. A moiety now due on the unpaid mortgages, will be more than sufficient to pay the money collected by Brown, on account of the mortgages and notes holden in severalty and in common.

The defendant, who was duly appointed administrator on the estate of Brown, caused a moiety of the unsold lots and the notes and mortgages held in common, to be inventoried as the property of his intestate, and has collected $255, on the mortgages owned in common, half of which has been duly paid the plaintiff. The plaintiff has demanded the other moiety and the notes and mortgages owned in common. The defendant is willing to settle the estate according to the legal rights of all interested.

Written arguments were furnished by the counsel in this case.

D. Perham. 1. It is admitted, that from the joint property Brown received more than his share, which remains unaccounted for; and that the notes and securities which were in his hands at his decease, are now in the hands of the defendant. The plaintiff contends, that her equal share of what has been received, as well as of what is due, should be a charge upon the common fund, and that she should not be subjected to a dividend. In the latter event, the intestate's estate will have received more, and the plaintiff less, than the equal proportion belonging to each; in the former, each will receive their just share. Were Brown alive, he could not prevent this; and having deceased, no new rights are thereby acquired to his estate. The act of God injures no one.

2. The estate being insolvent, the creditors of Brown have no greater rights than Brown. They can claim only through him; and their claim will be only for a moiety after all charges on the common fund shall be satisfied.

3. The plaintiff, as survivor, has a right to possession of the notes and mortgages, to enable her to collect them; and when collected, she will be liable to the defendant only for the bal-

ance due after a final settlement of all moneys collected. *Wilby* v. *Phinny, Adm'r*, 15 Mass. R. 116. Both had an equal right to the possession of the common fund, while living; the survivor now has that right — and having it, may thus protect himself.

W. Abbott, pro se. By St. c. 51, § 25, it is provided, that all insolvent estates shall be equally divided among the creditors. Unless it can be shown that the plaintiff, at the time of the death of the defendant's intestate, had a lien upon their common property, her claim must share the fate of the claims of other creditors. This transaction was not a partnership, but a mere tenancy in common. *Harding* v. *Foxcroft*, 6 Greenl. 76; *Thorndike* v. *DeWolf*, 6 Pick. 120; *Rice* v. *Austin*, 17 Mass. R. 197; *Jackson* v. *Robinson*, 3 Mason, 138.

The notes and mortgages having been placed in Mr. Brown's hands for collection, he was liable personally, for the money thus received, upon demand; and having given a note upon settlement, any lien, if any existed, was thereby destroyed.

The personal estate of an intestate vests in his administrator, and without question, a mortgage is personal estate. 1 Williams on Ex'rs, 431. The right of a joint mortgagee devolves on his executor; the remedy survives to his companion, who will be liable to account with the executor. Ibid. 546; *Randall* v. *Phillips*, 3 Mason, 378.

It is admitted, that mutual demands existing at the time of his death, may be offset. *McDonald* v. *Webster*, 2 Mass. R. 498. But the demand of the plaintiff against the estate of Brown, and the demand against her for money collected on the mortgages after his death, are not *mutual demands*. On the death of Brown, a moiety of the mortgages uncollected vested in the defendant; and upon payment to the plaintiff, he would be entitled to half. 2 Pow. on Mort. (Rand's ed.) 671. An action may be maintained by the defendant in his own name for that proportion. *Mowry* v. *Adams*, 14 Mass. R. 327; 1 Williams on Ex'rs, 567–8. In an action by an executor in his own name to recover money due the testator, *in his lifetime*, and received by the defendant *after his death*, the defendant

cannot set off a debt due to him from the testator. *Shipman* v. *Thompson*, Willes, 103; 2 Will. on Ex'rs, 1153; *Jarvis, Adm'r*, v. *Rogers*, 15 Mass. R. 414–416.

The opinion of the Court was delivered by

SHEPLEY J. — The plaintiff, by assignment, with the consent of the intestate, has acquired the same rights, which Gardiner would have had in the joint property. The intestate and Gardiner were mortgagees of certain lots of land to secure debts due to them jointly. They could not be considered as partners; nor can the survivor claim by virtue of a lien on the securities. It was decided, in the case of *Appleton* v. *Boyd*, 7 Mass. R. 131, that a conveyance in mortgage to two persons to secure the payment of a debt jointly due to them, did not come within the statute providing, that conveyances to two or more shall be adjudged to convey estates in common, unless a different intention be therein disclosed. And of course, that they held the estate in such a case as joint tenants. In the case of *Goodwin* v. *Richardson*, 11 Mass. R. 469, while the case of *Appleton* v. *Boyd* was approved, it was decided, that the foreclosure of the mortgage operated as a new purchase, and that the grantees afterwards held the estate as tenants in common. In *Randall* v. *Phillips*, 3 Mason's R. 378, the case of *Appleton* v. *Boyd* is alluded to as having been erroneously decided, and it is there shown, that one of the reasons assigned, viz. that "upon any other construction but one moiety of the mortgaged premises would remain as collateral security for the joint debt," was founded on an erroneous view of the law. But another reason assigned was, that "as upon the death of either mortgagee the remedy to recover the debt would survive, we are of opinion, that it was the intent of the parties, that the mortgage or collateral security should comport with that remedy; and for this purpose that the mortgaged estate should survive."

It may be added, that the estate of mortgagees would not come within the mischief, which the Statute was designed to remedy. That mischief was to prevent the survivor from ac-

quiring the whole estate by the death of the other grantee. While the estate continues to be an estate in mortgage, no such result can take place, for it is only security for the debt, and the whole interest in that does not become vested in the survivor. It is the remedy only, which is vested in the survivor, who must account with the legal representative of the deceased, for his share of the debt. There are also difficulties attending the doctrine, that the mortgaged estate is held as a tenancy in common after the death of one of two mortgagees. The security for the debt would be divided, and the remedy upon it might be. The foreclosure, under different suits, might take place at different times, and the right to redeem one half expire before that of the other. There might be a difficulty in compelling the heirs of the one deceased to aid in the foreclosure; and if they should enter and take the rents and profits of one half of the estate, there might be serious difficulties arising from their want of ability to refund, or other cause, in adjusting the rights between the mortgagor, or his assignee, and the mortgagee and heirs. The rights of the mortgagor might be protected by a process in equity, but in case the heirs were unable to pay, and had no interest in the debt, the effect would be only to throw the loss upon those entitled to the fruits of the contract secured by the mortgage. And it may often happen that the executor, or administrator may be required to appropriate these fruits in such a manner as to exclude the heirs from all beneficial interest in them. No practical inconvenience has been experienced from the construction given to the Statute in the case of *Appleton* v. *Boyd*, and none is apprehended. By it the most simple remedies are afforded, with the least liability to inconvenience and loss; and it is not perceived, that any legal principle, or expediency requires a departure from it. The survivor, therefore, in this case, will be entitled to take possession of the mortgage securities, and from them obtain her own share of the debt secured by them; and to recover from the administrator what he has collected on them.

JOHN H. PILLSBURY *versus* OTIS SMALL.

In a suit against the sheriff for neglecting to satisfy an execution upon goods which had been attached and receipted for on the original writ, a judgment debtor, who is likewise a receiptor, is a competent witness for the sheriff.

There is no constructive possession of goods attached, in the officer, after he has left them in the possession of the debtor.

The sheriff is not liable for goods attached by a deputy of his predecessor, which were receipted for; though the same individual was a deputy of his when the execution in the suit upon which the attachment was made, was placed in his hands.

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

This was an action of the case against the defendant, late sheriff of the County of Penobscot, for the default of Abijah Jones, lately a deputy under the defendant, in neglecting to satisfy an execution upon goods attached by said Jones on a writ in favor of the plaintiff against Robert R. Haskins and Romulus Haskins.

The plaintiff offered in evidence a copy of the original writ, and of the officer's return, by which it appeared that he had attached goods and merchandize of the defendants to the value of two thousand dollars. It was admitted, that the action, *Pillsbury* v. *Haskins & al.* had been duly entered and prosecuted to final judgment; that execution was duly issued thereon, and seasonably delivered to said Jones, with directions to satisfy the same out of the property attached; and that said Jones neglected to satisfy said execution as directed. It was further admitted, that said Jones, at the time of the attachment on the original writ against said Haskins, was a deputy sheriff under Daniel Wilkins, late sheriff of said county; that during the pendency of that suit, his term of office expired, and that at the time of rendition of judgment, and of the delivery of the execution against said Haskins, the defendant was sheriff of said county, and that said Jones was a deputy under him.

The defendants introduced Robert R. Haskins, to whose testimony the plaintiff objected, on the ground of interest, and proved that he, with Robert Haskins and Buchan Haskins, had

signed a receipt to said Jones, for the goods attached in the suit in favor of the plaintiff against said R. Haskins & al. The objection was overruled, and the witness testified, that in April, 1835, he and Romulus Haskins, then copartners under the name of R. & R. Haskins, entered into copartnership with Jotham Parsons, under the firm of R. & R. Haskins & Co.; that the goods in the store at the time of the receipt, were the property of the new firm; that at this time the new firm was insolvent, and the goods receipted for went to pay their company debts, and that they were all sold as early as January, 1837. On being cross-examined, he testified that no goods were attached by Jones, nor were any removed by him. There was other testimony to the same points introduced.

The counsel for the plaintiff requested the Court to instruct the jury, 1. That Jones had the legal custody of the goods, notwithstanding the same had been receipted for.

2. That the custody and legal possession of the goods were in Jones at the time of the delivery of the execution, *Pillsbury* v. *R. Haskins & al.* and that as a deputy of the defendant he ought to have satisfied the execution with the proceeds of the same.

3. That Jones, not having specified what goods were attached, it was not competent for the defendant to show that goods not specified were the property of strangers.

4. That the legal custody of the goods being in Jones, the default occurred when he refused to satisfy the execution with the goods attached.

The counsel for the defendant introduced several authorities, and was permitted to argue the law to the jury, although the plaintiff objected thereto.

In committing the cause to the jury, the presiding Judge stated to the jury that it was contended in defence, that if the articles attached were liable for the debts of the judgment debtors, the evidence shew them to have been wasted, and the wrong done or permitted by Jones while he was the deputy of the former sheriff, and that the defendant was not liable in this action. On this point, the Judge directed the jury, that there

was but one office of sheriff, though filled at times by different individuals; that each individual was answerable for the negligence and misdoings of his own deputies, done or permitted while he was in office and that relation existed. That property attached, though left with the debtor or a stranger, must be considered in the legal possession of the attaching officer, and liable to be seized on execution and applied in satisfying the judgment, if to be found or in existence. That in presumption of law, they must be considered in his custody for that purpose, unless the presumption is contradicted by evidence showing the property to have been previously wasted, and not to be found, when sought to satisfy the execution; and if so wasted, the sheriff, who held the office at the time, would be liable for the wrong, and not his successor. He also stated, that this was not very important in this case, inasmuch as Jones would be liable in either event; and it is presumed the several sheriffs had taken sufficient bonds to indemnify themselves against their respective liabilities on his account.

It was contended secondly, that the goods and merchandize when attached, were not the goods of the judgment debtors, but belonged to a firm of which they were members; that the firm was insolvent when the property was attached, and was afterwards applied in payment of the company debts.

On this point, the Judge left the evidence to the jury, and instructed them, if they found the articles attached not to have been the property of the judgment debtors, and that it did belong to the company, and that the company was insolvent at the time; Jones would be justified in law for not levying the execution on them.

The jury returned a verdict in favor of the defendant.

Gilman, for the plaintiff. The action was rightly brought against Small. *Blake* v. *Shaw*, 7 Mass. R. 505. Haskins should not have been admitted as a witness, as he was directly interested in the event of the suit, having receipted for the goods returned as attached by Jones, and being now released from all liability for the goods attached. If permttied to testify, it was proved that Jones did not attach any goods in the store,

and therefore the goods returned by Jones were other and different goods from those claimed by the new firm of R. & R. Haskins & Co. That Jones did not attach any goods will not be presumed, as he has returned goods as attached, and a different conclusion would imply a fraud on the plaintiff, which will not be supposed. So far as the defence rests on the ground that the goods attached were wasted prior to the appointment of the defendant, it entirely fails if his witnesses are to be believed, as their testimony relates only to the goods in the store, and has no reference to any returned by Jones.

The Judge should not have permitted the defendant's counsel to argue the law to the jury, nor should he have submitted to the jury the question, whether articles attached were or were not the property of the new firm, but he should have instructed them that there was no evidence that any of those goods had been attached.

A. G. Jewett, for the defendant. The execution debtors were properly admitted to testify. *Pratt* v. *Thomas*, 16 Pick. 325; *Lathrop* v. *Mussey*, 5 Greenl. 450. Whether the plaintiff recovers of Jones and they pay him, or whether they pay the plaintiff and discharge Jones, was immaterial to them. *Bucknam* v. *Goddard*, 21 Pick. 70.

Whether the attachment made by Jones was actual or nominal, the defendant in neither event is liable. If there was an actual attachment, Jones, when he made the attachment, was not the officer of Small, nor had he any possession of the goods as his servant. If the receipt was nominal, the plaintiff is not entitled to recover when there was no attachment of goods which could be kept, and when the defendant had no official existence till long after the attachment.

The opinion of the Court was delivered by

Shepley J. — The debtors were liable to pay the judgment which the plaintiff had recovered against them, and also liable for the same amount to the officer on the receipt. The payment of one would operate as a discharge of the other. The verdict in this case cannot be evidence in a suit against them,

and their liability will remain the same, whatever may be the result of this suit. If the plaintiff should recover, it will not be increased for they are not responsible to the defendant for the costs; and if he should fail, it will not be diminished; they are still liable to pay the judgment. They were therefore competent witnesses.

The goods attached by the officer were left in the possession of the debtors, who with another person receipted for them and promised to deliver them on demand.

If the officer could be regarded as constructively in possession of them so long as they remained in possession of the debtors, he would cease to have any such possession, when the goods were sold by them; and according to the testimony they were all sold as early as January, 1837; and the defendant was not appointed sheriff until March following. And he could not, nor could the deputy while acting under a commission from him, have any actual or constructive possession. But it has been decided, that there is no constructive possession in the officer, after he has left them in the possession of the debtor. *Knap* v. *Sprague*, 9 Mass. R. 258. And so far as it respects the rights of the creditor, the officer must be regarded as releasing them at the time of the attachment, and assuming the responsibility himself by taking the receipt instead of the goods. If it should be regarded as a nominal, and not an actual attachment of property, the plaintiff would be in no better condition to maintain his action against the defendant. There could be no pretence in such case, that the deputy had any actual or constructive possession of goods attached since he held a commission under him. Any injury, which the plaintiff may suffer, arose out of his conduct before that time; and he does not appear to have been guilty of any default since the defendant was sheriff.

In the case of *Blake* v. *Shaw*, 7 Mass. R. 505, it does not appear, that the goods were not in the possession of the deputy until after the sheriff, under whom he made the attachment, ceased to be in office, and a successor was appointed. And if the goods attached had been faithfully kept during all the time

of the former sheriff there could be no misconduct of the deputy, while he was responsible for his official acts. It is not necessary to consider the other points in the case.

Exceptions overruled.

ISAAC FARRAR *versus* ALLEN GILMAN *& al.*

The indorsement of negotiable paper belonging to a bank, by a cashier, is *prima facie* evidence of a legal transfer of such paper.

THIS was an action on a promissory note, dated Feb. 25, 1837, and payable to the Penobscot Bank or order, in fifty-seven days and grace. The signatures of the signers were admitted, as was the signature of the cashier of the bank, purporting to indorse the note to the plaintiff. The defendants consented to be defaulted, subject to the opinion of the Court, whether such indorsement by the cashier, without any other proof of his authority, passed the property in the note to the plaintiff, so as to entitle him to maintain the action.

Gilman, for the defendants, contended, that the cashier had no authority, by virtue of his office, to negotiate or to sell the paper of the bank, and that the plaintiff had failed in establishing any title in himself to the note in suit.

E. G. Rawson, for the plaintiff. The cashier is intrusted with the funds of the bank; he is its executive officer; and, in the absence of all restrictions, it is his duty to apply the paper, as well as the cash of the bank, to such purposes as the interest of the bank may require. *Folger* v. *Chase*, 18 Pick. 63; *Flucker* v. *Bank of U. S.*, 8 Wheat. 338.

The opinion of the Court was delivered by

WESTON C. J. — Negotiable notes of hand and bills of exchange are often negotiated to and from banks, and from one bank to another. Nothing is more common than paper of this kind, bearing the indorsement of the cashier of a bank, in his

official capacity. And it may perhaps be assumed as a universal usage, that when instruments of this description are indorsed or transferred by a bank, he becomes their organ for this purpose. It may not be necessary to decide, that he may do this without special authority; and such an assumption might well be questionable. But as he is held out to the public as the confidential officer and actuary of the bank, as he is under bonds for the faithful performance of his duties, and as he acts as their organ in the transfer of negotiable paper, it is not in our opinion too much to hold, that when he indorses such paper, belonging to the bank, in his official capacity, it is *prima facie* evidence of a legal transfer.

In *Folger* v. *Chase*, 18 Pick. 63, the authority of the cashier was proved by a vote of the directors. But WILDE J. who delivered the opinion of the Court, says, "we think the indorsement by the cashier, in his official capacity, sufficiently shows, that the indorsement was made in behalf of the bank." In the *United States* v. *Elijah D. Greene & als.* 4 Mason, 427, a note, the property of the bank of Passamaquoddy, was indorsed by their cashier to the plaintiffs. His authority to do so, does not appear to have been proved, nor was it questioned.

Judgment for plaintiff.

INHABITANTS OF GARLAND *versus* INHABITANTS OF DOVER.

Children living separate from the father on account of his poverty, the parental and filial relations in other respects continuing, are still under the parent's care and control.

Supplies furnished such children, they living in another town from their father, are supplies indirectly furnished him, and prevent his gaining a settlement by lapse of time in the town in which he may reside.

THIS action was brought to recover for supplies furnished to Robert French, a minor son of Simon French, as a pauper. The writ was dated the 28th of February, 1838, and the sup-

plies furnished between the 22d of May and the month of November, 1837. On the trial, before SHEPLEY J. it was admitted that Simon French had a legal settlement in Dover on the first of January, 1830. Said French being called as a witness, testified, that in May, 1830, he sold out the improvements of his farm in Dover, and removed his goods into Garland, and in November following took up his residence in that town, with the intention of remaining there, and has since remained there, excepting for about one year and a half, when absent in Bangor, for a temporary purpose.—that about the time of his leaving Dover, his family was broken up, and in June of that year his wife was convicted of the crime of adultery, and sentenced to one year's imprisonment in the State's prison, and he had never since seen her, and that she died in a year or two after leaving the prison — that when he left Dover, he bound out his two sons till fourteen years of age, and left his two daughters in Dover, where they remained, and that he had not controlled them nor furnished them any assistance, except providing one pair of shoes for each of them in the fall of 1837; that he did not keep house after leaving Dover, until 1839, in the fall, when his daughter Anna came to live with him; that if he had been able, he should have taken care of them; that he understood that his daughter Elizabeth received supplies from Dover while under age; that he did not take any of their wages or earnings, or call for them, or in any way exercise any control over them, but they made their own contracts and received their own earnings.

There was evidence tending to prove that the daughters in the years 1834–5, and at other times, received supplies as paupers from the town of Dover, being then minors, and the plaintiffs contended that these supplies furnished the daughters, were indirectly furnished the father and had the effect to prevent his gaining a legal settlement in Garland by a residence of five years.

Upon this evidence, the defendants' counsel requested the Court to instruct the jury, that if French, at the time he sold out his improvements in the town of Dover, and established

his residence in the town of Garland, abandoned his wife, broke up his family and left his daughters behind him, to provide for themselves, without claiming parental authority, or exercising parental duties over them, the supplies thus furnished, though furnished to them as paupers, they standing in need of relief, would not defeat his settlement in Garland, provided he had continued to reside in said town five years together, and had received no other support from any town during that period.

These instructions the Court declined giving ; but instructed them that the father was entitled to the earnings of his children and had the right to control their course of life, and was bound to support and educate them ; and that if they were separated from the father in consequence of the breaking up of the family, or for other cause, and that he turned them off to get their own living, intending to do no more for them, whether able or unable, and that he did not, till 1837, provide any thing for them, and that the parental and filial relations were broken up, the supplies furnished them would not prevent the father's gaining a legal settlement in Garland. But if satisfied that the cause of their separation was the poverty of the father, and that the parental and filial relations remained in other respects unchanged, supplies to them must be regarded as supplies to the father and would prevent his gaining a settlement in Garland.

The jury returned a verdict for the plaintiffs.

A. W. Paine, for the defendants. The prominent question here seems to be, whether in order to prevent the supplies from having the statute effect, the Court will distinguish between the motives which compel the separation, and whether the abandonment ceases to have any effect, if brought about by poverty, or by other causes than crime. This question has been under the consideration of the Court in the following cases ; *Green* v. *Buckfield*, 3 Greenl. 136 ; *Dixmont* v. *Biddeford*, 3 Greenl. 205 ; *Hallowell* v. *Saco*, 5 Greenl. 143 ; *Raymond* v. *Harrison*, 2 Fairf. 190. In no one of these cases is any allusion made to the cause or reason for the breaking up of the family, as a material point.

The Court, in the case at bar, place reliance upon the point that there must be a breaking up of the parental and filial relation. But in the cases cited, that is not made an important fact. In the case of *Green* v. *Buckfield*, the Court rely upon the opposite fact; and the whole argument of that case proceeds upon reasons which exclude the idea of a real abandonment, or a breaking up of the filial and parental relation. All the cases cited, place the decision upon the fact, whether or not the supplies were furnished to one under "the care and protection" of the parent; and the question, whether there was a real or intentional abandonment, is not considered of any importance.

This rule, whether the child was under the care and protection of the parent, will make the question to be settled intelligible and easy of determination. If the causes of separation are to be regarded, doubt and uncertainty take the place of that which is certain and definite. The rule contended for, makes the question not one of fact, but of probability. The question to be settled would be — what would the father do, if not poor? would he support his children? If he were absent, the evidence to be introduced would be the character of the father; and according as that was good or bad, the question of settlement would be determined. Again, why should poverty be singled out as the only cause which should prevent the separation from having any effect? Were the separation caused by crime on the part of the child, or unkindness on that of the parent, ought not those causes to have the same effect as poverty? The rule of the Court would make the father, whose regard for his children continued with undiminished force, a pauper by reason of supplies furnished a son in distress; while, in case the father had entirely ceased to have any interest in the welfare of his son, but was utterly indifferent to his well being, and had entirely abandoned him, then supplies furnished would not have such effect. So that the effect of the same statute, in different individuals, would vary accordingly as their love for their offspring should vary; and the decision of a cause would be made dependent upon no external fact, but upon internal feelings.

J. Appleton, for the plaintiffs. The main objection taken to the charge of the presiding Judge, is to the proposition, that if the jury were satisfied that the poverty of the father was the cause of the separation of the parent and children, and that the parental and filial relations remained in other respects unchanged, then the supplies furnished the children must be regarded as supplies indirectly furnished the father. The fact supposed to exist by the ruling of the Court, may be considered as established by the finding of the jury. The case is not that of emancipation, abandonment, or any dereliction of duty, on the part of the parent. The true question is, whether a separation caused by poverty is, *ipso facto*, an abandonment? whether mere poverty is a dissolution, by operation of law, of the relative duties and obligations of parent and child? Here there was no greater abandonment nor disruption of parental and filial ties, than in every case of extreme poverty. Abandonment is constructive emancipation. Were the children of French emancipated? Were they *sui juris*? If so, then all children of parents unable from poverty to support them at home, are emancipated. Such are the consequences of the position which the counsel for the defendants seeks to establish. *The Etna*, Ware's Rep. 462.

The requested instruction was properly refused, the jury having negatived the facts upon which it was predicated. The cases cited do not support the requested instruction. The leading case on this subject is that of *Green* v. *Buckfield*, and all the other cases are merely inferences deducible from that. That was the case of an abandonment — of the dissolution of the parental relation — of an entire want of interest in the wellbeing of the offspring; here, the reverse was the fact — the will, the desire, all but the means to discharge the duties of a parent, existed in full force. There is no case which establishes the doctrine that an involuntary separation, caused by parental inability, is a legal abandonment. The children of the pauper were as much under his control, as, from his and their relative situations, they could have been expected to be.

The opinion of the Court was delivered by

Weston C. J.—During the period when Simon French, the father of the pauper, is supposed to have gained a settlement in Garland, he had broken up housekeeping, and no member of his family actually resided with him. His minor children, however, might be under his care and protection. Upon the facts found, his daughters were not emancipated, as clearly appears from the authorities cited for the plaintiffs. Some of the facts, assumed by the counsel for the defendants, in his requested instructions, have been negatived by the jury. They have found, that the separation of the daughters from the father, was occasioned by his poverty; and that in other respects the parental and filial relation continued. They were therefore under his care and protection, as much as his and their condition permitted. He was bound to maintain them. He would have performed this duty if he could. His poverty alone prevented. The supplies for his daughters, which he would have furnished, if he could, were provided by the town. This was indirectly receiving supplies as a pauper. He is a pauper, who is unable to provide necessary food and clothing for his minor children, and leaves them to be aided by the town.

Judgment on the verdict.

SETH F. DAVIS *versus* AUGUSTUS GOWEN.

Where the parties to a negotiable note live in the same town, a demand on the maker cannot be made, and notice to the indorser given, through the post office.

The holder of a note is not discharged from the duty imposed by law upon him of demanding payment of the maker at its maturity, and giving notice to the indorser of non-payment, by proof that, at the time of the negotiation of the note, the indorser was informed that the holder relied on him for the payment of the note at maturity.

It is not sufficient proof of a waiver of demand on the maker, and notice to the indorser of a note, that he was informed, at the time of the indorsement of the note, that the holder relied altogether upon him for the payment of the note at its maturity.

THIS was an action against the defendant as indorser of a note signed by Gideon Mayo.

To prove demand on the maker and notice of his refusal to pay to the indorser, the parties agreed to admit the testimony of Elvanton P. Butler, as given in the Court below, which was as follows: "That the note in suit was left in the Stillwater Canal Bank, of which he was cashier, before it was out, and that on the twenty-sixth day of October, 1837, he left written notices directed to the maker and indorser, in the post office in Orono; that the maker and indorser both resided in the village of Stillwater, Orono; that no other measures were taken by him to make demand and give notice; that it was the practice of the bank, when directed to take the necessary steps to hold an indorser on notes left for collection, to cause a demand to be made on the maker in person, or at his house, or place of business, and notice to be given to the indorser, or left at his house, or place of business; that he did not recollect that either Mayo or Gowen, had been in the habit of doing business at the bank prior to the 20th of October, 1837."

The plaintiff then called Nathaniel Wilson, Esq. who testified, that on the first day of grace, as he thinks, the plaintiff brought him the note and requested him to commence a suit on it; that he took the note and presented it to the defendant for payment, and told him that he was directed by the plaintiff

to sue it immediately, to which the defendant replied that he would pay it immediately, or see it paid. The witness testified, that when he took the note from the plaintiff, the plaintiff told him that he took the note of Gowen for money due him from Gowen, and that he told Gowen when he took it, that he would not take it unless he, (Gowen,) would pay it, at maturity, to him, and that he would not look to any other person for it; and this statement of the plaintiff, the witness testified, he made to the defendant at the time he called on him — which statement of the plaintiff the defendant did not deny.

Shepley J. who tried the cause, ruled the evidence was insufficient, and ordered a nonsuit; to which ruling and directions of the Court, the plaintiff excepted.

Ingersoll & Wilson, for the plaintiff.

Washburn, for the defendant.

By the Court. — The liability of the defendant, as indorser, is conditional, unless it appears that he waived demand and notice. This is not to be deduced from the conversation between the parties, testified to by the witness. The defendant might have agreed to pay the note at maturity, and the plaintiff may have apprised him, when he received the note, that he relied altogether upon him; yet the agreement of the defendant must be understood to have been made, with the implied reservation, that if the maker paid, he was not to be liable. He did not discharge the holder from the duty imposed upon him, to demand payment of the maker, at the maturity of the note. There is not sufficient evidence in the case, to charge or modify his legal liability, arising from the indorsement. Demand and notice are not proved. Where the parties live in the same town, this cannot be done through the post office.

Nonsuit confirmed.

JOHN B. HILL *versus* GILBERT KNOWLTON *& al.*

To bring a case within the provisions of St. 1839, c. 366, relating to poor debtors' bonds, it is only necessary to show that prior to a breach of any of the conditions of the bond, a notice of the intention to make a disclosure, and to take the poor debtor's oath had been given; and that the proper oath in pursuance thereof had been taken.

Though the certificate be not made at the proper time, or informally made, it does not prevent the debtor from claiming the advantage of the provisions of that act.

When there has been no damage, though the bond has been forfeited, the Court, upon an agreed statement of facts, will render judgment for the defendant.

THIS was an action of debt on a bond given on an execution against the principal defendant, agreeably to the provisions of the 7th section of "an act supplementary to an act, for the relief of poor debtors," passed April 2d, 1836. The bond was dated Nov. 24th, 1836.

To prove that the debtor had complied with the conditions of the bond, the defendants offered the certificate of two justices of the peace, and quorum, from which it appeared, that a disclosure had been made before them at Dixmont, and that the debtor had taken the oath required by the 8th section of an act for the relief of poor debtors, passed March 24th, 1835. The certificate described no amount of debt or cost in the execution upon which the principal defendant had been committed, and had never been placed on the files in the gaoler's office.

It is admitted that the plaintiff can prove, if it be admissible, that this certificate was not signed by the magistrates, till after the commencement of this suit; but that a record was made of their proceedings signed by one Justice as follows:

"Dixmont, April 15, 1837.

"On citation, Jacob Knowlton to John B. Hill, the creditor in execution. Examination before James Means, and Jesse Robinson, two Justices of the Peace, *Quorum unus*, at ten o'clock, A. M. when after a full examination and disclosure, it appeared that the debtor was destitute of property, except

what is exempted from attachment and execution; the said Justices therefore administered to him the poor debtor's oath.

"Jesse Robinson, attest."

It was admitted that the plaintiff could likewise prove that the complaint by the debtor, was made to a justice of the peace, and notice issued by him to the creditor, returnable at the office of said Justice, in Dixmont, where such disclosure as was made, was had.

The plaintiff offered to prove, but the facts were contested by the defendant, that the justice who issued the notification had no other office than his house, in one room of which he kept the Post Office, and transacted business as postmaster, and magistrate; and that the plaintiff appeared at the time specified in the disclosure, and could find neither debtor nor justices.

It was admitted that at the time of the disclosure the debtor had not any property not exempt by law from attachment.

Upon these facts, as far as they may be legally admissible, a default or nonsuit is to be entered according to the determination of the Court upon legal principles; unless the facts offered to be proved, shall be considered as affecting the defence, in which event the cause is to stand for trial.

J. Appleton, for the plaintiff. The original record of the magistrate shows no compliance with the conditions of the bond. The jurisdiction of the justices must appear by the record. 1 Pick. & Met. Dig. 629. The judgment of the justices is to be entered up, and their proceedings duly recorded. *Kendrick*, v. *Gregory*, 9 Greenl. 24. The magistrates constitute a Court, whose adjudication, when they have jurisdiction, is binding. *Agry* v. *Betts*, 3 Fairf. 417. Their power, being judicial, and they being obliged to keep records of their doings, the correctness of their decision is to be determined by the records alone. It can receive no aid, *ab extra*. The record existing is defective in not showing that any notice was given to the creditor — nor on what judgment the execution issued, on which the disclosure was had — and in showing that the disclosure, such as it was, was had at a place, and time

different from that set forth in the notice. *Knight* v. *Norton*, 15 Maine R. 337. The certificate of the magistrates is based upon the record, and if that be insufficient, the certificate cannot enlarge it. The certificate is not the proof, but the record of the magistrates. The certificate constitutes no defence. It does not show on *what* judgment the disclosure was made. This certificate is as good a defence to any or all other bonds given under similar circumstances, as to the one in suit. It in no way identifies the judgment upon which this bond was given, as being the one to which it relates. It is inferior in authenticity to the record of the magistrates — varies from and is unsupported by it. It was made after the commencement of this suit. It was not filed in the gaoler's office, and is not, for that cause, valid. Stat. 1835, c. 195, § 10.

The condition of the bond, required a disclosure according to the provisions of the 7th section of an act passed April 2d, 1836. The debtor, according to the certificate, took the oath prescribed by the 8th section of the poor debtor's law, passed March 24th, 1835. So that no compliance with the conditions of the bond is shown, and the case is not brought within St. 1839, c. 366.

A. W. Paine, for the defendants. The certificate being in due form, is conclusive as to all the facts therein recited. *Agry* v. *Betts*, 3 Fairf. 415; *Black* v. *Ballard*, 14 Maine R. 239; *Haskell* v. *Haven*, 3 Pick. 404. The Statute does not require the filing of the certificate. *Kendrick* v. *Gregory*, 9 Greenl. 22; *Murray* v. *Neally*, 2 Fairf. 238. The testimony offered was inadmissible, because it tends to contradict the record; and because if true it is immaterial, as it is not the certificate, but the administering the oath, which operates as a discharge. If all the proceedings are illegal, still by the act of 1839, c. 366, the debtor being insolvent, the defendant is entitled to judgment.

The opinion of the Court was delivered by

Shepley J. — There has not been a strict performance of the condition of the bond; and the plaintiff would be entitled

to recover, but for the interposition of the act of the 8th of February, 1839, c. 366. That act was decided to be constitutional in the case of the *Oriental Bank* v. *Freese*, 18 Maine R. 109. To bring a case within its provisions, it is only necessary to show, that prior to a breach of any of the conditions of the bond, a notice of the intention to make a disclosure and to take the poor debtors' oath had been given; and that the proper oath in pursuance thereof had been taken. Upon examination of the agreed statement it appears, that the notice was such, as that statute contemplates, and that the proper oath required by the law and the condition of the bond was administered.

Whatever objection there may be to the certificate, arising from the neglect of the magistrates to make it at the proper time, or from want of form, it cannot prevent the defendants from claiming the advantage of the provisions of that act.

When there is no proof of damages the jury are authorized to return a verdict for the defendant, although there may be a breach of the condition of the bond; and when the facts are submitted to the court, it appears but a proper discharge of duty to give effect to the intentions of the legislature.

Plaintiff nonsuit.

BARZILLAI BROWN *versus* LEWIS WATSON *& al.*

The certificate of two Justices of the Peace and Quorum, that the creditor has been notified according to law, of the time and place of his debtor's disclosure, is conclusive upon this point.

It is not essential that the certificate of the justices should be filed with the prison keeper prior to the suit on the bond.

THIS was an action of debt on a poor debtor's bond, in the usual form, given by the defendant, Watson. The parties agreed to submit the case, upon the following facts, to the Court for their decision.

The defendant, Watson, in this case, applied to a magistrate

instead of the gaoler, who issued a citation to the creditor, which was duly served. At the return day of the execution, the debtor appeared and disclosed. The plaintiff appeared, by his attorney, and proposed certain interrogatories, which were answered. No objection was then taken because the citation issued from a justice instead of the gaoler. The debtor disclosed no property, except certain choses in action, which the plaintiff's attorney declined taking.

The debtor was admitted to the oath and received the usual certificate, which was not filed in the gaoler's office till after the commencement of this suit.

J. A. Poor, for the plaintiff, referred to Stat. 1835, c. 19, § 9; *Knight* v. *Norton*, 327; *Putnam* v. *Longley*, 11 Pick. 487; *Slasson* v. *Broad*, 20 Pick. 486; *Sturgis* v. *Crowninshield*, 4 Wheat. 122.

Blake, for the defendants, cited *Thayer* v. *Seavey*, 2 Fairf. 290; *Kendrick* v. *Gregory*, 9 Greenl. 22; *Black* v. *Ballard*, 13 Maine R. 239.

The opinion of the Court was delivered by

Weston C. J. — Two justices of the peace and of the quorum, to whom jurisdiction of the subject matter belonged, having found and certified, that the creditor had been duly notified according to law, their certificate is conclusive upon this point, as was decided by this Court in *Churchill* v. *Balch*, 17 Maine R. 411, where the proper distinction was pointed out between that case and *Knight* v. *Norton & al.* 15 Maine R. 337. It was not essential to the defence, that the certificate of the justices should be filed with the prison keeper, prior to the suit. *Kendrick* v. *Gregory & al.* 9 Greenl. 22.

Judgment for the defendants.

JOHN WILLIAMS *versus* NYMPHAS TURNER *& al.*

By St. 1835, c. 195, § 10, two justices of the peace and of the quorum have authority to examine the notification to the creditor, and to administer the oath to the debtor.

A certificate by two justices of the peace, quorum unus, that the debtor has taken the poor debtor's oath, &c. is a nullity — they not having jurisdiction.

THIS was an action of debt on a bond, dated May 18, 1838, given by the defendant as principal, in conformity to an "act supplementary to an act for the relief of poor debtors," passed April 2, 1836, and was submitted to the Court upon the following statement of facts:—

The defendants introduced the certificate of two justices of the peace and quorum unus, in the usual form, and duly filed in the gaoler's office, by which it appeared that due notice had been given the creditor, and that the oath had been administered to the principal debtor.

J. A. & H. V. Poor, for the plaintiff.

S. H. Blake, for the defendants.

The opinion of the Court was delivered by

WESTON C. J. — By referring to the Statute conferring on two justices the power to examine the notification to the creditor, and to administer to the debtor the oath therein prescribed, it will be found to have been given to two justices of the peace and of the quorum. Statute of 1835, c. 195, § 10. Both are required to be of the quorum. Had the language been, two justices *quorum unus*, which occurs in another section of the same Statute, it would have been sufficient that one of them should have been of the quorum. *Gilbert* v. *Sweetser*, 4 Greenl. 483.

Only one of the justices, who officiated on this occasion, was of the quorum. This is a fatal objection. They had no jurisdiction either to examine the notification, or to administer the oath. The defence therefore is not sustained.

Judgment for the plaintiff.

JOHN BELKNAP *versus* AMOS DAVIS.

Where the treasurer of a corporation was authorized by vote to hire money on such terms and conditions as he might think most conducive to the interests of the company to meet certain acceptances by the defendant of the drafts of the company on him — *it was held*, that by this vote authority to raise money was given, and to indorse drafts drawn by himself to accomplish that object; and that the acceptance of such draft by the defendant, one of the directors, who was present at the meeting when such vote was passed, and who was thereby to be benefitted, precluded him from disputing the authority of the corporation to pass such vote.

THIS was a suit against the defendant, as the acceptor of the following bill of exchange, which was indorsed by said Norcross, as treasurer:

"Bangor, Oct. 17, 1836.

"$3600. Nine months from date, value received, pay to my own order at the Suffolk Bank in Boston, thirty-six hundred dollars, and charge the same to the Penobscot Mill Dam Company, being part of the sum authorized to be raised by a vote of the directors, passed on the 6th instant.

"N. G. NORCROSS, Treasurer of Penobscot
"Mill Dam Co.

"To Amos Davis, Bangor."

The plaintiff read from the records of the Penobscot Mill Dam Company, a vote passed Oct. 6, 1836, in the following words, viz. —

"Voted, that the treasurer of said company be authorized to hire, on such terms and conditions as he may think most conducive to the interests of the company, a sum of money not exceeding forty thousand dollars, in such sums as may be expedient and for a term of time not less than eight nor more than twelve months, for the purpose of meeting Amos Davis's acceptances of the company's drafts, given for the purchase of logs, as they respectively fall due."

It appeared, that the defendant was one of said directors, and present at said meeting.

It appeared, from testimony introduced by the plaintiff, that the business hours of the Suffolk Bank, Boston, closed at two

o'clock, P. M. and that immediately before two o'clock, on the 20th July, 1837, the bill was presented at that bank and payment demanded, and no funds were there to pay, and it was not paid. And it appeared, by testimony of the plaintiff, that the writ was made on the same 20th July, after two o'clock, P. M.; that Norcross lived then in Bangor, and that the office of the company was kept in Bangor.

Upon this testimony, the defendant consented to be defaulted, subject to the opinion of the Court, whether, upon this proof, the plaintiff is entitled to recover; and if the plaintiff is not so entitled, the default is to be taken off and a nonsuit entered.

Rogers, for the defendant. The plaintiff claims as indorsee. The question is one of strict legal rights. The acceptance does not imply authority to draw or indorse. The drawer in this draft was the corporation, not Norcross, and they alone are bound. When the treasurer undertakes to negotiate the property of the corporation, his authority so to negotiate, must be shown. As treasurer, he has not such authority. *Commercial Bank* v. *French*, 21 Pick. 486. The vote confers no power to negotiate or transfer the corporate property. It was not shown that this was a transaction to raise money. The plaintiff was bound to show that this was negotiated in compliance with the vote of the company. That was not to be a matter of doubt. Unless Norcross had authority, the plaintiff has no rights. He had no authority, except to transfer in pursuance of the vote. That this draft was so transferred, is not shown, and not being shown, the plaintiff is not entitled to recover.

Hobbs & Moody, for the plaintiff. The acceptance of the defendant, is an admission of the handwriting of the drawer, and of his right to draw, as he has drawn, payable to his own order. If it does not amount to that, it amounts to nothing. This does not dispense with proof of the indorsement. *Robinson* v. *Yarrow*, 7 Taunt. 455. Whether the indorsement was by Norcross individually or as treasurer is immaterial.

This is indorsed according to its tenor; and if paid by the acceptor, it is paid according to its acceptance. The vote must be regarded as authority to draw; if so it is equally authority to indorse. It is no authority to do either specifically, but it is an authority to do that which requires indorsement. It is an authority to draw and indorse. If indorsed without authority, the transfer is valid to the plaintiff, who is a *bona fide* holder, it being according to the terms of the acceptance. Chitty on Bills, 221; *Thatcher* v. *Dinsmore*, 5 Mass. R. 301; *Foster* v. *Fuller*, 6 Mass. R. 58.

The opinion of the Court was delivered by

Weston C. J. — The acceptance admits the signature of the drawer, and the authority to draw. But it does not admit the indorsement, or that it was duly authorized. *Robinson* v. *Yarrow*, 7 Taunt. 455. The directors of the company, of which the drawer was treasurer, are, by the nature of their office, the general agents of the company. It may be regarded as one of their duties, to provide for the payment of their debts and liabilities. The defendant being one of them, should not be permitted to dispute the authority of a vote passed in his presence, the object of which was to provide for the payment of a debt due to himself.

The acceptance was procured, as appears on the face of the draft, for the purpose of accomplishing the object of the vote. The treasurer was the payee. It was payable in nine months, not exceeding the term of credit authorized. The purpose of the vote was to raise funds immediately. This could not be done, but by the transfer of the draft, thus accepted, to some person willing to advance the amount. The authority to raise the money was given to the treasurer generally. The mode was not prescribed. The terms and conditions were left to his discretion. Being payee, as well as drawer, he made the draft available for the purpose intended, by indorsing it, the only mode that could be adopted. And we are of opinion that such indorsement was authorized, as

one of the means necessary, as well as suitable and proper, to carry the vote into effect.

Judgment for plaintiff.

EDWARD R. SOUTHARD *& al. versus* ROBERT M. N. SMYTH *& als.*

By St. 1834, c. 617, the trustee must disclose, and the Court must determine his liability upon such disclosure, before he is entitled to give in evidence such adjudication in the trial of a cause between him and his creditor.

Where exceptions have been filed to the acceptance of the award of referees, and the report has, after a continuance of the cause, been accepted by the Court, interest will not be allowed on the sum awarded, in making up judgment.

THIS was an award of referees which came before the Court for their acceptance.

The defendants objected to the acceptance of the award, because certain claims which were laid before the referees by the defendants, on which the defendants had been summoned as trustees of the plaintiff, had been disallowed. It appeared that the defendants offered at the trial before the referees, three writs, founded on judgments in favor of certain individuals, against said Southard, in which the defendants had been summoned as trustees of said Southard; and that the defendants had been defaulted as his trustees. The writs and the executions issued on the judgments on which the suits were brought, were before the referees. The referees rejected those claims, it not appearing that there had been any disclosure, nor that they were then pending.

The referees, being examined, stated, that they were informed that if the defendants should be chargeable, the Court to which the rule was returnable, would deduct the amount due from the award.

The defendants produced before the referees an order drawn by the plaintiff on these defendants, and by them accepted, in which the plaintiffs had indorsed an agreement that it should

be paid after the referees should make their report. This was disallowed.

The defendants proved, before the referees, the presentment of a receipt purporting to be drawn by Mr. Emerson, one of the plaintiffs; but this sum was disallowed.

Upon this evidence, EMERY J. before whom the report was offered for acceptance, ordered that the same be accepted; to which the defendants' counsel filed exceptions.

At the argument of the questions of law in this case, the plaintiffs claimed interest on the award from the time of its acceptance; but this claim was resisted by the defendants.

Rogers and *Washburn*, for the defendants. The claims presented by the defendants, should have been allowed. Judgment having been obtained against them as trustees, they will be obliged to pay the debt twice, unless the amount for which they have been adjudged trustees shall be deducted from the claims of the plaintiffs. These judgments being seasonably presented, should have been allowed as a bar to their amount. *Smith* v. *Barker & al.* 1 Fairf. 458; *Howell* v. *Freeman*, 3 Mass. R. 121; *Kidd* v. *Shepherd*, 4 Mass. R. 238. A judgment on trustee process is a bar, as well before as after satisfaction. *Mathews* v. *Houghton*, 2 Fairf. 377; St. 1821, c. 61; *Clark* v. *Brown*, 13 Mass. R. 272.

If these judgments against the trustees would have been a bar at law, the referees should have allowed them. By St. 1834, c. 617, § 1, these judgments may be given in evidence. This Statute does not alter the law. It merely affects costs. If the actions had been continued, these judgments must have been allowed. The referees acted under a mistake of the law; and when that is shown to be the case, the award should be set aside. *Kent* v. *Elstob*, 3 East, 18; 2 Tidd's Pr. 894; Kyd on Awards, 351; *Aubert* v. *Maze*, 2 B. & P. 371; *Jones* v. *Boston Mill Cor.* 6 Pick. 148.

Cutting, for the plaintiffs. The judgment of the referees is conclusive upon the matters submitted. *Kleine* v. *Catara*, 2 Gall. 61; *North Yarmouth* v. *Cumberland*, 6 Greenl. 25;

Kyd, 185; *Shepherd* v. *Watrous*, 3 Caines,167; *Walker* v. *Sanborn*, 8 Greenl. 288; *Smith* v. *Thorndike*, 8 Greenl. 288; *Jones* v. *Boston Mill Cor.* 6 Pick. 148; *Bigelow* v. *Newell*, 10 Pick. 348.

There was no error in the decision of the referees. To have availed themselves of St. 1834, c. 617, they should have disclosed, so that both parties should have the benefit of it. They neither disclosed, nor offered to disclose, nor asked for a continuance.

By the Court. — The referees, at the time of the hearing of the cause before them, had no right to make any allowance for the judgments against the defendants as trustees. They had never been adjudged trustees upon a disclosure made by them, and without such adjudication, they do not bring themselves within St. 1834, c. 617, § 1.

The order of Southard was not to affect the award, but was rather to be a consequence of it. It should be allowed in part payment of the plaintiffs' claim.

The plaintiffs claim interest in this case; but we do not know any legal principle by which interest is to be added to the sum awarded. The award must be accepted without interest. *Exceptions overruled.*

Ware Eddy *versus* Hollis Bond *& als.*

A bill or note payable to a person named, or bearer, is payable to the bearer; and one coming lawfully into possession of it, for valuable consideration, is not required to show any consideration between the maker and the person named.

The alteration of a note from "I promise," to "We promise," is not a material alteration, and does not avoid the note.

The addition of the name of the attesting witness to a note, unless done fraudulently, will not avoid the note.

An alteration of a note, not apparent on inspection, and made before any one as holder or payee had any legal claim upon it, and while it was in the hands of one of the promissors, must be presumed to have been made by their consent.

Exceptions from the District Court, Allen J. presiding.

This was an action of assumpsit on a promissory note dated April 6th, 1836, for the sum of one hundred and twenty dollars, payable to Gilbert Knowlton, or bearer, in one year from date, and signed by Ibrook E. Collins, James Austin, Daniel Collins and Hollis Bond. This note was signed by S. D. Collins as attesting witness. Bond and Austin pleaded the general issue. Daniel Collins was defaulted, and no service was made on Ibrook E. Collins.

The defendants called Gilbert Knowlton, who testified, that in April, 1836, Ibrook E. Collins applied to him for the sum of $100, which he agreed to loan on good security for $120 in one year — that Austin brought the note in suit, which he declined taking till he might inquire of Austin and Bond — that they told him on inquiry, not to take the note unless the plaintiff's name was to the note, and that it was agreed between the plaintiff and said Collins, that he was to secure the plaintiff by mortgage on real estate; that Collins called, and he informed him of the statements of Austin and Bond; to which said Collins replied that the note was good enough without — that at this time the note was written I promise to pay, &c., and there was no attesting witness to the signatures of the defendants; that witness asked Collins if it would not be necessary to sue him before he could call on the others, to which

said Collins replied that it would; that thereupon the witness declined having any thing more to do with the note — that Collins then immediately erased the 'I' in the said note, and inserted 'We,' saying that he had a right to do it — that Collins then agreed with witness to procure the name of the plaintiff upon the note, but not succeeding, the witness declined having any thing to do with the note.

Willard Howard, who was called by the defendants, testified that the plaintiff told him that the note was written for Austin, Bond, D. Collins, I. E. Collins and himself to sign; that Daniel and I. E. Collins, brought it to him to sign, after it had been signed by the other parties to it; but that he preferred to take the note and let them have the money, to signing it — and that he did. He further testified that the attesting witness was dead.

Upon this evidence, the defendants' counsel requested the Court to instruct the jury that if the testimony was believed, the note was void; that being payable to Gilbert Knowlton or bearer, unless some consideration passed between the payee and the makers, it could not be put in circulation by any other person, and become binding on them; but the Court did not give such instruction, but instructed the jury that if they believed that the note was originally made for Bond, Austin, I. E. Collins, D. Collins, and the plaintiff to sign, that said note was not to be used unless the plaintiff did sign it; and that this agreement was known to the plaintiff when he advanced the money to said D. & I. E. Collins on the note, and there was no subsequent consent by said Austin and Bond that the note might be used without the signature of the plaintiff thereto, that they would find a verdict for the defendants.

The counsel for the defendants requested the Court to instruct the jury that the alteration of the note from "I promise to pay," to "we promise to pay," was material, and avoided the note; but this the Court declined, and instructed them that the note was not, in that particular, altered materially.

They further requested the Court to instruct the jury, that the addition of the name of the subscribing witness was also a

material alteration; that as the note was proved not to have been witnessed at the time it was signed, that it was incumbent on the plaintiff to show that the attestation of the subscribing witness was duly made or placed there by the consent of the makers. The Court declined giving this instruction; but instructed the jury that the addition of the subscribing witness, without the knowledge or consent of the promissors, if done fraudulently, would render the note void; but that if the name of such witness was added before the note went into the plaintiff's possession, that the law would presume that such attestation was made with the knowledge and consent of the promissors; and that the burthen of proof was on the defendants to show that such alteration was made without their knowledge and consent.

The jury returned a verdict in favor of the plaintiff, and thereupon exceptions were filed by the counsel for the defendants, and allowed.

J. A. Poor, for the defendants. 1. This note could not legally be put in circulation by Collins. *Wheeler* v. *Guild*, 20 Pick. 545. The evidence shows that the plaintiff took the note with the knowledge of all the facts which impaired its validity; and having such notice, he cannot recover.

2. The alteration from "I promise," to "we promise," avoided the note. It changed it from a several to a joint note. The alteration is material, when the remedy to be pursued is changed by such alteration. Whether the liability of the party be enlarged or diminished by the alteration is immaterial. Chitty on Bills, 130; Bailey on Bills, 58; *Henfere* v. *Bromley*, 6 East, 312; *Stephens* v. *Graham*, 7 S. & R. 508.

Were the alteration made to conform to the contract of the parties, it might be supported, but such is not the case here. *Hervey* v. *Harvey*, 15 Maine R. 357; *Farmer* v. *Rand*, 16 Maine R. 453.

3. The addition of the signature of a subscribing witness is a material alteration. *Smith* v. *Dunham*, 8 Pick. 249.

4. The instruction that the burthen of proof was on the defendants, to show the alteration made without their knowledge

and consent, was erroneous. *Jackson* v. *Osborn*, 2 Wend. 555; *Prevost* v. *Gratz*, 1 Pet. C. C. R. 369; *Jackson* v. *Jacobs*, 9 Cow. 125; *Chesley* v. *Frost*, 1 N. H. R. 145; *Knight* v. *Clemens*, 35 Eng. Com. Law R. 377.

A. G. Jewett, for the plaintiff. It has been settled by the jury that the plaintiff is an innocent indorsee, taking the note before it was due, for a valuable consideration. If any fraud has been committed, it is that of one defendant on his co-defendants, to which the plaintiff was not a party and of which he was not conusant.

Even if the signature of the attesting witness was affixed by the request of the holder, if done in good faith, it does not avoid the note. *Smith* v. *Dunham*, 8 Pick. 246. The jury have here negatived all fraud. The presumption of law is, that it was done with the consent of all the defendants. 3 Stark. Ev. 1249; *Hunt* v. *Adams*, 6 Mass. R. 519. The alteration from I to we, was immaterial. *Bailey on Bills*, 44; *Hemenway* v. *Stowe*, 7 Mass. R. 58; *Nichols* v. *Johnson*, 10 Conn. R. 192.

The opinion of the Court was delivered by

Shepley J. — The presiding Judge declined instructing the jury as requested, "that [the note] being payable to Gilbert Knowlton or bearer, unless some consideration passed between the payee and the makers, it could not be put in circulation by any other person and become binding on them."

A bill or note payable to a person named, or bearer, is payable to the bearer; and one coming into possession of it for a valuable consideration, lawfully, is not required to shew any consideration between the maker and the person named. *Bullard* v. *Bell*, 1 Mason, 252; *Ellis* v. *Wheeler*, 3 Pick. 18; *Pierce* v. *Crafts*, 12 Johns. 90. And a compliance with that request was properly refused.

The note as originally drawn and signed, was made to read, I promise, and was altered to read We promise; and the jury were correctly instructed, that the alteration was not material. As first drawn the signers were jointly and severally bound.

Hemmenway v. *Stone*, 7 Mass. R. 58. The alteration limited their liability to the holder; and did not change their legal rights in relation to each other. It was not made by the holder, but by a party to the note before it was negotiated.

The attestation of a note by one, who was not present and did not see the maker sign, has been decided to be a material alteration. *Brackett* v. *Mountfort*, 2 Fairf. 115. The presiding Judge, on this point, instructed the jury, "that the addition of the subscribing witness without the knowledge or consent of the promissors, if done fraudulently, would render the note void; but that if the name of such witness was added before the note went into the plaintiff's possession, the law would presume, that such alteration was made with the knowledge and consent of the defendants." Considering the testimony in the case, the use of the language, "before the note went into the plaintiff's possession," was equivalent to saying, before it was issued. And a note is not considered as issued before it comes to the hands of some one entitled to make a claim upon it. *Sherrington* v. *Jermyn*, 3 C. & P. 374. In *Henman* v. *Dickinson*, 5 Bing. 183, it was decided, "that where an alteration appears on the face of a bill, the party producing it must shew, that the alteration was made with consent of parties, or before the issuing of the bill." And in *Johnson* v. *the Duke of Marlborough*, 2 Stark. 313, where the date of the bill appeared on the face of it to have been altered by the acceptor, Abbott J. said that "he could not presume one way or the other, and unless it could be proved, that the alteration was prior to the acceptance, the bill was void for want of a new stamp." It was then proved, that the bill was in the possession of Wooddison, the drawer, after the acceptance, and this was held to be *prima facie* proof, that it had not been previously negotiated. In the case of the *Cumberland Bank* v. *Hall*, 1 Halstead, 215, it was held, that an alteration apparent on the face of a note was not to be presumed to have been made after its execution. It is not necessary to express any opinion on that question in this case. The cases of *Henman* v. *Dickinson*, and *Johnson* v. *the Duke of Marlborough*, are noticed

only for the purpose of shewing, that they proceed upon the principle, that where the alteration appears to have been made before the bill or note was issued, it is not presumed to be fraudulent, and does not destroy its validity. In the case of *Farmer* v. *Rand*, 14 Maine R. 225, and 16 Maine R. 453; the note had been negotiated, had passed out of the hands of the maker, and had been indorsed by the several parties before the alteration was made. And it was contended that after such proof, it was to be presumed that the alteration was made by consent, but it was decided otherwise. That was a case of an alteration not apparent by an inspection of the note. And so is the one now under consideration, and the testimony shews, that it was made before the note was negotiated although after it had been signed and offered for negotiation. An alteration not apparent on inspection, and which was made before any one as holder or payee had any legal claim upon it, and while it was in the hands of one of the promissors, must be presumed to have been made by their consent. The rule, that fraud or crime is not to be presumed, would apply in such a case.

Exceptions overruled.

JACOB FISH *versus* EBENEZER JACKMAN.

An agent to whom a note has been transmitted for collection, is not entitled to a day, before he is bound to give notice.

Though not entitled to a day, he is not obliged to go himself, or to employ a special messenger to advise his principal; but notice sent by the next mail, after demand, will be sufficient.

The holder of a note may send it by mail for collection; and notice by the agent of the result of such demand, by the next mail after the demand made, is due diligence.

Although the general rule is, that when the party to be served with notice resides in a different place or city from that of the holder, that notice may be sent by mail to the post office nearest the residence of the party entitled to notice, — yet that rule does not apply to the case of an individual living in the wilderness, at a distance of twenty or thirty miles from any post office.

In such case, notice should be given in person, or a special messenger should be sent.

The holder of a note sent to an agent for collection, received notice from his agent of the non-payment of the note, on the first day of the month. He sent a special messenger to the indorser, who resided forty-eight miles distant, by whom notice was given on the fourth. The instruction of the Court to the jury, that it would be seasonable, if he commenced exertions to notify on the second, and used ordinary diligence in giving notice, was held correct.

THIS was an action of assumpsit against the defendant as the indorser of a note of hand, dated Whitefield, Feb. 27, 1839, signed by Osgood Johnson, payable to the defendant, or order, on demand and interest, and given for the sum of two hundred and three dollars, thirty-four cents.

To prove demand and notice, he introduced the testimony of Henry K. Baker, by which it appeared, that in pursuance of a letter received by Samuel Wells, Esq. Hallowell, from said Fish, and at the request of said Wells, he demanded the note at said Whitefield, of said Johnson, the 27th of March, 1839, who declined paying the same; and that he sent a letter, directed to said Fish, at Lincoln, enclosing his doings, by the next mail from Hallowell.

It appeared, by the testimony of Asa Baker, that on the 4th of April, 1839, he left a notice with the defendant, at his resi-

dence in No. 4, of the presentment and non-payment of the note, dated at Lincoln, April 3, 1839, and requesting payment of the same.

It was admitted, that there was no post office in No. 4.

The plaintiff further proved, that the mail laid over at Bangor, on account of bad travelling; so that the letter, mailed at Hallowell on the 28th of March, did not arrive in due course of mail at Lincoln, the residence of the plaintiff, till in the afternoon or evening of the first day of April.

The defendant proved that the mail went on the road toward his house, twenty miles further, that same evening, to a point where the Aroostook and Houlton roads separate; that the next mail was on the 3d of April; that there were two post offices in the town of Lincoln, one two, and the other six miles on the road nearer to his house than the post office where said letter was received by the plaintiff; that there was a post office twelve miles nearer on said road toward his house; and the mail passed on the same road again on the evening of the third of April; that the distance from the post office at which said letter of Baker was received in Lincoln, to the residence of the defendant in No. 4, was forty-eight miles; that it was twenty-eight miles only from the post office at the forks of said roads to his house; and that the sleighing was pretty good the first days in April; and that it was but one day's travel from the Lincoln post office, to which the notice of Baker had been transmitted, to the residence of the defendant.

The counsel for the defendant, contended that there was no legal evidence of demand and notice to the defendant.

Shepley J. who tried the cause, instructed the jury that if the plaintiff had used due diligence to give notice to the defendant, that there was a legal demand and notice, and that the question of due diligence, was a question exclusively for the jury. There was no testimony, except the testimony already stated, to prove demand and notice, and the testimony of the postmaster at Lincoln, that the letter did not arrive till the first of April.

The defendant's counsel, further requested the Court to instruct the jury, that if the notice of Baker to Fish, arrived at Lincoln on the first day of April, and Fish did not make out his notice till the third day of April, it was not sufficient, and that the date of said notice was evidence of that fact, unless explained or proved to be erroneous; and that Fish, was bound to have forwarded the notice, the next day after its arrival, by a mode of conveyance as rapid as the ordinary mode of travelling on the road at that season of the year, and that notice on the 4th of April, was not sufficient. These instructions were not given — but the jury were instructed, that the plaintiff was not by law obliged to commence his exertions on the evening of the day, the mail arrived, to give notice of non-payment — and that he was obliged to commence them on the following morning, and to use reasonable and ordinary exertions to give him notice thereof, and if in their judgment from the testimony he had done so, he was entitled to a verdict.

The jury returned a verdict in favor of the plaintiff.

A. G. Jewett, for the defendant. The facts in relation to the notice given, being undisputed, it is a question of law upon those facts whether due notice has been given. With the determination of that question the jury have nothing to do. It is not even a mixed question of law and fact. *Ireland* v. *Kip*, 10 Johns. 492; *Warren* v. *Gilman*, 15 Maine R. 70; *Thorn* v. *Rice*, 15 Maine R. 263; *Williams* v. *Bank of U. S.* 2 Pet. Cond. U. S. R. 106; *Bank of Columbia* v. *Lawrence*, 1 Pet. Cond. U. S. R. 583; *Aymar* v. *Beers*, 7 Cow. 709.

The facts proved, show no cause of action for the plaintiff. The verdict of the jury was against the instructions of the Court. The plaintiff received the letter of Baker, informing him of the non-payment of the note on the first of April. The jury were instructed that the plaintiff was bound to commence giving notice the next day. There was no proof that any preparations were made on that day to give notice to the defendant. The notice given was dated at Lincoln, on the third day of April; and must be presumed to bear its true date, and if not the true date, the burthen is on the plaintiff to

show that fact. That notice was not delivered to the defendant, till the 4th of April. Nothing is proved to have been done on the 2d of April, and not being proved, the jury were not warranted, in the absence of all proof on this point, in finding that any thing was done. The Court, on this evidence, could not infer due notice, and the jury will not be justified in rendering their verdict on less evidence than would satisfy the Court. Chitty on Bills, 400.

If the letter had not been taken out at Lincoln, it would have gone on further that day. The plaintiff should have adopted the mail, or if he chose to give notice, should have resorted to an equally expeditious mode. He is not an indorser and is not entitled to any more time than if he had proceeded to Whitefield and there made a personal demand on the maker. *Flack* v. *Greene*, 3 Gill. & Johns. 481; *Haynes* v. *Birks*, 3 B. & P. 599; *Sewall* v. *Russell*, 3 Wend. 277; *U. S.* v. *Barker*, 3 Wheat. 559; *Field* v. *Nickerson*, 13 Mass. R. 131.

The defendant would have been liable, had the letter been sent to the post office at the Forks, whether he received it or not. Had it been directed there, it would have arrived on the first of April. The plaintiff had no right to intercept the letter. *Shed* v. *Brett*, 1 Pick. 401; 3 Kent's Com. 107; *Reed* v. *Johnson*, 16 Johns. 221; *Smith* v. *Mullett*, 2 Camp. 208.

Hodgdon, for the plaintiff. The note being payable on demand and over due when indorsed, the plaintiff is not bound to use the same diligence as when the note is payable on a day certain. This case is peculiar in its circumstances. Though the cases settle that notice to the next adjoining post office is sufficient, yet in no case is the distance of such post office from the residence of the individual to be notified, a matter of consideration by the Court. Here the distance was twenty-eight miles; and it may be considered questionable, whether a notice sent to a post office so distant, would have been sufficient.

Had there been a post office at No. 4, if notice had been sent by the mail of April 3d, it would have been in due season. By sending a special messenger, the notice

reached the plaintiff sooner than by the ordinary course of mail. The state of the travelling — the diligence used — were all matters of consideration for the jury — and upon all the facts proved, the jury were satisfied that there had been no negligence on the part of the plaintiff. Bailey on Bills, 178; *Bank of Columbia* v. *Lawrence*, 1 Pet. Con. R. 581; *Union Bank* v. *Magruder*, 7 Pet. Con. R. 287; *Wallace* v. *Agry*, 4 Mason 347. The notice, though dated on the 3d of April, might have been post dated, or if dated truly, it was not inconsistent with the idea that the plaintiff might have commenced on the morning of the second of April, to seek for a messenger; all the facts connected with this were submitted under proper instructions to the jury, and there is nothing which shows an error in the conclusion to which they have arrived.

The opinion of the Court was delivered by

Weston C. J — The plaintiff is not an agent, but the indorser and holder of the note. H. K. Baker, who was imployed by him, through Mr. Wells, to demand payment of the maker, was constituted the agent of the plaintiff, to make such demand. According to the cases cited for the defendant, an agent is not entitled to a day, before he is bound to give notice. The case finds, that in point of fact, he did, by the next mail after the demand, send notice to the plaintiff. Although not entitled to a day, he was not obliged either to go himself, or to employ a special messenger. He might avail himself of the post office, and as he sent by the next mail, he made use of all possible diligence, by this mode of conveyance. *Shed* v. *Brett*, 1 Pick. 401.

It is contended, that the agent should have sent his notice directly to the defendant. The maker living at a distance from the plaintiff, it was competent for him to send the note to an agent for the purpose of making a demand. This being done, notice to him of the result by the next mail was, in our judgment, due diligence. It does not appear, that the agent knew where the defendant resided; and if he did, we are quite clear, that a notice sent by the agent to the defendant by

mail would have been insufficient. In the leading case of *Ireland & al.* v. *Kip*, 11 Johns. 231, it was laid down, that if the party to be served by a notice, resides in a different place or city, then the notice may be sent through the post office, to the post office nearest the party entitled to notice. To this rule there must necessarily be exceptions. It could not apply to the case of the defendant, who lived secluded in a part of the country, but just beginning to be reclaimed from the wilderness, twenty miles from any post office.

As the plaintiff was not at liberty, under the circumstances, to avail himself of the mail and as it does not appear, that there was any other ordinary mode of conveyance to the defendant's residence, no other alternative remained, but to notify him in person, or to send a special messenger. The plaintiff received his notice the afternoon or evening of the first of April. The Judge instructed the jury, that it would be seasonable, if he commenced exertions to give notice the next day. And in our opinion, this would be due diligence on his part. The jury have found this fact. It is said, this is against the evidence, as his letter of notice is dated at Lincoln, his own residence, on the third of April. The jury might have deduced from the distance and from the state of the travelling, upon which all the evidence is not reported, that the letter may have been misdated. These facts must be taken into the account on the question of due diligence; and they were proper for the consideration of the jury. We perceive nothing in the ruling of the presiding Judge, which calls for correction; and we are not satisfied, that the verdict is against evidence.

Judgment on the verdict.

A TABLE

OF THE

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APPEAL.

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2. An appeal from the judgment of the District Court in a matter of law, without any exceptions being filed and allowed, is irregularly brought into this Court, and must be dismissed. *Hill* v. *Hills*, 423.

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ASSIGNEE.

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ASSUMPSIT.

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ATTACHMENT.

1. The right of redemption of personal property mortgaged is attachable on mesne process by virtue of St. of 1835, c. 188. *Sawyer* v. *Mason*, 49.
2. Where goods in trunks locked, and boxes nailed, were deposited in one of the chambers of the person summoned as a trustee, and it did not appear that the officer did or could know their contents, nor whether they were attachable or not, nor where they were to be found, nor that he would be permitted to search for them, they cannot be regarded as liable to be attached by the ordinary process in the sense contemplated by the Statute. *Hooper* v. *Day*, 56.
3. The lien which an officer acquires by virtue of an attachment of personal property is lost, unless he remains in possession of it either personally or by a keeper appointed by himself. *Gower* v. *Stevens*, 92.
4. Where the lien acquired by an attachment is dissolved by a delivery of the property attached to the debtor, such lien does not revive upon his regaining possession of it by delivery from such debtor — though it be delivered to him with the intent that it may be appropriated towards the payment of the debt on which it had been attached. *Ib.*
5. Where goods attached are left in possession and under the control of the debtor by the officer making the attachment, they may be a second time attached by another officer — and such attachment will be valid though the second attaching officer had notice of the prior attachment. *Ib.*
6. There is no constructive possession of goods attached, in the officer, after he has left them in the possession of the debtor. *Pillsbury* v. *Small*, 435.

See SHERIFF.
OFFICER, 1, 2, 3, 5.
RECEIPTOR.

ATTORNEY.

See OFFICER, 4.
PRACTICE, 5.

AWARD.

See PRACTICE, 27.

BAILMENTS.

See REPLEVIN.

BANK.

1. The cashier of a bank is the regularly authorized agent of the bank and whatever is done by him in that capacity is the act of the bank. *Burnham* v. *Webster*, 232.
2. When a note is left with a bank for collection, although the bank has no interest in it; yet for certain purposes they are to be considered the real holders. *Ib.*

3. Proof that a note indorsed to a cashier — and by him handed to a notary for protest, is sufficient to establish the fact that it was either negotiated to or left in the bank for collection — and consequently that the makers are entitled to grace. *Ib.*

See BILLS AND NOTES, 23.

BASTARDY.

1. Where a bond was given under a prosecution for the bastardy act, conditioned that the defendant should appear and abide the order of the Court, and there was an order of commitment upon the failure of the defendant to comply with the order of Court, for the maintenance of the child, and to furnish further security, by virtue of which he was committed, and subsequently discharged by due course of law, by taking the poor debtor's oath; *it was held*, that this was not a compliance with the condition of the bond, and that his sureties were not discharged. *Corson* v. *Tuttle*, 409.
2. St. 1831, c. 487, provides only for the enlargement of the accused from prison, when committed, but does not affect his bond. *Ib.*
3. Unless the principal be surrendered by his bail, in pursuance of St. 1836, c. 210, the bail are not discharged. It is not enough that he is taken in custody by the sheriff. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. It is sufficient to charge the indorser of a note signed by the standing committee of a parish, to prove a demand on the committee and notice of such demand to the indorser. *Casco Bank* v. *Mussey*, 20.
2. A demand on the treasurer is unnecessary, the parish being under obligation to pay within the time limited by their note. *Ib.*
3. When a suit is brought by the holder of a note indorsed over due, against the maker, he is not entitled to the benefit of his counter claims against the indorser, unless they are filed in set-off. *Wood* v. *Warren*, 23.
4. By Stat. of 1824, c. 272, a note left with a bank for collection is entitled to grace, and cannot be demanded till the last day of grace. *Howe* v. *Bradley*, 31.
5. It is not necessary to charge an indorser, that the notice of the non-payment of the bill should state the name of the holder or the place where the note or bill was to be found. *Ib.*
6. The holder is excused from making further exertion to notify an indorser, when he finds during business hours, his place of business closed and the door locked. *Ib.*
7. Where a note is made payable at some future period, with interest annually till its maturity, and no demand is made for the annual interest as it becomes due, or if made, no notice thereof is given to the indorser; if duly notified of demand and non-payment when the note falls due, he is liable for the whole amount due, both principal and interest. — Emery J. dissenting. *Ib.*
8. Interest is to be regarded as incidental to the debt and not a part of it. *Ib.*
9. Annual interest cannot be recovered by a separate action for it after the principal has become due. *Ib.*
10. To charge the last indorser, it is not necessary that the first indorser should be notified of demand and non-payment. *Carter* v. *Bradley*, 62.
11. The holder may notify him or not at his election, without losing his claim against subsequent parties, who may have been duly notified. *Ib.*
12. The last indorser, if he wishes his preceding indorser held, should notify him, to do which, he has one day, after being duly notified himself. *Ib.*
13. Where the notice delivered the indorser misdescribed his name, it was held good if the defendant thereby knew that the notice was intended for him, and that the note therein described was the note in suit — which facts were submitted to the jury. *Ib.*
14. Notice to Samuel A. Bradbury — which was meant for and delivered to Samuel A. Bradley — held sufficient. *Ib.*
15. Where the maker of a note procured it to be attested by a witness nearly six years after its date, *it was held*, that such attestation gave the paper the legal character of a witnessed note. *Boody* v. *Lunt*, 72.
16. Where a note payable on demand, was transferred when over due by indorsement in these words, "accountable in eight months from the above

BOND.

generally, and upon that part which adjoins the plaintiff's land, is not of that adverse and marked character, to establish by prescription a right to depasture on said beach — and, the right to depasture on said beach failing, the incidental and attendant right to require the plaintiff to fence against his cattle so on the beach, must likewise fail. *Donnell* v. *Clark*, 174.

2. If the right prescribed for is not injurious to the rights of another, it lays no foundation for a prescription. It is only long continued and adverse enjoyment, which affords evidence of prescription. *Ib.*

CONSIDERATION.

See CONTRACT, 1, 10.
BILLS AND NOTES, 17, 27.
VENDORS AND PURCHASERS, 3, 4.

CONSTRUCTION.

The clause, "it being for his proportional part of the surplus revenue fund," inserted in an order drawn by the selectmen on the town treasurer, designates the purpose for which the order was drawn, and not the fund from which it was to be paid. *Pease* v. *Cornish*, 191.

See CONTRACT, 24, 25.
CONVEYANCE, 3, 4.
SCHOOL LANDS, 1.

CONTAGIOUS SICKNESS.

1. Expenses incurred for supplies furnished a pauper under the provisions of act St. 1821, c. 127, providing against the spread of contagious sickness, are a proper charge against, and may be recovered of, the town where the person receiving such supplies has his legal settlement. *Kennebunk* v. *Alfred*, 221.
2. Expenses incurred for the protection of the inhabitants of the town from the smallpox, and to prevent the spread of contagious diseases, cannot be recovered of the sick person, but must be borne by the town thereby to be benefited. *Ib.*
3. Expenses "for nurses, attendance, and other assistance and necessaries," may be recovered — but not those incurred by virtue of c. 127, for the protection of the inhabitants of the town in which such expenses are incurred. *Ib.*

CONTRACT.

1. An agreement to sell is a sufficient consideration for an agreement to purchase. *Appleton* v. *Chase*, 74.
2. Money paid in part fulfilment of a valid agreement cannot be recovered back unless that agreement has been rescinded by mutual consent — or the plaintiff has a right to rescind it from the failure of the defendant to perform on his part. *Ib.*
3. When a bond or deed was to be given by the vendor of the premises bargained for upon the first payment being made — and the purchaser was at the same time to give satisfactory security for the remaining payments — he must tender such security before he can charge the vendor as in fault for not giving such deed or bond. *Ib.*
4. Neither could charge the other as in fault without performance or a tender of performance. *Ib.*
5. When upon such payment a bond or deed was to be given, the alternative is with the vendor — and it affords no ground for a rescission of the contract that the land was subject to incumbrance — the bond providing for its removal. *Ib.*
6. Where the agent of the town, in May, 1835, without authority, agreed to give A. B., C. D., and E. F., a good and sufficient deed of a school lot, "providing the town get liberty from the legislature to sell the same," if not, to give back certain notes given as the consideration for said land, or to pay four hundred dollars as damage for non-performance — and the town without taking any measures to procure authority from the legislature to sell — in Aug. 1839, voted that the doings of their agent in relation to the school lot, with the defendant, be ratified and confirmed, so far as the said doings relate

to taking and continuing possession by the purchaser and the giving of the note to the Treasurer and no further — and that the agent give a good and sufficient deed pursuant to the contract made in May, 1835, — and said agent did tender a deed, which was refused — it was held; —

7. That the agent having no authority to make the contract, the purchaser could neither compel the town to perform it or pay damages for non-performance; —

8. That the votes of the town were no sufficient ratification of the contract of the agent; —

9. That if the town would ratify the contract — it was their duty within a reasonable time to obtain authority from the legislature to sell; —

10. That having neither confirmed the contract nor obtained such authority, the note was without consideration and void. *Wolcott* v. *Strout*, 132.

11. The statute of frauds does not apply to verbal contracts for the manufacture and delivery of articles. *Hight* v. *Ripley*, 137.

12. If the article exist at the time in the condition in which it is to be delivered, it should be regarded as a contract of sale — but if labor and skill are to be applied to existing materials — it is a contract for the manufacture of those articles to which such labor and skill are to be applied — and such contract is not within the statute of frauds. *Ib.*

13. A contract on the part of the defendants "to furnish as soon as practicable," 1000 or 1200lbs. of malleable hoe shanks, agreeable to patterns left with them — and to furnish a larger amount if required at a diminished price, must be considered as a contract for the manufacture of the articles referred to. *Ib.*

14. Where the plaintiffs made a special contract to furnish certain machines according to a model to be furnished by the defendant, but no model was furnished, the plaintiffs are not bound to furnish one, and have no right to proceed to execute the contract without its being furnished. *Savage Manuf. Co.* v. *Armstrong*, 147.

15. Where by the terms of the contract the machines were to be delivered at a particular place, the plaintiffs, before they can recover their pay, are bound to prove a delivery at the place agreed upon. *Ib.*

16. Fraud does not render contracts void, except at the option of the party defrauded, and if the party defrauded in the sale of goods by false pretences would rescind the contract, and reclaim the goods — he should offer to the purchaser the notes taken on the sale or have them ready at the trial. — It is too late to make the offer after the verdict has been rendered. *Ayers* v. *Hewett*, 281.

17. When by the terms of the contract the plaintiff was to deliver paper hangings, conforming to a memorandum annexed, "on board a Gardiner steamboat, at Boston, on her first trip in April then next," for which the defendant was to pay in paper of a certain quality and price, to be shipped "at Gardiner," on the receipt of the paper hangings, for Boston, — upon the shipments by each party according to the contract — the goods sent are at the risk of the party for whose use they are thus shipped. *Barry* v. *Palmer*, 303.

18. The stipulation in the contract, that the plaintiff was to be paid on the receipt of the goods at Gardiner, determined only the time of payment, but did not impose the risk of transit upon the plaintiff. *Ib.*

19. If the goods were not sent all at one time, nor in season as required by the contract, but were received in different parcels as sent — and were paid for — it is a waiver of that part of the agreement by which the entire quantity was to be shipped at one time — and by a fixed day. *Ib.*

20. The contract of guaranty is in its nature special — and not negotiable — and no suit can be maintained upon a guaranty except by the party with whom this contract is made. *Springer* v. *Hutchinson*, 359.

21. A delivery of a deed with an indorsement on the back, by the grantee, that he has transferred the within deed upon certain conditions, conveys no legal title to the person to whom the delivery is made. His rights rest only in contract, and are to be enforced in equity. *Porter* v. *Read*, 363.

22. One having an interest by virtue of a contract, not under seal, in real estate subject to a mortgage, is not entitled to redeem by virtue of St. 1821, c. 39, § 1, and if in possession of the premises, cannot insist in a suit against him, that a conditional judgment shall be rendered for the plaintiffs. *Ib.*

23. Where the defendant had given a bond to convey a tenth of a certain tract of land to the plaintiffs, on certain conditions, and the plaintiffs had agreed to build a dam on said tract, "and that all moneys expended by them for said W. the defendant, are to go towards payment for their tenth of the within named township," and the plaintiffs had not complied with the conditions of their bond, they were not permitted to recover for building the dam. *Littlefield* v. *Winslow*, 394.
24. The term "moneys expended," &c. does not embrace claims for services performed, or moneys expended prior to the date of the agreement in which it is used. *Ib.*
25. In the construction of contracts, the language used must be limited by the subject matter of the contract. *Ib.*

See TRUSTEE PROCESS, 2, 3.
TOWNS, 2.
PARTNERSHIP, 8, 9.
EVIDENCE, 21, 22.

CONVEYANCE.

1. The estate, right, title and interest which any person has by virtue of a bond, or contract in writing to a conveyance of real estate upon conditions by him to be performed (which by St. 1829, c. 431, is to be sold on execution like an equity of redemption,) must be truly described in the return and deed of the officer selling on execution — else nothing will pass. *Stevens* v. *Legrow*, 95.
2. Where such right, title and interest, was described as an equity of redemption by the officer, the proceedings were held fatally defective. *Ib.*
3. The like rules of construction must be applied to levies as other conveyances. *Pride* v. *Lunt*, 115.
4. The intention of the parties, if possible, must be carried into effect. *Ib.*
5. Where a conveyance declares a fact, as that the land adjoins a river or a street, parol evidence cannot be received to prove that it does not; unless the description contains a latent ambiguity, or be found false, and therefore to be rejected. *Ib.*
6. Where the commencement of a levy is described to be at a stake, at "the westerly corner of land set off to William Cobb," and that corner can be ascertained, parol evidence is inadmissible to prove that in fact the stake referred to, stood at a different place. *Ib.*
7. An administrator's deed made after more than one year had elapsed since the license to sell was granted by the Judge of Probate, is void. *Marr* v. *Boothby*, 150.
8. A deed of release and quit-claim without proof of actual or constructive possession of the premises by the grantor, or of any entry by the grantee, is not sufficient proof of title to enable the grantee to maintain trespass *quare clausum*. *Ib.*

CORPORATION.

Where the treasurer of a corporation was authorized by vote to hire money on such terms and conditions as he might think most conducive to the interests of the company to meet certain acceptances by the defendant of the drafts of the company on him — *it was held*, that by this vote authority to raise money was given, and to indorse drafts drawn by himself to accomplish that object; and that the acceptance of such draft by the defendant, one of the directors, who was present at the meeting when such vote was passed, and who was thereby to be benefited, precluded him from disputing the authority of the corporation to pass such vote. *Belknap* v. *Davis*, 455.

COSTS.

1. Where the plaintiff moved to dismiss his own writ for want of jurisdiction, and the defendant claimed costs, they were allowed. *Reynolds* v. *Plummer*, 22.
2. Where a will approved by the Judge of Probate, was reversed upon appeal in this Court, the appellant is not entitled to costs by virtue of st. 1821, c. 51, § 64. *Dennet* v. *Dow*, 110.

executor, and devised whatever should remain after paying debts and legacies to the husband of the demandant — *it was held* — that the husband acquired thereby no seizin — and that the devise was of such portion of the proceeds of the sales made by the executor as might not be wanted for the payment of debts or legacies. *Fickett* v. *Dyer*, 58.

2. When the executor, with power to sell by the will, conveyed the estate of his testator with covenant of the seizin of his testator, and the devisee of the remainder, after the payment of debts and legacies, by deed of warranty against all persons, but without covenants of seizin, conveyed the same estate to the same grantee on the same day on which the deed of the executor was made and delivered — *it was held*, that the deed of the devisee operated only to confirm the title conveyed by the executor — and that the grantee was not estopped to deny his (the devisee's) seizin. *Ib.*

DISSEIZIN.

See SEIZIN AND DISSEIZIN.

DISTRICT COURT.

See APPEAL, 2.

DOWER.

1. The demandant in dower is entitled to recover according to her title, though in her demand on the tenant to have dower assigned, she claimed dower in the whole premises when she was by law entitled to dower of a moiety only. *Hamblin* v. *Bank of Cumberland*, 66.
2. Proof that two persons jointly and equally built two houses in a block — that they divided by parol — that each occupied, sold, and received the proceeds arising from the sale of the house to him belonging, is not sufficient to prove such sole seizin as to enable a widow to recover dower in the house assigned to her husband. *Ib.*
3. Where the tenant, having contracted to build a block of houses, for which he was to receive a farm in payment, agreed with the husband of the demandant, that he should build one of the houses for a specified price, and the value of his interest should be applied to pay for a part of those lands to be conveyed by the tenant to him; and said farm having been conveyed to the tenant, the tenant, in fulfilment of his agreement, designated a portion of the farm by metes and bounds for the demandant's husband, into the possession of which he entered, and upon which he built a house, having paid for such portion in full, and continued to reside there a few months till his death,—*it was held*,— there being no written contract for a conveyance, that he had no seizin in the farm to entitle his widow to dower. *Hamlin* v. *Hamlin*, 141.
4. The widow of the *cestui que trust*, is not dowable of an estate in which the husband had but an equitable title. *Ib.*
5. Where the demandant in dower deceased during the pendency of her suit, the court refused to permit judgment to be rendered, as of a term anterior to her decease. *Rowe* v. *Johnson*, 146.
6. Where from the death of the demandant, it is impossible to assign dower, damages cannot be rendered for its detention. *Ib.*
7. The assignee of a widow's right to dower, cannot be placed in a better situation than his assignor. *Ib.*
8. An action to recover dower is abated by the death of the demandant. *Ib.*

ENTRY, WRIT OF.

See PLEADING, 2.

EQUITY.

1. The introduction of scandalous and impertinent matter in a bill, does not authorize nor justify similar matter in an answer to meet such improper allegations in the bill. *Langdon* v. *Pickering*, 214.
2. Upon exception taken to such answer, the court will order it to be expunged. *Ib.*

EQUITY OF REDEMPTION.

ERROR.

ESTOPPEL.

EVIDENCE.

alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that a felony has been committed.
State v. *Furlong*, 225.

3. In an indictment for stealing three sides of sole leather, the property of A. B., when the alleged owner testifies that he could not swear positively that "he had lost leather, or that he had not sold the same leather to some other person than the defendant" — this is not sufficient proof that the ownership of the property taken was at the time of the taking, in the person described as owner in the indictment. *Ib.*
4. Proof that the person charged with a larceny, was poor, and that for years before he had not been the owner of property to the amount alleged to be stolen — that he made false statements as to where he obtained the property, and that when selling it, he called himself by a wrong name — and that he did not, or could not give any account how he came by the property — though tending strongly to implicate his integrity — has no tendency to prove the ownership of the property stolen — as alleged. *Ib.*
5. If the transfer of bank stock, for the purpose of making the owner a witness, be unconditional, the contingency that he might again become the owner of the same, is not such an interest as goes to his competency.
Snow v. *Thomaston Bank*, 269.
6. The entries by the cashier, of the appropriation of money which the bank was to apply to the payment of notes belonging to it, are admissible to prove the fact of such appropriation — they having been shown to the party interested without objection on his part. *Ib.*
7. The rule of law that instruments in writing purporting to be witnessed by a subscribing witness, are not allowed to go in evidence, till the execution of them has been proved by such witness, does not extend so far as to require every instrument, which may incidentally and collaterally be introduced, to be so proved. *Ayers* v. *Hewett*, 281.
8. If the instrument introduced is a contract *inter alios*, under which neither party claims, proof of its execution by the subscribing witness, is not required. *Ib.*
9. Testimony that the witness, an officer, having a writ for service, made inquiries for the residence of the defendant, and that he made a service upon him by leaving a summons at a house, specifying it, is properly admissible.
Augusta v. *Windsor*, 317.
10. It is no objection that upon such testimony the jury might infer the answers given from the facts stated — it being no objection to competent testimony that possibly an improper use may be made of it. *Ib.*
11. Entries of a deceased physician in the regular course of his business are admissible in evidence when corroborated by other circumstances to render them probable. *Ib.*
12. It is not necessary that entries, to be admissible, should be against the interest of the deceased person making them. *Ib.*
13. A witness who is introduced to prove that another witness is unworthy of credit, should be examined as to the general character of such witness for truth and veracity. *Phillips* v. *Kingfield*, 375.
14. The character which a witness has acquired for truth is to be proved as a fact in the case, from which, combined with all the various matters in the testimony tending to establish or impair it, the jury will form their own opinion respecting the credit due to his statements. *Ib.*
15. The proper inquiry is, whether the witness knows the general character of the witness attempted to be impeached; and if so, what is his general reputation for truth? *Ib.*
16. On the cross-examination, the inquiry should be limited to the witness's opportunity for knowing the character of such witness; for how long a time and how generally such unfavorable reports have prevailed, and from what sources they have been derived. *Ib.*
17. It is not allowable to inquire of the impeaching witness whether he would believe the witness attempted to be impeached upon oath. *Ib.*
18. Possession by the accused, in a prosecution for larceny, of the articles stolen soon after the larceny was committed, raises a reasonable presumption of guilt. *State* v. *Merrick*, 398.
19. If a reasonable doubt is thrown upon a *prima facie* case of guilt, the party accused is not proved guilty, beyond a reasonable doubt. *Ib.*

LICENSE.

MARRIAGE.

MILITIA.

PLEADING.

POOR.

PRESCRIPTION.

PROBATE COURT.

PKOMISSORY NOTES.

PROPERTY.

REAL ACTION.

RECEIPTER.

3. The sum at which property attached is valued in a receipt, is *prima facie* the measure of damage. *Ib.*
4. If there be an over valuation it may be shown in reduction of damages. *Ib.*
5. The admission, on the back of the receipt, by the receipters of personal property which had been attached, of a "due and legal demand," is not sufficient proof of the continuance of the lien upon the property, or that the demand was made within thirty days from the rendition of judgment. [EMERY J. dissenting.] *Fowles* v. *Pindar*, 420.
6. Where by the terms of the receipt, a demand on one is to have the same effect as if made upon all, whether the admission of one upon other points should be conclusive upon the other receipters — *quære.* *Ib.*

See REPLEVIN, 1.

REPLEVIN.

1. The general owner of property in the hands of a bailee, may maintain replevin against an officer, who, having attached the same as the property of the bailee, puts it in the hand of a receipter, by whom it is suffered to go back into the hands of the bailee — the attachment being not thereby dissolved. *Small* v. *Hutchins*, 255.
2. But if the attachment be dissolved by the neglect of the officer to seize the goods attached within thirty days after the rendition of judgment, the property being actually in the hands of the bailee of the plaintiff, the constructive possession of the officer would be gone, and that, as well as the actual possession, would revert to the plaintiff — in which case, replevin could not be supported. *Ib.*
3. A person obtaining goods by fraudulent pretences, is guilty of a tortious taking and no demand is necessary to enable the person defrauded to maintain replevin. *Ayers* v. *Hewett*, 281.

REVIEW.

1. It appearing uopn demurrer to a petition for review, that where a resident of this State was temporarily absent, leaving an agent here, an illegal service in a suit against him was made by leaving a summons at the last and usual place of abode of his agent, and it further appearing that the petitioner had had no hearing in said suit, a review was granted. *Holmes* v. *Fox*, 107.
2. The St. 1821, c. 57, regulating reviews, applies to a judgment rendered in the District Court, upon a sham demurrer, from which an appeal was claimed, but which through mistake was not entered. *Knight* v. *Bean*, 259.

ROAD.

See WAY.

SALE.

See CONTRACT.
VENDORS AND PURCHASERS.

SAVINGS INSTITUTION.

1. Money deposited with a Savings institution, to be repaid at certain times prescribed by the institution, may on demand in pursuance with the by-laws, be sued for in assumpsit — and it affords no defence that the institution, having in accordance with its by-laws invested its funds in stocks which have depreciated, is unable to repay the whole amount received. *Makin* v. *Institution for Savings*, 128.
2. Whether a Court of Equity on a bill brought by the institution against the several depositors, would not apportion the loss among them in proportion to their deposits — *quære.* *Ib.*

SCHOOL LANDS.

1. Where the proprietors of Bakerstown, which was incorporated by the name of Poland, made a reservation of certain lots of land for the use of schools, and subsequently, the town of Minot was incorporated by taking off a portion from the town of Poland — with the provision in the act of incorpo-

ration "that the public lands appropriated for the support of schools, and the town's stock of military stores, shall be estimated and divided in the same proportion that each town paid at the purchase thereof," it was held, that the lots so reserved for the support of schools were not within the meaning of this provision, they not having been paid for by the town. *Poland* v. *Strout*, 121.

2. An action of trespass *quare clausum*, for an injury to these lots, in the name of the inhabitants of Poland, was sustained. *Ib.*

SEAL.

See BOND, 1, 2, 3.
PRACTICE, 8, 9, 11, 12.

SEIZIN AND DISSEIZIN.

1. An attachment and subsequent levy of real estate, of which the debtor was in the quiet enjoyment, puts the judgment creditor, as against his debtor, in the seizin of the premises, as much as if the tenant had at that time given a deed of the same at the time of the attachment. *Bryant* v. *Tucker*, 383.
2. After such levy, the debtor becomes the tenant at will of his creditor, and if he resists the entry of the judgment creditor, he may treat him as a disseizor, at his election. *Ib.*

See DEVISE.
DOWER, 2, 3.
ESTOPPEL, 1.

SERVICE OF WRIT.

Where a resident of this State is temporarily absent, leaving an agent here, no valid service in a suit against him can be made by leaving a summons at the last and usual place of abode of his agent. *Holmes* v. *Fox*, 107.

SET-OFF.

See BILLS AND NOTES, 3.
PARTNERSHIP, 3.

SETTLEMENT.

See POOR.

SHERIFF.

1. The sheriff is not liable for goods attached by a deputy of his predecessor, which were receipted for; though the same individual was a deputy of his when the execution in the suit upon which the attachment was made, was placed in his hands. *Pillsbury* v. *Small*, 435.
2. In a suit against the sheriff for neglecting to satisfy an execution upon goods which had been attached and receipted for on the original writ, a judgment debtor, who is likewise a receipter, is a competent witness for the sheriff. *Ib.*

SHIPPING.

1. Bottomry bonds may be executed by the owner of a ship at a home port, and their validity does not depend upon the application of the money, when obtained by the owner, to the purposes of the ship or of the voyage. *Greeley* v. *Waterhouse*, 9.
2. It is of the essence of a bottomry bond that it is for money taken up on a maritime risk. *Ib.*
3. When bottomry bonds are given as collateral security for debts due, that fact may be shown when the interests of third persons are thereby to be affected, notwithstanding the recital in the bond, that they are given for money lent and advanced. *Ib.*
4. When a bottomry bond is given to secure past indebtedness, if that were discharged to the amount of the security by bottomry, it would seem that it might be regarded as a new loan on bottomry. *Ib.*
5. When unaccompanied by delivery, such bond cannot be regarded as a mortgage, unless recorded as required by St. 1839, c. 390. *Ib.*

SMALL POX.
See CONTAGIOUS SICKNESS.

STATUTES CITED.

SPECIAL STATUTES.

STATUTE OF FRAUDS.
See CONTRACT, 11, 12, 13.

SURPLUS REVENUE.
See CONSTRUCTION.

TAXES.
See BOND, 7, 8, 9, 10.
COLLECTOR OF TAXES.

TENANT AT WILL.

1. A tenant at will, upon the termination of his tenancy, has the right of ingress and egress, so far as may be necessary for the purpose of removing his goods and personal property. *Folsom* v. *Moore*, 252.

See SEIZIN AND DISSEIZIN, 2.

TENANTS IN COMMON.
See PARTNERSHIP, 1, 2.

TENDER OF PERFORMANCE.
See BOND, 5, 6.
CONTRACT, 4.

TITLE.
See ESTOPPEL, 4.

TOWNS.

1. In pursuance of an article in the warrant calling the meeting, for that purpose, the town at a legal meeting voted to invest the surplus revenue in bank stock — and chose an agent to carry the vote into effect — such agent, having disposed of the money as he was authorized by the vote, was held discharged from all responsibility. *Cornish* v. *Pease*, 184.

2. When an offer to purchase of the town the bank stock, was made in town meeting, which was accepted by vote of the town — but there was no article in the warrant calling the meeting by which the town was authorized to make such contract — it was held, that by St. 1821, c. 114, § 5, such a contract was void. *Ib.*

TRESPASS.

See COMMON, 1.
CONVEYANCE, 8.
MINISTERIAL LANDS, 2.
SCHOOL LANDS, 2.

TROVER.

See VENDORS AND PURCHASERS, 5.

TRUSTEE PROCESS.

1. Though a usual it is not a decisive test, to determine the question, whether trustee or not, that the principal has a right of action against the supposed trustee. *Whitney* v. *Munroe*, 42.
2. The interest of a joint contractor may be reached by a trustee process, though the effect of this may be to sever the joint contract. *Ib.*
3. If the joint creditors of the parties to a joint contract would claim a priority over the several creditors of either of the contractors, they should assert it by suits against both, and by summoning the same trustees and thus present the question to the consideration of the Court. *Ib.*
4. Where goods in trunks locked and in boxes nailed, were deposited in one of the chambers of the house belonging to the person summoned as trustee — and it did not appear that the officer did or could know the contents — nor whether they were attachable or not — nor where they were to be found — nor that he would be permitted to search for them — the depositary was charged as trustee. *Hooper* v. *Day*, 56.
5. Before revised St. c. 119, § 43, administrators could not be held as trustees of a creditor of the intestate in any case whatever. *Kimball* v. *Woodman*, 200.

See EVIDENCE, 26.

TRUSTS.

See VENDORS AND PURCHASERS, 1, 2.
DOWER, 4.

USURY.

See EVIDENCE, 23.
ACTION, 3, 4.

VENDORS AND PURCHASERS.

1. The title of a bona fide purchaser of property conveyed by a debtor in trust for his wife and family, by a conveyance void as against creditors — but which was sold *by the cestui que trust*, prior to any interference on their part — will be protected in a court of law. *Sparrow* v. *Chesley*, 79.
2. The purchase money is a substitute for the property sold and is subject to the same trusts. *Ib.*
3. The purchaser of a note voidable for want of consideration as against the maker, from an innocent indorsee without notice, is entitled to recover, though he purchased with a full knowledge of such want of consideration. *Hascall* v. *Whitmore*, 102.
4. Purchasing from one who had no notice, he must be considered to be in the same situation and as entitled to the same protection as his vendor. *Ib.*
5. Where property is sold and delivered upon the condition that the title is not to pass till payment be made, and the conditional vendee sells the same without performance of the condition, trover may be maintained by the first vendor against the last purchaser, without demand upon and refusal by him to surrender the same. *Whipple* v. *Gilpatrick*, 427.

See PROPERTY.

VERDICT.
See PRACTICE, 1, 25.

WAGER.

1. No action can be maintained to recover back money deposited upon a wager, unless when made recoverable by Statute, both parties being *in pari delicto*. *Stacy* v. *Foss*, 335.
2. Where money lost on a wager has not been paid over by the stakeholder, he is liable to the loser for the amount by him deposited, upon demand and notice, as well after as before the happening of the event. *Ib.*

WAY.

1. When after the location of a road, the land over which it passes, is transferred to another owner, and a part of the road located is discontinued and a new location made, the owner of the land over which the new location is made is entitled to compensation from the public for this incumbrance, notwithstanding the discontinuance of the original road over his land. *Herrick* v. *Moore*, 313.

WASTE.
See MINISTERIAL LANDS, 1, 2.

WILL.
See EQUITY, 4, 5.

WRIT.
See PRACTICE, 5.
SERVICE OF WRIT.

WRIT OF ENTRY.
See PLEADING, 2.

ERRATA.

5th line of marginal note, in case *Gore* v. *Jenness*, p. 53, for *mortgagee* read *mortgagor*.

2d line of marginal note, in case *Hascall* v. *Whitmore*, p. 102, for *indorser* read *indorsee*.