REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

VOLUME XX.

HALLOWELL:
GLAZIER, MASTERS & SMITH.
1843.

A TABLE

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By JOHN APPLETON.

VOLUME II.

MAINE REPORTS.

VOLUME XX.

HALLOWELL:
GLAZIER, MASTERS & SMITH.
1843.

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.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1841.

SAMUEL USHER *versus* LUTHER SEVERANCE.

Two articles not simultaneously published in the same paper or book cannot be coupled together for the purpose of ascertaining whether one of them is libellous or not.

In a libel, the charge of larceny being made, malice is by law implied and it is for the defendant to disprove it.

The presumption of malice, arising from the publication of the charge, is not rebutted by proof that the publisher had reason to suspect and believe the truth of the charges made.

In every case it is the province of the jury, under the instruction of the Court, to determine the import of the language used, whether it be libellous or not.

The editor of a newspaper has a right to publish the fact that an individual is arrested, and upon what charge, but he has no right, while the charge is in the course of investigation before the magistrate, to assume that the person accused is guilty, or to hold him out to the world as such.

THIS was an action of trespass on the case for a libel. Plea, the general issue.

The plaintiff read in evidence the article charged as libellous in the Kennebec Journal under date of Nov. 5, 1834, which was as follows: —

"POST OFFICE REFORM."

"We understand that Samuel Usher, Esq. postmaster of Kingfield in Somerset county, has been arrested for being a little too eager for the spoils of victory. Mr. Stanley, the old postmaster and a very worthy man, was removed since Jackson

came in, to make a place for Mr. Usher, who hurraid for Jackson at a prodigious rate. But Mr. Usher found the proceeds of his office but an insufficient reward for his party services until at last a prize came, a letter with a $500 bill in it from General Crehore of Boston to Daniel Pike, Esq. of Kingfield. The honest and patriotic postmaster, who had perhaps been peeping into letters for some time, discovered the $500 bill and removed the deposit to his own pocket. The missing bill after a while came to the Augusta Bank to be changed and by these means the roguery was traced to the Kingfield postmaster who is now we learn in custody."

The defendant admitted himself to have been the author and publisher of the above article. He then offered in evidence the following article referring to the first, which was published in the same paper of the date of Nov. 19, 1834.

"We are admonished in the Age that we have done great injustice to Samuel Usher, Esq. postmaster of Kingfield, by representing him as guilty of having robbed the mail; that he has been examined before a magistrate and the proof against him was not deemed sufficient to commit him. We did not represent that he had been *proved* guilty, and as he has been discharged on that count, we must deem him to be innocent.

"From the information we had however we supposed there was very little doubt of his guilt. Far be it from us to charge an innocent man with robbing the mail."

The defendant further introduced evidence tending to show that he had reason to believe the truth of what was stated in the first article.

The counsel for the defendant requested the Court to give the following instructions: —

That the article of the 5th of Nov. in connexion with that of the 19th, is not on the face of it libellous.

That if the jury believe that the defendant, when he published the article, had good reason to believe it true and published it from good motives and for justifiable ends, they ought to find for the defendant.

That if the defendant published the article in good faith,

believing the public had an interest in knowing the facts contained in it, the burthen of proving express malice lies on the plaintiff.

These instructions WESTON C. J. who tried the cause, refused to give.

He was further requested, by the counsel for the defendant, to instruct the jury — that if from the evidence they were satisfied, the defendant honestly believed that the conduct of the plaintiff was such as induced the defendant to believe that the plaintiff had been guilty of the charge imputed to him by the defendant, and that the defendant did not publish the article *maliciously*, the jury may well find for the defendant.

The presiding Judge did instruct the jury, if they should find that the article, alleged to be libellous, was published without malice, the action was not maintained, but that the publication itself, the truth not having been set up in justification, was evidence of malice in this case, which was not controverted or removed by the testimony relied upon in defence, as the whole publication was not made lawful by the position occupied by the defendant as the editor of a public newspaper. That as such he had a right to publish the fact that the plaintiff was arrested and upon what charge, but that he had no right, while the charge was in a course of investigation before the magistrate, to assume that the plaintiff was guilty or to hold him out as such to the world.

Upon the last request no other instruction was given.

The jury returned their verdict for the plaintiff: —

If the instructions requested and withheld should have been given, or those which were given, were erroneous, the verdict is to be set aside and a new trial granted; otherwise judgment is to be rendered thereon.

Boutelle, for the defendant. The articles of Nov. 5 and Nov. 19, should be considered as part of the alleged libel. The two articles taken in connexion, the Judge should have told the jury that it was their right and duty to ascertain the meaning of the article, and if they believed it not libellous, to

find for the defendant. *Rex* v. *Lambert*, 2 Camp. 398. The right to publish the fact of the plaintiff's arrest, being admitted, the fairness of the comments made by the defendant, should have been decided upon by the jury. *Cooper* v. *Lawson*, 5 Bing. N. C. 514.

The third request, it is believed, the Judge ought to have complied with. Many well settled cases go to establish the doctrine, that when the words written or spoken are in themselves actionable, yet if spoken or written with confidence of friendship, in the course of church discipline, in the regular course of judicial proceeding, or addressed to executors or other officers entrusted with the power of appointment to or removal from office, *or in the proper discharge of the duties of life*, an action of slander or libel cannot be sustained, because the circumstances repel the presumption of malice, and the burthen of proving malice is thrown on the plaintiff. *Thom* v. *Blanchard*, 5 Johns. 508; *Genet* v. *Mitchell*, 7 Johns. 120; *Tillotson* v. *Cheetham*, 3 Johns. 264; *Jarvis* v. *Hatheway*, 3 Johns. 180; *Remington* v. *Congdon*, 2 Pick. 310; *Com.* v. *Blanding*, 3 Pick. 304; *Bodwell* v. *Osgood*, 3 Pick. 379; *Bradley* v. *Heath*, 12 Pick. 163; *Barbauld* v. *Hookham*, 5 Esp. 109; *Howard* v. *Thompson*, 21 Wend. 319. It is contended that the case at bar comes within the principles established by the above cases. The law considers that the business of life could not be carried on unless men and their affairs were discussed with some freedom, though frequently at the hazard of individual reputation, and therefore it has wisely thrown its shield over communications *honestly* made by one man to another, on subjects in which the latter has an interest; subject, however, to be punished if the appearance of a lawful purpose is assumed maliciously in order to injure another. If the law thus extend its protection to communications of this kind between man and man, should not its protection be equally extended to communications made through the public press, in which the whole community have an interest? The defendant had a right, and it was his duty, even with the information he had of the supposed delinquency of the plaintiff, to publish

the fact to the world, that individuals might be on their guard as to sending money through the postoffice kept by the defendant, or that petitions might be preferred to the department for his removal from office. The best interests of society and the ends of justice will be best secured by requiring that in this and in all like cases, the burthen of proving malice and want of probable cause should be thrown on the defendant.

The latter part of the charge of the Court must be considered as nullifying the first part, and as taking away all discretion from the jury to pass on the malice of the defendant, and as asserting, not by way of opinion, but of instruction in matter of law, that if they found the fact of publication, which was admitted, and that inuendoes were true, which was not denied, they should return a verdict for the plaintiff; and this on the ground that the publication was libellous, which the Judge, and not the jury, decided; and that the law inferred malice, which was not rebutted by the position of the defendant as an editor.

In all actions for slander, the jury have a right to pass on the malice of the defendant. In all cases of libel, let the inference of malice from the terms of the publication be ever so cogent, the existence of malice must be found by the jury. 2 Stark. Ev. 741; 2 Kent's Com. 21; *Powis* v. *Smith*, 5 B. & A. 850; *Pitt* v. *Donavan*, 1 M. & S. 639; *Smith* v. *Spooner*, 3 Taunt. 246; *Coward* v. *Wellington*, 7 C. & P. 531; *Stockdale* v. *Taste & al.* 4 Ad. & Ellis, 248; *Hunt* v. *Algar*, 6 C. & P. 245; *Dunman* v. *Bigg*, 1 Camp. 269; *Delancy* v. *Jones*, 4 Esp. 191; *Coffin* v. *Coffin*, 4 Mass. R. 1; *Fowler* v. *Homer*, 3 Camp. 294; *Rogers* v. *Clifton*, 3 B. & P. 587; *Bodwell* v. *Osgood*, 3 Pick. 379; *Findler* v. *Westlake*, 22 E. C. L. R. 356. The Judge should have submitted the intent of the publication to the jury; but under the charge given, the jury had no alternative but to disregard the positive instructions of the Court, or to render a verdict for the plaintiff.

The defendant offered evidence tending to show that he believed the truth of what was published in the first article. It was the province of the jury to put their own construction

on the two articles published. If the testimony offered was sufficient to induce a full conviction in the mind of the defendant of the truth of what he published, ought not this testimony to have been weighed by the jury? and if it entirely rebutted the presumption of malice, should not they have rendered a verdict for the defendant? 3 Stark. Ev. 1243; 1 Phil. Ev. 106; *Burdell's* case, Vaughan's R. 135. "If the Judge from the evidence shall by his own judgment, first resolve upon any trial what the fact is, so, knowing the fact, shall then resolve what the law is, and order the jury severally to find accordingly, what either necessary or convenient use can be fancied of juries, or to contrive trials by them at all?"

Tenney, for the plaintiff. The article of Nov. 5, is most clearly libellous. *Com.* v. *Clapp*, 4 Mass. R. 168. It is not to be considered in connexion with that of Nov. 19, for they were not published together, and the defendant cannot be permitted to qualify his own wrong.

The requested instruction, that if the publication was made with good motives and for justifiable ends, they must find for the defendant, was properly withheld. The principle involved in this request is that the publication of a falsehood is justified by a belief of its truth. But in the publication of any fact, the publisher assumes the risk of the truth of the fact published. He cannot avoid responsibility by saying he was sincere. Starkie on Slander, 181; *King* v. *Root*, 4 Wend. 137.

The object of a civil suit is compensation for an injury sustained. If untrue, what benefit is it to the plaintiff that the defendant believes the truth of what he published; such a defence would be a mere mockery. It might tend to lessen the punishment in a criminal prosecution, but it could have no influence in a civil suit. *Root* v. *King*, 7 Cow. 613; *Brooks* v. *Bemiss*, 8 Johns. 358. Starkie on Slander, 181; *King* v. *Root*, 4 Wend. 113; *Skinner* v. *Powers*, 1 Wend. 451.

The authorities all show that express malice need not be proved. *Andres* v. *Wells*, 7 Johns. 260.

The request that if the jury were satisfied that the defendant honestly believed that the conduct of plaintiff was such

as induced him to believe that he had been guilty, &c., and that the defendant did not publish maliciously, the jury should find for the defendant, is unsupported by legal principles or authorities. This would be to have the benefit of a justification, without its peril. It is asking the jury to infer the absence of malice, not from the truth of the charge, but from an honest mistake under which it may have been made. But the law allows no such mistakes. If libellous matter is published, malice is inferred unless it be true. Carelessness or negligence is no excuse. An editor has no greater privilege than an individual. If he takes the responsibility of publishing what is not true, he cannot avoid it. He cannot assume the prerogatives of a judicial tribunal, and decide upon the character of individuals, and consign them to infamy, and then shield himself from harm by saying that he was an editor and he believed it. His position furnishes no excuse for the publication of falsehood. The jury were bound to find malice.

The opinion of the Court was by

WHITMAN C. J. — This is an action for the publication of a libel upon the plaintiff, in a newspaper edited by the defendant. A verdict was returned for the plaintiff; but with the right, on the part of the defendant, to have it set aside, and a new trial granted, "if the instructions requested and withheld, should have been given; or those which were given were erroneous."

The first instruction requested and withheld was, "that the article of 5th of Nov. taken in connexion with that of the 19th is not on its face libellous." This instruction, we think the Judge did right in withholding. We know of no authority for coupling two articles, not simultaneously published, and not in the same paper or book, for the purpose of ascertaining whether one of them was libellous or not. In this case a fortnight intervened between the two publications.

The other instructions requested were, that, "if the jury believed, that the defendant, when he published the article, had good reason to believe it true, and published it from good

motives and justifiable ends, they ought to find for the defendant." "That if the defendant published the article in good faith, believing the public had an interest in knowing the facts contained in it, the burthen of proving express malice lies on the plaintiff;" and, "that, if from the evidence, they were satisfied, that the defendant honestly believed, that the conduct of the plaintiff was such, as induced the defendant to believe the plaintiff had been guilty of the charge imputed to him by the defendant, and that the defendant did not publish the article maliciously, the jury may well find for the defendant."

The counsel for the defendant, Mr. Boutelle, has cited numerous authorities, and his argument has been elaborate and ingenious in support of these propositions. But the authorities, upon examination, will be found to apply to a class of cases very different from the one at bar. They are cases arising from communications to a body having power to redress a grievance complained of; or having cognizance of the subject matter of the communication, to some intent or purpose or other; and to cases of communications made confidentially, or upon request, where the party requesting information had an interest in knowing the character of the individual inquired after; and to cases where a party might be honestly endeavoring to vindicate his own interest; as in the case of the slander of title; or of guarding against any transaction, which might operate to his own injury; and to cases of words not in themselves actionable, except from the special injury which they might occasion.

The case at bar is one of a publication addressed to no person or body of men having power to redress a grievance; and, it is rather superfluous to add, not a confidential communication to any one; and does not appear to have been designed to guard against any injury imminently threatening the individual interest of the publisher; nor does it present a case of words in themselves not actionable.

The allegation in the plaintiff's writ is, that the publication accuses him of the crime of larceny. This allegation being proved, malice is by law implied, and it would be for the de-

fendant to disprove it. The burthen of proof in such cases is thrown upon him.

But it is incumbent on the plaintiff first to prove, his allegation, that the defendant has, by his publication, accused him of the crime. The terms of the article may, to this purpose, be explicit and unequivocal; or they may be obscure and unintelligible, in the absence of extraneous proof to show their meaning; as in the case of the use of words, which are mere provincialisms or cant phrases, or terms of art, or where words are used qualifying or restraining the meaning of other words used. In every case it is believed to be the province of the jury, under the instruction of the Court, to determine the import of the language used. 1 Carr & Paine, 245.

The instruction of the Court is nothing more than the term imports. It is not mandatory but advisory. The instruction requested of the Court, we cannot, therefore, on the whole, regard otherwise than as properly withheld.

The argument of the counsel for the defendant seems to concede, that the presumption of malice in this case, if the matter of the publication may be regarded as malicious, is inferable from publication; and in the absence of all evidence to the contrary, the Court would be justified in advising the jury, that malice was to be inferred; but the evidence to do away with such a presumption, as has already been seen, must be different from that relied upon in the defence. There was, then, no evidence in the case, which should have had that effect; and the charge of the Judge to the jury would not seem to have been, substantially, at variance with the position admitted, by the counsel for the defendant, to have been correct.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PISCATAQUIS, JUNE TERM, 1841.

WILLIAM G. CLARK *versus* BINGHAM GELLERSON *& als.*

The evidence of the sale of a possessory interest in real estate is not required to be by deed — and if by deed, the same need not be acknowledged nor recorded.

THE facts in this case sufficiently appear in the opinion of the Court.

Hutchinson, for the defendants.

J. Appleton, for the plaintiff.

The opinion of the Court was by

TENNEY J. — This action, which is upon a note of hand, in the name of the indorsee, negotiated after it became payable, is defended on the ground, that no consideration has been realized by the defendants. The supposed consideration was the conveyance of a possessory title to certain real estate in the town of Brighton to the defendants by one Woodward, made Oct. 8, 1832, Woodward holding under a deed from one Witherell bearing date July 6, 1831, acknowledged Aug. 11, 1832, at the time of the conveyance to the defendants, being and having before been in the possession and occupancy of the land. It is insisted by the defendants, that an attachment made July 6, 1832, and the subsequent sale, Sept. 8, 1832, of the possessory right, as the property of said Witherell, defeated

the conveyance to Woodward, so that the defendants could take nothing by Woodward's deed to them.

It is not necessary that the evidence of sale of such an interest should be a deed, consequently the acknowledgement and registry are not required. The deed, such as was executed and delivered by Witherell in this case, and the possession of Woodward, which we are to suppose commenced upon its delivery, as the exceptions are silent as to the time, were sufficient to pass the right to him, and that was afterwards legally transferred to the defendants. There was then nothing on which the attachment in the suit against Witherell could operate and the consideration of the note has not been taken away.

Exceptions overruled.

STATE *versus* JOHN SOULE.

A count in an indictment defective for not alleging the offence to have been committed against the form of the statute, is not aided by another count in the same indictment for another offence in which there is that allegation.

When a motion to quash an indictment was overruled, and the indictment was ordered to proceed to trial, it was held that exceptions would not lie to such order. If a motion had been made after verdict, and in arrest of judgment for cause, exceptions would be sustained if improperly overruled.

Though exceptions are overruled, the motion in arrest of judgment may be made in this Court, and judgment will be arrested.

EXCEPTIONS from the District Court, ALLEN J. presiding.

This was an indictment against the defendant. The first count was for lewdly and lasciviously associating and cohabiting with one Lydia Humphrey, a married woman, the defendant being a single man. There was no allegation that the offence was against the form of the statute.

The second count was for fornication with the same person, which was alleged to have been committed against the form of the statute.

Before the cause was committed to the jury, the counsel for the defendant moved the Court to quash the indictment, but

the motion was denied. The jury returned a verdict of guilty on the first and not guilty on the second, and exceptions were filed.

J. Crosby, for the defendant, argued that the first count was defective in not concluding *contra formam statuti.* Such an allegation is necessary in every indictment for a statutory offence, and should be in every count. It is necessary in order that the defendant should know with what offence he is charged, and that the Court may know from the record what judgment to pronounce. *King* v. *Holland,* 5 D. & E. 624; 4 Bac. Ab. 8; *Com.* v. *Stockbridge,* 11 Mass. R. 279. There is no reference to the other count. Every allegation necessary to constitute an offence must be alleged. 1 Chitty's Cr. Law, 233; *King* v. *Aylett,* 1 D. & E. 63. The Court will not presume the offence to have been committed against the form of the statute unless it be so alleged. *Baxter* v. *Martin,* 5 Greenl. 80. The words *contra formam* are essential in the description of every statutory offence. 1 Chitty's Cr. Law, 173. The counts are as distinct as several counts in a declaration. 4 Bac. Ab. 9. An indictment like the present one was adjudged bad in *The King* v. *Mason,* 2 D. & E. 581.

D. Goodenow, Attorney General, *contra.*

By the Court. The question whether a defective count can be cured by a reference to another, does not arise in this case, there being no such reference. The allegation that the offence was committed *contra formam statuti,* is necessary to the description of it. But the motion in this case, having been made before verdict, and there having been one good count in the indictment, it was within the discretion of the presiding Judge to quash the indictment or not. Had the motion been made after verdict in arrest of judgment, the exceptions must have been sustained.

Exceptions overruled.

The counsel for the defendant then filed a motion in this Court in arrest of judgment, for the reasons before assigned, and it was arrested.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT, JUNE TERM, 1841.

Asa Davis *versus* Ebenezer French, Adm'r.

Where the cause of action existed against the deceased, the executor or administrator may make himself liable by a written promise to pay, founded on sufficient consideration; and in such case the action should be brought against him in his own right.

A promise from the executor or administrator, as such, to pay a debt due from the deceased, may be alleged in an action brought against him as executor or administrator and then the judgment should be *de bonis testatoris*.

The executor or administrator can create no debt against the estate of the deceased.

This was an action founded on a note signed by the defendant as administrator of one Zadock French deceased.

The parties agreed that judgment should be rendered against said Ebenezer, either in his individual capacity, in which event the plaintiff was to take no costs, or against him as administrator with costs, as the Court may adjudge.

This case was submitted upon the briefs of counsel.

G. B. Moody, for the defendant. The question to be settled in this case, is the liability of the intestate's estate to be charged with the payment of the note in suit. Where the estate has been declared insolvent, the claims must first be presented to the Commissioner, and no suit can be maintained upon any claim unless it has been disallowed by them, &c. St. 1821, c. 51, § 25. A time is limited within which a

suit is to be brought, and if not seasonably commenced the administrator is liable for waste, if they do not resist it, and judgment is recovered against the estate. St. 1821, c. 52, § 26; *Brown* v. *Anderson*, 13 Mass. R. 203; *Emerson* v. *Thompson*, 16 Mass. R. 178.

The object of the statute was to provide for a termination to liability of estates for debts which otherwise would be a lien upon them forever. Estates ought not to be charged on the contracts of the administrators arising out of debts against the intestate, for that would allow them to nullify the statute, by giving to the creditor a new term of time in which to commence a suit, to wit, from the date of the note. If this action could prevail, an administrator might burthen an estate with his own debts not only for an unlimited term of time, but also for an unlimited amount. A guardian cannot bind the estate of his ward by his own note given in that capacity. *Thatcher* v. *Dinsmore*, 5 Mass. R. 301; *Foster* v. *Fuller*, 6 Mass. R. 58; *Sumner* v. *Williams*, 8 Mass. R. 199. The principle applies to this case, — it is, that the estate cannot be charged by their contract.

Cutting, for the plaintiff. Judgment in this case should be against the goods of the testator in the hands of the administrator and not against the administrator's own goods. *Whitaker* v. *Whitaker*, 6 Johns. 115. That an executor or administrator, as such, is liable upon his contracts in that capacity seems assumed in *Carter* v. *Phelps*, 8 Johns. 441; 1 Chitty on Pleading, 205.

The opinion of the Court was by

Shepley J. — Where the cause of action exists against the intestate, and the administrator for a sufficient consideration promises to pay, the action may be brought against him in his own right, and a general judgment should be entered against him. *Wheeler* v. *Collier*, Cro. Eliz. 406; *Atkins* v. *Hill*, Cowp. 284. But since the statute of frauds such a promise must be in writing. And no judgment can in such an action be entered against the estate of the intestate. *Hawkes* v.

Saunders, Cowp. 289. It was decided in the case of *Trevinian* v. *Howell*, Cro. Eliz. 91, where the executor for a sufficient consideration promised to pay a debt due from the testator, and the action was brought against him as executor, that a judgment against him *de bonis propriis*, was not erroneous. But in *Secar* v. *Atkinson*, 1 H. Bl. 102, where the action was against the administratrix, it was decided, that a count on her own promise to pay a debt due from the intestate might be joined with counts on promises of the intestate; and that the proper judgment on all the counts was *de bonis testatoris*. And Heath J. in delivering the opinion, says, "this is the common mode of declaring against executors and administrators to save the statute of limitations; but if it were to be considered as making them personally liable, I do not know, who would ever take out administration."

The true doctrine on this subject appears to be, that where the cause of action existed against the deceased, the executor or administrator may make himself personally liable by a written promise founded upon a sufficient consideration. And in such case the action should be brought against him in his own right, if the plaintiff would have a judgment against him in preference to one against the estate. A promise from the executor or administrator, as such, to pay a debt due from the deceased may be alleged in an action brought against him as executor or administrator, and in such case the judgment must be *de bonis testatoris*. But the executor or administrator cannot create a debt against the deceased. And it is immaterial how clearly the intent to do so may be expressed; for having no power to bind the estate he only binds himself by such a contract. And there can therefore be no judgment *de bonis testatoris*; and the action should be brought declaring against him in his own right. *Barry* v. *Rush*, 1 T. R. 691; *Sumner* v. *Williams*, 8 Mass. R. 199; *Myer* v. *Cole*, 12 Johns. 349.

In this case the contract originated with the administrator and there is no evidence that the debt also did not, and no judgment can be entered against the estate which he represents.

Judgment against defendant generally without costs.

LEONARD MARCH, Executor, *versus* JACOB GARLAND.

To charge an indorser, the day on which notice was placed in the postoffice addressed to him should be made certain.

Where the person by whom notice of the non-payment of a draft was sent to the indorser, was uncertain as to which of two places the same was directed, but it appeared that he was correctly informed on the day the notices were sent, of the residence of such indorser; and that the indorser had said he knew, or had notice that the draft had come back, it was held, that the jury were justified in finding the notice to have been properly directed.

THIS was an action against the defendant, as indorser of a draft dated July 1, 1836, payable in sixty days, at the Suffolk bank, Boston, drawn by S. & G. Turner & Co. on Nath'l Fifield, and by him accepted.

The plaintiff, to prove his claim, introduced the notarial protest of Wm. Stevenson, by which it appeared, among other things, that he sent notice of the non-payment of the draft in suit to the drawers, the first indorser, and accepter, enclosed to John Wyman, cashier, per mail, to Bangor.

The plaintiff then called John S. Ricker, who testified that he was a clerk in the Mercantile bank, Bangor; that on the 5th or 6th of September, 1836, although he was not positive as to the day, he received from Samuel Harris, cashier of the same bank, certain notices to be delivered, signed by Wm. Stevenson, notary public, and by said Stevenson directed on the inside, one of which was addressed to the defendant; that he sealed it up and put it in the postoffice, Bangor, directed to the defendant either at Bangor or China, he could not state which, but thinks it was China; that he inquired of Moses Patten, Jr. where the defendant resided; that Patten was not certain as to his place of residence; and that independently of the protest and of a record of the names of persons to whom notices were to be sent, which he kept, he had no recollection whatever as to the time.

Henry Warren, who was called by the plaintiff, testified that he was in the Mercantile bank in the early part of September, 1836, as he thought, and that while there he recollected that John Wyman, cashier of the Penobscot bank, came in and left

papers resembling a protest and notices; that observing the name of the defendant among the papers he noticed them more particularly, that he thought Fifield and the Turners were also named, but that he was not certain as to the Turners — that he found these papers in season by due course of mail, from Boston; that he did not recollect the date, or amount of the protested papers, or the name of the notary — that inquiry was made of him where Garland lived, that he replied that he lived in China, but that he spent considerable time in Bangor, and that they had better inquire if he was not then there. He further testified that China was on the direct mail route from Boston to Bangor, that the mail arrives in China the day preceding its arrival in Bangor, and that after the arrival of the mail at Bangor, no communication by mail could be forwarded to China until the day following.

From the testimony of Samuel Harris, cashier of the Mercantile Bank, it appeared that the draft in suit was left by the plaintiff in the Mercantile Bank for collection, that having no account with the Suffolk Bank, he handed it to the cashier of the Penobscot Bank for collection; that he subsequently received from said cashier (Wyman) a protest and notices which he presumed were on the same draft, that he passed the same over to Ricker to be delivered — and that he had no recollection of the time independently of the protest.

From the testimony of Moses Patten, Jr. it appeared that some time in September, 1836, John. S. Ricker inquired of him where the defendant resided, and that (after making inquiry to ascertain) he on the same day, before the close of bank hours informed him that the defendant, resided in China. Said Patten further testified that soon after the protest of the draft, and, as he thought, not more than four or five days from that time, but as to the time he was not certain, he saw the defendant in Bangor and asked him if he knew of it or had notice of it; and that, as he thought, the defendant replied that he did know or had notice of it, and that he would attend to it, or would arrange it.

Upon this evidence the defendant's counsel moved the Court

to order a nonsuit on the ground that the evidence was insufficient in law to maintain the issue on the part of the plaintiff. But PERHAM J. before whom the cause was tried, directed the jury that if they were satisfied, that a demand of payment had been seasonably made, and notice of non-payment had been seasonably made and forwarded to Bangor, and due diligence had been used, after its reception in Bangor, to forward it properly directed to the defendant to his place of residence, it was such a compliance with the law as would charge the defendant, and that it was necessary for the plaintiff to satisfy them on these points by clear and satisfactory evidence.

The defendant's counsel requested the Court to instruct the jury that in order to charge the defendant, the evidence of notice should be direct, explicit, and attended with no uncertainty, and that it should not be left to inference; that the testimony of Ricker was not of that character, and was insufficient in law to prove seasonable notice to the defendant. The Court declined giving the requested instructions further than as appear in the instructions given. The jury returned a verdict for the plaintiff, and exceptions were duly filed to the rulings of the Court.

Godfrey, for the defendant. The indorser is responsible only on proof of demand and refusal, and due notice thereof. From the evidence, it does not appear when the notice sent from Boston was received, nor when notice was transmitted to the defendant. The whole matter was left in such doubt and uncertainty that the defendant should not, as a matter of law, have been liable. Upon the proof offered he was not legally liable, and the law should not have been left to the jury. *Warren* v. *Gilman*, 15 Maine R. 136. This being a foreign bill, the protest is the proper evidence. *Phœnix Bank* v. *Hussey*, 12 Pick 483; *Green* v. *Jackson*, 15 Maine R. 136. There is no certainty as to the time when notice was sent, without which the defendant should be discharged. *Lawson* v. *Sherwood*, 1 Stark. 251.

The cashier of the Mercantile Bank was not a holder of the note, nor was he the proper person, not being a party to the

draft, to give the requisite notice to the several parties. Those should have come from a holder. *Stanton* v. *Blossom*, 14 Mass. R. 116; *Roberts* v. *Bradshaw*, 1 Stark. 29.

J. A. Poor, for the plaintiff. The notice given was sufficient. *Munn* v. *Baldwin*, 6 Mass. R. 316; *Bank of Utica* v. *Davidson*, 5 Wend. 587; *Meade* v. *Engs*, 5 Cow. 303; *Chapman* v. *Lipscombe*, 1 Johns. 294.

The agreement, testified to by Patten, to pay, is conclusive on the defendant. *Miller* v. *Hackley*, 5 Johns 375; *Reynolds* v. *Douglas*, 12 Pet. 497.

The opinion of the Court was by

SHEPLEY J. — The protest being the only proper evidence of the proceedings of the notary was produced. It appears from it, that notice was sent to the defendant in due season enclosed to Wyman, the cashier of the Penobscot bank. Parol evidence was properly admitted to show, when it was received by the cashier, and what was done with it. Harris, the cashier of the Mercantile bank, says, that he had no doubt, that the protest and notices were seasonably received by him from Wyman, and that he passed them over to Ricker, the clerk, to be delivered. This testimony is sustained by that of Warren. And the jury might fairly conclude, that they were received from Wyman on the day of their arrival at Bangor in due course of mail, from Boston, and immediately passed over to Ricker. Ricker testifies, that on the fifth or sixth of September he received the notices from Harris, and put the one addressed to the defendant into the postoffice at Bangor, directed to him at Bangor or China, he could not state which, but thinks it was at China. The day on which it was placed in the postoffice should be made certain, and if the testimony of this witness were not aided by that of others, it would be insufficient. But, when taken in connexion with the testimony of Harris and Warren, it appears, that the notice came to the hands of Ricker on the day that it was received at Bangor, and on the same day was put into the postoffice.

The testimony of Ricker leaves it uncertain also whether the notice was properly directed to the defendant at China. But when the testimony of Warren and Patten including the statement of the defendant to Patten, that he knew or had notice, that the draft had come back, is considered in connexion with it, the jury would be justified in concluding that it was properly directed.

The testimony exhibits an inattention to dates and a want of accuracy in the persons entrusted to do the business of the bank, very dangerous to the rights of the holders of such paper. And when the present practice of the notaries to forward all notices to the cashier instead of sending them properly directed to each party by mail, is considered, it must be apparent, that the risk to the holders of such paper is greatly increased, and their rights put to extreme hazard by this practice on the part of the notaries. None of the other objections taken at the trial were insisted on at the argument.

Exceptions overruled.

ALVAH HUNTRESS *versus* WILLIS PATTEN.

The cashier of a bank in which a draft has been left for collection, is a competent witness to prove that due notice of its dishonor has been given to the several parties.

Where the final payment of a draft was guaranteed, it is sufficient to maintain a suit against the guarantor to prove the insolvency of the parties to the draft before the commencement of the suit, and that the draft could not have been collected.

Neglect to proceed against the principal debtor, or to become a party to his assignment, (in case he has made one,) does not discharge the guarantor in whole or in part.

The guarantor of a contract tainted with usury, is so far a party to the same that he may set up usury as a defence to a suit upon his guaranty.

THIS was assumpsit against the defendant, as guarantor of the draft described in the following contract of guaranty: —

"Bangor, Jan. 12, 1837.

"I hereby guaranty to Alvah Huntress, or his order, the final payment of Newell Bean's acceptance for five hundred and seventy-nine dollars twenty cents, dated this day, drawn by Herman Fisher, and by him indorsed, payable in sixty days at the Suffolk bank in Boston. WILLIS PATTEN."

The plaintiff then proved that said draft was duly protested, and notices to the several parties to the same were seasonably forwarded to W. H. Foster, the cashier of the bank in which it had been left for collection; and that on the same day they were received, one was left for the defendant at his counting room, in Bangor, he being then absent.

It appeared in evidence, that Bean, at the maturity of the draft, had property in his possession; and that on the third day of April, 1837, he assigned his property for the payment of his debts; and that his creditors, who became parties to this assignment, received dividends of forty-eight per cent.

John Huckins testified that he wrote the guaranty, copying it from a similar one, which had been given by the defendant to the plaintiff to secure a similar draft, which had been accepted by Bean, and that the draft and guaranty adduced in evidence were received instead of the former draft and guaranty, which were given up.

The defendant offered to prove that interest at the rate of five per cent. per month, for the term of the former draft and the one in suit, was included in the latter. This evidence was excluded.

The counsel for the defendant requested the Court to instruct the jury that no consideration for the guaranty was proved, and that neither identity of date nor the testimony of Huckins proved that the draft and the guaranty were executed upon the same consideration. But WESTON C. J. who presided at the trial, instructed them that there was evidence to be left to them whether both were not given for the same consideration, and if so, a sufficient consideration for the guaranty was proved.

The defendant's counsel further requested the Court to instruct the jury, that defendant cannot be held to pay unless it be proved that the parties to the bill were and have been insolvent since its maturity, and that judgment has been obtained against them each, which after due diligence cannot be collected, or that such suits would have been unquestionably useless.

That notice being left at the counting room of Willis Patten & Co. if the jury were satisfied that the defendant was absent from Bangor, and out of the State at the time and for weeks after, was not sufficient and legal notice.

That if the jury were satisfied that Bean, the acceptor, had property which could have been attached, at the day the draft came back into the hands of the plaintiff, and that the debt might then have been secured, and that the plaintiff neglected until the third of April following to secure it by suit and attachment, and that Bean then failed and assigned his property, and that the defendant was absent as aforesaid, — it was the duty of the plaintiff to have secured his demand by suit and attachment before Bean's failure; and if he neglected to do so, he could not call upon the defendant upon his guaranty.

These instructions the presiding Judge declined giving.

The jury returned a verdict for the plaintiff. If the testimony rejected ought to have been received or that which was objected to by the counsel for the defendant ought to have been rejected, or if the instructions requested and withheld should have been given, or if those which were given were erroneous, the verdict is to be set aside and a new trial granted; otherwise judgment is to be rendered thereon.

Cutting, for the defendant. 1. The testimony to prove usury should have been received. St. 1821, c. 19. The guaranty refers to the draft. They are both part of one and the same transaction. *Bridge* v. *Hubbard*, 15 Mass. R. 103. It was given as security for a contract; and the party giving security for an usurious contract may show it in defence. *Richardson* v. *Field*, 6 Greenl. 36; *Warren* v. *Crabtree*, 1 Greenl. 169; *Tate* v. *Wellings*, 3 D. & E. 531. Any party to the contract, when coming in simultaneously or subsequently, may

take advantage of the usury. *Cuthbart* v. *Haley*, 8 D. & E. 390; *Young* v. *Wright*, 1 Camp. 139; *Mann* v. *Commission Co.* 15 Johns. 44. The statute prohibits the taking of usury directly or indirectly. The defendant was a party as much by virtue of his guaranty, as if on that day he had placed his name upon the draft.

2. No consideration for the guaranty was proved. It was given in exchange for a similar guaranty of another draft. No consideration is shown for the former guaranty — for if that was without consideration, so is this. *Aldridge* v. *Turner*, 1 Gill. & Johns. 427; 7 Har. & Johns. 457.

3. The neglect of the plaintiff has absolved the defendant from all liability. The plaintiff used no efforts to secure his debt of Bean, when with ordinary diligence it might have been collected. *Oxford Bank* v. *Haynes*, 8 Pick. 423.

By the express terms of the guaranty, the plaintiff cannot sustain his suit. The "final payment" of the debt only is guaranteed. The language of a surety is to be construed liberally for him. The words imply a condition precedent. 'Final' must have some meaning. He was the last person to be called upon by the contract of guaranty. It could never have been understood that resort should first be had to him. The other parties to the bill should have been called upon first. *Moakley* v. *Riggs*, 19 Johns. 69.

4. Foster was interested as a witness being liable if he was guilty of neglect in giving notice. *Springer* v. *Shirley*, 2 Fairf. 204; *Bailey* v. *Ogden*, 3 Johns. 399.

Rogers, for the plaintiff. There is no evidence that Patten was a party to the usurious contract; and none but a party can take advantage of the usury. *Reading* v. *Weston*, 7 Conn. R. 409. The guaranty was for a valuable consideration. Although there might have been usury between the parties to the draft, yet if the acceptor will not invoke the aid of the Statute, why should the defendant, who was no party to it be permitted to avail himself of that defence. The contract of guaranty was for a new consideration; and the guarantor is paid for his liability as upon a valid draft. The guar-

anty is a distinct and separate undertaking. The statute of usury applies only to a loan of money. Here was no loan to the defendant. It was merely a contract to pay, on the happening of a certain event, the debt of another. It should have been proved that the draft had no validity until it was negotiated to the plaintiff, to bring it within the statute. If none but a party can avail himself of the statute, and this be a separate and independent agreement, (not for the loan of money but for the security of the plaintiff, and for which the defendant has been paid,) then, as the defendant has not shown that this contract was part of the loan, and that the security was not to be available till after his signature, there is not that privity on the part of the defendant which authorizes him to invoke the aid of the statute.

2. The giving up of a former guaranty was a sufficient consideration for the present one. The legal presumption is that it was sufficient.

3. It was the duty of the guarantor to see to the payment of the draft. *Oxford Bank* v. *Haynes*, 8 Pick. 483. The defendant was to be liable upon some contingency, and if not liable now, it is difficult to perceive when he ever will be. The plaintiff was bound neither to become a party to the assignment, nor to commence a suit.

The opinion of the Court was by

Shepley J. — The defendant was the guarantor of a bill or draft, which was proved to have been presented and regular notice to have been given to the other parties to it, if the cashier of the bank was a competent witness. The decisions appear to have been uniform, that one so situated is a competent witness, when it does not appear, that he would be liable to the plaintiff, if he failed to recover against the defendant. And there was no sufficient proof of it in this case.

When the guaranty is made at the time of the original promise and becomes an essential ground of the contract with the principal, the consideration between the principals to the contract constitutes also a sufficient consideration for the guaranty,

Leonard v. *Vredenburgh*, 8 Johns. 29; *DeWolf* v. *Rabaud*, 4 Peters, 476. The surrender of the former draft was a sufficient consideration for the present. The contract of guaranty is less favorable for the party making it than that of an indorser; for while it is necessary to notify an indorser, it is not necessary to notify a guarantor, in case of the insolvency of the acceptor. When notice has, as in this case, been regularly given to the guarantor, he may take measures to relieve himself; and mere neglect to proceed against the principal does not discharge him. In the case of *Oxford Bank* v. *Haynes*, the guarantor was discharged by the neglect to notify, and not by the neglect only to proceed against the principal. This guaranty being only for the "final payment" of the draft, it is contended that the plaintiff cannot recover without proving, that he has exhausted his remedies against the other parties, or that they were insolvent, when it became payable. In the case of *Seaver* v. *Bradley*, 6 Greenl. 60, the guarantor was to to be "ultimately accountable"; and it was contended, that he was not liable until after legal process against the principal had proved to be without effect. The Court say, "we consider the fair meaning to be, that if Heald should not comply with the terms of his engagement as to the payment for the goods purchased, then on due notice of the advances made on the faith of the guaranty, he would be accountable and pay for such advances not exceeding the limited amount." If the engagement in this case could be regarded as more favorable for the defendant, it does not in terms require any legal proceedings against the principal, and would be fully satisfied by proof, that the prior parties had become insolvent before the commencement of the suit. The defendant's liability would become certain and fixed by the proof, that the draft could not be collected of them. In the case of *Moakley* v. *Riggs*, 10 Johns. 69, the guaranty, in terms, required the proof of inability to be made out by proceedings in "due course of law."

The requested instructions were properly withheld, because they required proof of the inability of the principals to pay to extend to the time when the draft became payable; and the

plaintiff was only obliged to prove its existence before the commencement of his suit. After notice to the defendant the risk of the solvency of the other parties was upon him and not upon the holder. Lord Eldon says, in *Wright* v. *Simpson*, 6 Ves. 734, " but the surety is a guarantor; and it is his business to see whether the principal pays, and not that of the creditor."

The defendant is not the less a party to the contract because he is liable only collaterally and not in the first instance. The ground, upon which the consideration for his promise is held to be sufficient, is, that he was so connected with the contract between the other parties, that the consideration of their promise was that of his also. It is the very contract, which he engages to pay, that is alleged to be tainted with usury; and he may prove it to be illegal, as well as defective in any other manner to prevent a recovery in part or in the whole.

The testimony offered to prove, that interest at the rate of more than six per cent. per annum was included in the draft should have been received, and there must therefore be a new trial.

JOEL VICKERY *versus* WILLIAM SHERBURNE.

In replevin, before a justice of the peace, under the plea of *non cepit*, the taking only is in issue.

If the defendant would avail himself of any other defence it should be by special plea or brief statement.

EXCEPTIONS from the District Court, ALLEN J. presiding.

This was an action of replevin, returnable before the Municipal Court for the city of Bangor, for certain juniper knees. The defendant pleaded the general issue. Judgment was rendered in his favor, from which the plaintiff appealed.

On the trial in the District Court, before ALLEN J. the defendant offered to show that the property replevied was in one Samuel Sherburne, under whose authority he justified the taking, but the Court refused to admit the evidence and instructed the jury that the defendant under this issue, which

merely denied the taking, could not dispute the ownership, and that the only question for their consideration was, whether the defendant did take and detain the property in question as alleged in the plaintiff's writ. The jury returned a verdict in favor of the plaintiff.

J. A. & H. V. Poor, for the defendant. The question to be determined is the construction of St. 1831, c. 514. By St. 1821, c. 76, § 12, the general issue was to be pleaded as all civil cases before justices of the peace, and special matter might be given in evidence under it. In *Holmes* v. *Wood*, 6 Mass. R. 3, it was decided that replevin was not within the statute; and that only the taking was put in issue by that plea. By the statute, c. 514, the general issue is required to be pleaded in all cases, and being required by virtue of the provisions of the statute, it is no admission of any fact contested. The language of that statute is general and embraces replevin. Under this last statute none of the consequences can arise, which led to the decision of the Court in 6 Mass. R. 3. Unless this last statute embraces replevin, then special pleading is to be considered as abolished in all cases but one; and that by judicial construction, when the statute includes all cases.

McCrillis, for the plaintiff. By the common law, under the plea of *non cepit* in replevin, the only question to be determined is the taking. The statute of this State, c. 76, § 12, is a transcript of that of Massachusetts passed in 1783, c. 42, § 7, and should receive the same construction. In *Holmes* v. *Wood*, 6 Mass. R. 3, it was settled that replevin is not a civil action, within the provisions of that statute. By adopting that statute, the legislature may be presumed to have adopted the judicial construction of their Courts. *Bailey* v. *Rogers & al.* 1 Greenl. 186; *Gibson* v. *Waterhouse*, 5 Greenl. 19; *Marble* v. *Snow*, 14 Maine R. 195. By St. 1831, c. 514, the filing of a brief statement is to take the place of a special plea under the previous statute, but as neither has been done in this case, the evidence was properly rejected.

That the last statute must be considered as repealing the former, so far as to abolish all special pleading, on a fair con-

struction of its meaning and import would seem to be established by the following authorities. *Williams College* v. *Mallett*, 16 Maine R. 84; *Penobscot Boom* v. *Lamson*, 16 Maine R. 223; *Gordon* v. *Paine*, 2 Fairf. 213; *Potter* v. *Titcomb*, 2 Fairf. 157; *Potter* v. *Titcomb*, 13 Maine R. 36.

If then the general issue is to be pleaded by the imperative provisions of the statute, it should not be considered as an admission of any fact; and under the general issue, which is thus required, the evidence offered should not have been received.

By the Court. As the question here raised may be one of frequent occurrence in practice, it may be desirable that the views of the Court on this point should be known. This was an action of replevin before the Municipal Court for the city of Bangor. The general issue was there pleaded, and judgment being rendered in that Court in favor of the defendant, an appeal was taken. At the trial in the District Court, the defendant intending to avail himself of a license, offered to prove the property replevied, to be in one Samuel Sherburne. The error on his part was, that he had not resorted to a brief statement in the Municipal Court, in which event the evidence would have been admissible. According to former decisions, the ruling of the Court below was correct. It has been settled by decisions in Massachusetts, by their Court, in the construction of a statute similar in its language to our own (St. 1821, c. 76, § 12) in the case of *Holmes* v. *Wood*, 6 Mass. R. 3, that under the plea of *non cepit*, the taking only can be controverted. That construction must be followed here. The defendant having filed no special plea, the evidence offered was inadmissible by virtue of St. c. 76, § 12. He can derive no aid from the provisions of St. 1831, c. 514, by which special pleading was abolished, inasmuch as having neglected to file the brief statement required by that act, he has not brought himself within its provisions. It is not necessary to determine in this case whether the latter repeals the former statute and we leave that point undetermined.

Leonard Jackson *versus* Inhabitants of Hampden.

An offer to be defaulted in pursuance of the provisions of St. c. 165, § 6, is not an admission of the contract as stated in the plaintiff's declaration.

The certificate of the majority of the superintending school committee as to the qualifications of a teacher, is to be regarded as *prima facie* evidence that they have performed their duty as well in notifying those who do not sign as in making the necessary examination.

If all the members of the committee have not received notice, a certificate by a majority is void.

A member of the committee does not waive his right to be notified by absence.

A teacher is not authorized to teach, and cannot recover pay without the requisite certificate of the superintending school committee, even though all the members neglect or wantonly refuse to examine him.

The certificate required is of the existing committee, and one of the committee of a former year though composed of the same individuals, would be unavailing.

This was an action of assumpsit brought by the plaintiff for services in keeping school in the town of Hampden, in district No. 15, in the winter of 1835–6.

The plaintiff introduced the certificate of Asa Matthews, preceptor of Hampden Academy, and a gentleman of collegiate education, dated Nov. 21, 1835; the certificate of Hannibal Hamlin, Esquire, dated Dec. 27, 1834; the certificate of the selectmen of the town of Newburgh, the town in which said Jackson lived, of his good moral character, dated Dec. 14, 1835. Plaintiff further read in evidence, as the admission of the defendants, the following offer to be defaulted. —

"Penobscot, ss.

"Supreme Judicial Court, Oct. Term, 1836. *Leonard Jackson* v. *The Inhabitants of Hampden.*

"And now the said inhabitants of Hamden, on the first day of the term of said Court, by their agent, offer to be defaulted in said action, for the sum of ten dollars, debt or damage, and costs of court to be taxed by the Court according to law.

"Signed, Hannibal Hamlin, Agent and attorney for the town of Hampden;" which offer in writing was filed the first day of said term in court, and so entered on the docket of said Court.

The plaintiff further offered in evidence the certificate of

Harvey Hawes, and Silas Baker, two of the superintending school committee of said Hampden for the year A. D. 1835, which being objected to, the Court refused to admit, without record proof that said Baker and Hawes were legally chosen and sworn.

The plaintiff then offered the records of the town of Hampden, by which it appeared that said Baker, Hawes, and Hannibal Hamlin, Esquire, of said Hampden, were duly chosen and qualified as said superintending school committee, and thereupon offered to read said certificate, which being objected to, was rejected by the Court. It appeared by the testimony of Charles Andrews, that the plaintiff, after having been hired by the agent of the said district, and before he commenced said school, offered himself for examination at said Hamlin's office, and that said Hamlin was absent; and the plaintiff hereupon again offered said certificate, which being objected to by the defendants, EMERY J. who tried the cause, rejected it, and nonsuited the plaintiff. To which ruling the plaintiff filed exceptions.

A. G. Jewett, for the plaintiff. The admissions of the defendant of record, and the offer to be defaulted, are a waiver of their right to contest the legal qualifications of the plaintiff. The offer to be defaulted admits the contract to have been legally made, leaving the amount due the only question to be settled. It is equivalent to a tender, and has the same binding force. *McLellan* v. *Howard*, 4 D. & E. 194; *Cox* v. *Brain*, 3 Taunt. 95; Roscoe on Ev. 31; *Morton* v. *White*, 4 Shep. 53; Bul. N. P. 298; *Dyer* v. *Ashton*, 1 B. & C. 3.

The plaintiff here did his duty by calling on the third member of the school committee. He did all in his power. The certificate of Hamlin, of the preceding year, and that of two of the committee, should have been received, leaving the effect of the evidence for subsequent consideration. The certificate of two being uncontradicted, is presumed to be the certificate of all. *Downing* v. *Rugan*, 21 Wend. 178; *Williams* v. *East India Company*, 3 East, 192; *Rex* v. *Haskins*, 10 East, 216.

It would be a fraud on the plaintiff, who has done all in his power, for the defendants to take advantage of the absence of the third member of the committee, which was caused by their own act. *Hartwell* v. *Littleton*, 13 Pick. 233; *Clark* v. *Great Barrington*, 11 Pick. 264.

No contract is here sought to be dissolved, and the same strictness is not necessary as when that is the case.

H. Hamlin, for the defendants. The offer to be defaulted has not the same effect as a tender. The object of the statute was to enable the defendant to settle a suit without further litigation. If it were to be considered as a tender, it is available to the plaintiff only to the amount tendered. It is no admission for the excess above the sum tendered. *Cox* v. *Parry*, 1 D. & E. 464. Fraud may be proved after a payment in court. *Muller* v. *Hartshorn*, 3 B. & P. 556. As to the rest, the plaintiff stands as if no offer had been made. *Stevens* v. *York*, 4 D. & E. 10; *Stodhart* v. *Johnson*, 3 D. & E. 657.

The cases cited for the plaintiff are where no statute qualifications are imposed upon him. The requirements of the statute are compulsory and cannot be waived. The plaintiff at his peril must have the necessary certificates; and if he does not have them he is liable for a penalty. The rights of these parties were determined, and the law on the facts presented in this report settled, when this case was before the Court. *Jackson* v. *Hampden*, 16 Maine R. 184.

The opinion of the Court was delivered by

Shepley J. — When this case was before the Court on a former occasion, 16 Maine R. 184, it was decided, that all the members of the superintending school committee being notified, that they might have the opportunity to take part in its deliberations and decisions, a majority might perform the duties. And that notice should be given, although a member might then be absent from home. The proceedings of the committee then under consideration had reference to the discharge of the teacher; those now presented respect his qualifications. Ac-

cording to the principles of the former decision, the certificate produced signed by a majority of the committee, would not be sufficient if it appeared, that the other member was not notified. The fact that the teacher presented himself at the office of the other member and offered himself for examination cannot aid him. If all the members should neglect or even wantonly refuse to examine a person, he would not be authorized to teach and to recover his wages without the required certificate. The production of it is an indispensible prerequisite to a legal employment. Nor could the certificate of Mr. Hamlin of a former year be received. It was not given in the character of a member of the committee. It is the certificate of the then existing committee, which is required. The case does not present any facts, from which a waiver of legal rights can properly be inferred. The town could not dispense with any of the provisions of the statute or deprive any member of the committee of the right to be informed of its proceedings. Nor does a member waive his right to be notified by being absent. Notice to each member is not required so much to secure a private right as the proper performance of a public duty.

It is insisted, that the offer to be defaulted is an admission of the contract declared on. The statute, c. 165, § 6, by virtue of which the offer was made, does not appear to have been designed to afford the plaintiff any advantages, beyond what he might derive from the offer itself. The reasons upon which the rule was established, that a tender of a part admits the contract stated in the declaration, do not apply to an offer to allow the plaintiff to take judgment for a certain sum. Such offer may be made to avoid the risk of costs, where there may be a chance for the recovery of nominal damages or a small amount, where the defendant thinks that there is nothing due. The act determines the effect, that the offer is to have upon the rights of the parties; and to decide, that it admitted the contract, would be to change that effect, and to defeat in a great degree the design of the act.

It does not distinctly appear from the case, that the other

member of the committee was not notified; and the certificate of a majority may be regarded as *prima facie* evidence, that they have performed their whole duty as well in notifying those who do not sign, as in making the necessary examination. *Downing* v. *Rugar*, 21 Wend. 178. In the absence of proof that notice was not given to the other member, the certificate should have been received.

But when received the effect of it will be destroyed by proof, that he was not notified by the majority or by their order. It was stated at the argument, that no such notice was given and if such should prove to be the fact, the plaintiff can recover only the amount, for which the defendants offered to be defaulted.

Exceptions sustained.

STATE *versus* GREAT WORKS MILLING & MAN. CO.

Where a crime or misdemeanor is committed under color of corporate authority, the individuals concerned, and not the corporation should be indicted.

EXCEPTIONS from the District Court, CHANDLER J. presiding.

This was an indictment charging the defendants with a nuisance in the erection of a dam across the Penobscot river. The indictment is to be copied and made a part of the case. There was evidence tending to show that a Mr. Emery who assumed to act as defendants' agent, caused a dam to be erected across a portion of the Penobscot river in the town of Bradley, and there was evidence tending to show that said dam had obstructed the navigation of the river for the passage of rafts. The counsel for the defendants, requested the Court to instruct the jury that the defendants, being a corporation, were not amenable to this process and that the erections, if made in Orono as alleged, and were so made by the owners of mills on the western side of the Penobscot river, and not by the defendants, they were not guilty. But the Court, to enable the

jury to pass upon the effect of the erections made by the defendants in the town of Bradley, instructed them that the allegation of place in the indictment was not material and that the defendants, if they had caused a dam or dams to be erected, in any part of the Penobscot river within the county of Penobscot, which had obstructed the navigation of the river, were guilty of the nuisance alleged. That the defendants as a corporation were liable to be indicted for the obstructions, if they had been occassioned by their procurement through their agents therefor; that as the testimony related solely to the obstructions occasioned by the dam to the running of rafts, if they were satisfied that other interests and classes of men, not engaged in that business were benefited to a greater extent than the running of rafts was injured, it would be no defence; but if the running of rafts, the interest alleged to be involved, was benefited to a greater extent than it was injured, or left as well as it was before, the defence was made out, and the dam no nuisance. The jury found a verdict of guilty. To which rulings and directions of the Court, the defendants' counsel filed exceptions.

Rowe, for the defendants. An indictment will not lie against a corporation for erecting a nuisance. Corporations are not liable to this process. Angell & Ames on Corporations, 396. The same doctrine is laid down by Holt C. J. in 12 Mod. 559. Counties and parishes can only be indicted for negligence in not removing nuisances — for the erection of them, the guilty individuals must be indicted. 4 Bl. Com. 167. No indictment against a *quasi* corporation can be found, except for not doing an act which the law required of it. All indictments for the erection of nuisances in England, and in this country have been against the individual members or servants of the corporation, by whom the erection was made. There is no necessity for indicting corporations as the natural persons by whom the act has been done are liable.

If the defendants are to be held in this case, they may equally be held liable for the larceny or any other illegal act of their agent.

D. Goodenow, Attorney General, *contra.* The general rule is, that those should be held answerable by whom the offence has been committed. The jury have found it to have been done by the defendants. It was an act which a corporation could do. A corporation may do or omit to do acts which will be to the injury of the public and for which they should be held responsible. They may make or repair highways, and they may be indicted for omitting to keep them in repair, or in permitting nuisances upon them. There is practically no difficulty either in the sentence or the punishment. The Court, in indictments against individuals, may fine or imprison according to the circumstances of the case. The corporation has property upon which the judgment of the Court can act.

Rogers, in reply. The argument of the counsel for the State, assumes that the defendants are guilty of erecting the dam complained of, and that they are responsible therefor. This is denied. The jury have found the erection was made by the defendants through their agent. But the defendants could have no agent, they could constitute no agent to erect a nuisance. Their charter gave them no authority to do it. They are charged with doing the act complained of "*vi et armis*," "with force and arms," and "maliciously," neither of which are predicable of a corporation. The judgment, in case of a nuisance, is fine and imprisonment. Though a fine may be imposed, yet imprisonment is the usual judgment. Corporations cannot be made subject to imprisonment. Even in the case of a fine, imprisonment is a usual and necessary mode of enforcing its payment. It would be unjust to make individuals, not consenting, responsible for an unauthorized act.

The opinion of the Court was delivered by

WESTON C. J. — A corporation is created by law for certain beneficial purposes. They can neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may by a vote entered upon their records, require an agent to commit a battery; but if he does so, it cannot be re-

garded as a corporate act, for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offence, thus incited by them, the innocent dissenting minority become equally amenable to punishment with the guilty majority. Such only as take part in the measure, should be prosecuted as individuals, either as principals, or as aiding and abetting or procuring an offence to be committed, according to its character or magnitude.

It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation should be indicted. Angell & Ames on corporations, 396, § 9. We think it cannot be doubted, that the erection of a public nuisance, is a misdemeanor.

There are cases, where *quasi* corporations are indictable for the neglect of duties imposed by law. Towns for instance, charged with the maintenance of the public highways, are by statute indictable, for any failure of duty in this respect. The corporation here attempted to be charged, have violated no duty imposed upon them by statute. Whatever has been done, was by the hand or procurement of individuals. They may be indicted and punished and the nuisance abated. We have been referred to no precedent where an indictment has been sustained against a corporation, upon such a charge; and in our opinion, the individuals concerned and not the corporation, must be held criminally answerable for what has been done.

Exceptions sustained.

INHABITANTS OF GARLAND *versus* CHARLES REYNOLDS *& als.*

Where a town voted to loan the surplus revenue, and appointed a committee for that purpose, — one of which number was chosen, by the committee, treasurer of the surplus revenue fund; and the town subsequently voted to receive such notes, and instructed their treasurer to collect the same; *it was held*, that the suit to collect such notes should be in the name of the town.

A corporation may sue in its own name on a contract made to an agent for its benefit.

It would seem that a suit could not be maintained in the name of an agent who has no interest in the contract.

THIS was assumpsit on a note signed by the defendants and payable to Enoch Huntington, treasurer of the committee of the surplus revenue, for the sum of $100, and dated March 23, 1837.

The note in suit was given for a portion of the surplus revenue.

It appeared, that at a regular town meeting, held on the 14th March, 1837, the town voted to receive and to loan the surplus money, and chose a committee of three for that purpose.

At a town meeting on the 12th of March, 1838, it was voted "that the treasurer of the surplus revenue fund be instructed to collect said fund, that is now loaned out, forthwith, and pay it into the town treasury, and that the town treasurer shall distribute (after deducting the expenses of procuring and loaning said funds,) all that may be collected prior to the 4th of July next, on that day, *per capita.*"

At a town meeting held the 14th of July, 1838, the town treasurer, amongst other things, was authorized to receive of the treasurer of the surplus fund all notes and papers relating to said fund, and to demand payment of the same, and to collect the same by the first day of January, 1839.

Upon this evidence, the right of the plaintiffs to maintain this suit was submitted to the Court for their decision.

Rogers, for the plaintiffs, contended that the note not being negotiable was no extinguishment of the original cause of ac-

tion. *Thatcher* v. *Dinsmoor*, 5 Mass. R. 299; *Warren* v. *Nobleborough*, 2 Greenl. 121. The action is rightly brought in the name of the present plaintiffs. *Gilmore* v. *Pope*, 5 Mass. R. 491; *Irish* v. *Webster*, 5 Greenl. 171; *Commercial Bank* v. *French*, 21 Pick. 486.

J. Appleton, for the defendants.

The opinion of the Court was delivered by

Shepley J. — It appears from the agreed statement, that the plaintiffs voted to receive their share of the surplus revenue deposited with this state; and chose a committee of three persons to loan the money, when received. And it would seem, that the committee appointed one of their number to act as treasurer, for he is in subsequent votes of the town recognized as the treasurer of the surplus revenue fund although there is no proof of his appointment. The note now in suit was made payable to that person as treasurer of the committee of the surplus revenue fund or his successor in office. The committee were agents of the town and their treasurer has also been recognized as an agent of the town. If there be no previous authority for taking the note in this form, the town has received it of him, and thereby adopted and ratified his acts. The note is not negotiable. A corporation may sue in its own name on a contract made to an agent for its benefit; and when that contract is not negotiable, it would seem according to the later cases, that the suit cannot be maintained in the name of an agent, who has no interest in the contract. *Irish* v. *Webster*, 5 Greenl. 171; *Trustees* v. *Parks*, 1 Fairf. 441; *Commercial Bank* v. *French*, 21 Pick. 486. The consideration in this case proceeded from the plaintiffs, they have the legal interest in the contract and can discharge it; and may therefore maintain a suit upon it.

Defendants are to be defaulted.

LEANDER S. LIBBEY *versus* INHABITANTS OF GREENBUSH.

In a suit against a town for the loss of a horse occasioned by a defect in a causeway or road which the town was bound to repair—proof that the horse was in usual health on the day of and up to the time of the accident; that he fell through a causeway, owing to a defect in the same; that the injury was such as might cause death; that the horse immediately after was sick and died — is not *prima facie* evidence that the death was caused by the injury then received, and does not throw the burthen on the defendants to show the existence of any disease or other cause, by which death was occasioned.

So long as there is any doubt as to the cause of death in such case, whether by disease or by the injury, the plaintiff is not entitled to recover.

EXCEPTIONS from the District Court.

This was a special action on the case to recover of the defendants for the loss of a horse belonging to him, occasioned by a defect in a road in the town of Greenbush, which the defendants were by law bound to keep in good repair.

The liability of the defendants to keep the road, where the accident happened, in good repair, was not denied. The plaintiff proved by Daniel Libbey that the horse at some time before had in one instance been sick; but that previously to and on the day of the accident, he was, to appearance, well; that prior to and on the day when the accident happened, he had performed the labor of a well horse, and there had been no symptoms of disease; that in Olammon, the bridge over the stream, there was a hole in the causeway in the travelled path of the road; that the day previous, in driving with a loaded double wagon from Stillwater to Passadumkeag, he had passed by it on one side without injury; that on his return, he drove, as he supposed, far enough on the other side to avoid it; that when the horse was opposite the hole, he broke through the earth and slabs and fell on his breast in the road; that the other horse and the force of the wagon dragged this horse his length in the road; that he extricated the horse and drove on a short distance and stopped; that the horse had not the free use of his fore legs; that he was swollen from his breast to his joles, and was so much injured that he left him; that he could not eat, and in four days after the horse died.

It was further proved that the road was in an unsafe and dangerous condition, and that the inhabitants had been duly notified thereof.

On the part of the defendants there was evidence proving that the horse had previously been sick, and that he had not recovered; and that the appearance of the horse, upon dissection, shew that he had died of disease.

Upon this evidence, the counsel for the plaintiff requested the Court to instruct the jury, that if the horse was in usual health on the day, and up to the time, of the accident, and if the injury was such as might cause death, and the horse immediately after was sick and unable to eat, and died consequent upon the accident, then, *prima facie*, the death was occasioned by the injury thus received, and the burthen of proof was on the defendants to show the existence of some disease by which the death was occasioned; but CHANDLER J. who presided at the trial, declined giving this instruction, but instructed the jury, that it was a fact for them to consider and determine, whether the horse died from any injury he might have received at said causeway, or from sickness, or other cause, which might have befallen him in any other way.

The jury returned a verdict in favor of the defendants, and the counsel for the plaintiff filed exceptions to the ruling of the Court.

J. Appleton, for the plaintiff. The facts assumed in the requested instruction were proved to exist by evidence on the part of the plaintiff. Whether they were disproved or not, is not the question for consideration. The facts assumed, being proved, had not the plaintiff a right to the requested instruction? Do they not show a *prima facie* case? Would not the plaintiff, in the absence of all counter testimony, upon the proof of those facts, be entitled to a verdict? *Prima facie* evidence of a fact is such as in judgment of law is sufficient to entitle the plaintiff to recover, unless rebutted. *Kelley* v. *Jackson*, 6 Pet. 623. In the case of a blow given to a man, whether sick or well, sufficient to cause death, and where death ensues, the burthen is thrown on the party giving the blow to

prove the existence of some other cause which produced that result. Had the facts assumed been proved without any counter testimony, would it not be the duty of a court to give the instructions requested? If a fire happens in a house occupied by a tenant, *prima facie* the fault is his, and the burthen is upon him to show that it happened by accident, by communication from an adjoining house, by the fault of construction, or some cause for which he should not be held responsible. Gabriel Traite des Preuves, 385. So death occasioned by another is, *prima facie*, murder; and the burthen is on him to show the offence of a more mitigated character. *Rex* v. *Germain*, 34 E. C. L. R. 280. The mere fact that a carriage was upset, is *prima facie* proof of negligence, and throws the burthen of proof on the driver to exculpate himself. *Stokes* v. *Saltonstall*, 13 Pet. 185; *Chester* v. *Griggs*, 2 Cowp. 80; *Murphy* v. *Slater*, 3 Mumf. 239; *Worster* v. *Canal Bridge*, 16 Pick. 549; *Loomis* v. *Greene*, 7 Greenl. 386.

If the facts assumed in the requested instruction constitute a *prima facie* case, then it was erroneously withheld. The defendants should then have been the actors, and affirmatively established such facts as they relied upon by way of defence. In a nicely balanced case, the question of what constitutes a *prima facie* case, is a matter of importance, and an erroneous ruling is good cause for a new trial. *Barrett* v. *Brooks*, 7 Pick. 98; 1 Stark. Ev. 451; *Smith* v. *Lorillard*, 10 Johns. 347; Gabriel, 422.

The instruction given was but the mere statement of the fact in dispute. It afforded no rule for the guidance of the jury.

A. G. Jewett, for the defendants, contended that the instructions given were more favorable than the plaintiff was legally entitled to have; that it was a question of fact for the jury to determine whether an injury had been done; and if so, whether it arose from the default of the defendants; that the facts were for the jury, and that their verdict had established that the plaintiff had sustained no loss through their default. In the

case of *Stokes* v. *Saltonstall,* 13 Pet. 185, the injury for which compensation was sought, was admitted; here it was denied. The loss was asserted to have happened from disease and the jury have found such to be the fact.

The opinion of the Court was by

SHEPLEY J. — To enable the plaintiff to recover by virtue of the provisions of the statute, c. 118, § 17, he must prove an injury, and that it was occasioned by a defect or want of necessary repair of the highway. The principal difficulty consisted in proving the injury. The plaintiff contended, that the death of the horse was occasioned, or hastened by his breaking through the covering and falling in the highway; while the defendants contended, that it was occasioned by disease. The plaintiff had not fully established his right to recover so long as this question was left in doubt. In the case of *Stokes* v. *Saltonstall,* 13 Peters, 181, the plaintiff had proved conclusively, that the coach was overturned, and that the person had suffered an injury from it; and the Court considered, that the legal presumption would be, that it was occasioned by the negligence of the driver. But it would not be a legal or safe presumption, that every horse that broke through the covering of a road was killed or injured by it.

Exceptions overruled.

JEDEDIAH HERRICK *versus* JOHN BEAN.

H contracted with R S to sell a certain quantity of land at a stipulated price, who effected a sale at an advance to B. B alleging the sale to be fraudulent, files a bill in equity against H. R S assumed the defence of the equity suit against H and gave him a bond with E S as surety, to save him harmless from the suit. H then gave to E S, the surety on the bond, the note of B for the profits belonging to R S, who held the same as security. B recovers in equity, and E S recovers judgment in his own name and that of his partner against B and placed the execution in the hands of an officer with orders to take the execution, B *v.* H, in offset of the execution, E S *v.* B; it was held, that this was not a payment of the execution, B *v.* H, but an assignment, and that E S might enforce its collection in the name of B.

Adverse judgments between the same parties, are extinguished only by an order of the Court, by some act of the parties, or some action of an officer having both executions for collection.

Evidence is admissible to show the circumstances under which, and the consideration for which an order was drawn; such evidence neither varying or contradicting the legal effect of the order.

EXCEPTIONS from the District Court.

This was an action of assumpsit for so much money paid, laid out and expended, and for money had and received by the defendant to the plaintiff's use.

The plaintiff claimed to recover $576,35, as so much money paid by him to procure a re-conveyance of bank stock which had been seized and sold by H. Winslow, deputy sheriff, by virtue of the execution, *John Bean* v. *Jedediah Herrick*, hereafter referred to; and which the plaintiff claimed to have been paid and satisfied previously. The writ was dated August 23, 1837.

The plaintiff offered an alias execution, *Bean* v. *Herrick*, recovered October, 1835, S. J. Court, Kennebec County, and dated May 13, 1837, for $399,51 debt, and $120,84 costs; and the return of H. Winslow, deputy sheriff, thereon, by which it appeared the plaintiff's bank stock had been seized and sold on said execution. It was admitted that the same was bid off by an agent of the plaintiff, by whom the money of the plaintiff had been paid for the same.

To prove a prior payment, the plaintiff called Samuel P. Strickland, who testified that in June, 1837, the defendant told

him that he had purchased some land of R. M. N. Smyth, belonging to Gen. Herrick, for which he had given his notes, that finding the statements, upon the faith of which the sale was made, incorrect, he instituted a suit in equity against the plaintiff and recovered the execution before mentioned. That E. and S. Smith recovered judgment against him and others on one of the notes given to the plaintiff for about $2300 and costs; that the execution, *E. & S. Smith* v. *Bean,* was paid by $830,50 in money, by a receipt for $959,55 for land deeded back by him, and the execution, *Bean* v. *Herrick,* amounting to $520,35, which was received in set-off of the execution against himself; and that these sums, and the officer's fees, paid that execution. He farther stated that Smith had agreed to indemnify Herrick and save him harmless from the suit he (Bean) had instituted and had given a bond to that effect.

It appeared from the testimony of Francis Davis, the officer having the execution, *Smith & al.* v. *Bean & al.* that he was directed to receive the execution, *Bean* v. *Herrick,* as and for so much money in satisfaction of the execution, *Smith & al.* v. *Bean & al.;* and that he did so receive it.

The plaintiff then introduced a bond signed by R. M. N. Smyth, and Edward Smith, as surety, dated Oct. 1, 1833, the condition of which was, "that whereas the said Robert M. N. Smyth on the first day of Sept. 1832, agreed with said Herrick to purchase of him about twenty-seven hundred acres of land in the towns of Kilmarnock and Lagrange, at $1590,10, and afterwards agreed with John Bean to sell and convey the same land to him, on terms agreed upon between them, and by request of said Robert the deed conveying said land was made by said Herrick directly to said Bean, and the purchase money over and above said sum of $1590,10 has been paid to said Robert, and whereas the said Bean has commenced a suit in equity against said Herrick, claiming that the sale to him was void, and to recover back the consideration, damages, costs, &c. as will appear by the bill now pending in S. J. Court in Kennebec county, which suit the said Robert assumes upon himself and agrees to indemnify and save Her-

rick harmless from all damage, cost and trouble that may arise or be sustained in consequence of said suit or of the sale to said Bean; the said Herrick permitting said Robert to defend and manage the same as he may think proper. Now if the said Robert M. N. Smyth shall well and truly indemnify the said Herrick against said suit in equity and all damage, cost and expense which he may suffer or be obliged to pay or incur in said suit, or in any other suit or claim which said Bean may make upon him by reason of the sale of said land to him as aforesaid, and shall do, or enable said Herrick to do whatever shall be decreed against him in said suit, so that said Herrick shall in no wise suffer any loss or damage by reason of said sale to said Bean, or of any proceeding that may spring therefrom, then this obligation to be void; otherwise to remain in full force and virtue."

It appeared by the receipt of E. & S. Smith, that they had received, Oct. 23, 1833, a note signed by Bean & als. for $1949,51, and dated Nov. 1, 1832, which note was received as, and acknowledged to be the property of R. M. N. Smyth. The judgment and execution, *Smith & al.* v. *Bean & al.* was recovered upon this note.

The plaintiff then introduced the following paper.

"To Mr. Hezekiah Winslow, Sir, I authorize you to pay over the money collected on the execution in my favor against Jedediah Herrick, being about $520,50, to N. O. Pillsbury, or his order, said execution having issued on judgment or decree in my favor against Herrick, rendered by the justices of the S. J. Court for the county of Kennebec, and said Pillsbury's *receipt shall be the same as* though signed by me.

"Aug. 2d, 1837. JOHN BEAN."

This was indorsed by Pillsbury to bearer and the money receipted for by H. A. Head.

It appeared from the testimony of H. Hamlin, that Rob't M. N. Smyth and Edward Smith both informed him (Hamlin) in May, 1837, that the execution, *Bean* v. *Herrick*, had been paid by set-off, they having given a bond to save said

Herrick harmless from the equity suit and that the same was settled and said Herrick discharged from the same.

The defendant then called H. Winslow who testified that he received the execution, *Bean* v. *Herrick*, from Edward Smith and sold the bank stock by his direction; that after receiving the money it was attached by order of Herrick in a suit in his favor against Smith; that in Aug. 1837, he received Bean's order, but did not then pay over the money on account of the attachment; but that long after this suit was commenced, the attachment being released, he paid the money to H. A. Head.

Rob't M. N. Smyth testified, subject to all objections, that after the determination of the suit in equity, *Bean* v. *Herrick*, which was defended by himself at an expense of about a thousand dollars, he never intended to pay the execution recovered by said Bean, and never authorized the payment of it; that the note against Bean, received of Herrick, was in the hands of E. & S. Smith as security for the signature of E. Smith on the bond and for other transactions.

It appeared from the testimony of Head, that the execution, *Bean* v. *Herrick*, had been assigned to him by E. Smith; that he assigned it to Pillsbury as security for borrowed money, but subsequently received it back; that Bean's order was procured by E. Smith, because Winslow would not pay the money over, and for his safety.

The defendant further introduced the bill and answer in the suit in equity, *Bean* v. *Herrick*; from which it appeared, among other things, that the price at which Herrick sold the land was $1590,10.

The defendant introduced the testimony of F. Allen, the subscribing witness to the order of Bean on Winslow, dated Aug. 2, 1837, which was as follows: — That at the request of the Messrs. Smiths he went to Mr. Bean and procured the paper by him attested, for the purpose of security to the officer for paying over the money according to the previous direction of Messrs. Smiths; that said Bean, for said purpose, and for none other, gave said paper at the time of the date thereof; that he advised said Bean it was proper he should give such a

paper if he had assigned said execution to the Messrs. Smiths, and it was done. This testimony was received, subject to all legal objections.

The counsel for the plaintiff requested the Court to instruct the jury, that if the execution, *Bean* v. *Herrick*, had been paid, that the plaintiff had a right of action for money paid, laid out, and expended, &c. on account of the seizure and sale of the bank stock, upon the payment by him; that he had a right of action upon the reception of the same by the officer; that the defendant was responsible for all acts done in his name; and that the order given was a ratification of all acts done in his name.

These instructions, ALLEN J. who tried the cause, declined giving; but instructed the jury to inquire whether the execution, *Bean* v. *Herrick*, had been paid or assigned; that if they found the execution had been assigned, this action was not maintainable.

He further instructed them that if said execution was paid and satisfied, and the defendant, with a full knowledge that it was so paid and satisfied, caused the execution to be levied upon the plaintiff's property, whereby the same was sold, that the defendant was liable.

The Court likewise instructed the jury, that if the execution was collected for the benefit of the defendant, or if he was beneficially interested in the same either directly or indirectly, he was liable; that if the officer declined to pay over the money without an order from the defendant, and they believed in the evidence that the order was given merely to remove his apprehensions as to his own safety for paying over the money according to the direction of the Messrs. Smiths, and should find that the defendant had no beneficial interest in the execution, or the money collected on it, that he would not be liable.

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

J. Appleton, for the plaintiff.

1. The demand, *Bean* v. *Herrick*, was paid, not assigned.

The receipt of E. & S. Smith, admits the ownership of the note on which judgment was obtained in the suit, *E. Smith & al.* v. *Bean*, to have been in R. M. N. Smyth. This note was originally payable to the plaintiff. By the bond given, Smyth, having received all but the price which he contracted to give for the land, was estopped to use this execution to the injury of the plaintiff, and was bound to offset or discharge it in some other way. The real parties to this litigation were *Bean* v. *Smyth*, Herrick being nominal defendant, and Smyth having assumed the defence, and *Smyth* v. *Bean*, Smith & al. being nominal plaintiffs, though the suits were between different parties to the record. The defendant admitted the execution to have been paid. Payment was to be presumed, as the parties who enforced the payment of the execution had contracted that it should be paid. A payment may be made as well by land, or any thing, as by money; and when so made, will support an action for money had and received. *Brown* v. *Foster*, 7 Wend. 301; *Anslie* v. *Wilson*, 6 Cow. 662; *Arms* v. *Ashley*, 4 Pick. 71; *Dole* v. *Hayden*, 1 Greenl. 155.

2. Assumpsit may be maintained to recover back money compulsorily paid on a satisfied execution. *Wisner* v. *Bulkley*, 15 Wend. 321. So where one levies more than is due. *More* v. *Trumpbour*, 5 Cow. 488; *Lazell* v. *Miller*, 15 Mass. R. 207. Or if collected on a judgment irregularly issued. *Judson* v. *Eslava*, 1 Min. 71. Or when the judgment is reversed. *Green* v. *Stone*, 1 Har. & Johns. 405; *Brown* v. *Williams*, 4 Wend. 360. Generally it lies where money not due is paid to relieve property seized without right. *Chase* v. *Dwinal*, 7 Greenl. 135; *Preston* v. *Boston*, 12 Pick. 10; *Shaw* v. *Woodcock*, 14 E. C. L. R. 14.

3. The suit must be against the party to the record, who is responsible even in cases of assignment for what is done in his name, *a fortiori*, against him when there is no assignment. *Brown* v. *Foster*, 7 Wend. 301; *Freeman* v. *Crane*, 13 Maine R. 255; *Fling* v. *Trafton*, 13 Maine R. 295; *Dennett* v. *Nevers*, 7 Greenl. 399. It should be brought against the defendant, because with a full knowledge of what had been done

he ratified it by his order on the sheriff, directing him to pay over the money. Whether the sale was his own act or the act of an agent, having affirmed it, he is equally liable. *Briden* v. *Dubarry*, 13 S. & R. 27; *Harvey* v. *Turner*, 4 Rawle, 230; 2 Kent's Com. 616.

4. The Court instructed the jury, that though the execution was paid, the plaintiff was not entitled to recover, if the defendant was not *beneficially* interested in the execution or the money collected, and gave the order to pay over the money merely to remove the apprehensions of the officer in case of his paying the money, according to the directions of Smith. The execution being paid, as in this direction, was assumed to be the fact; here was a fraud which could only be successfully perpetrated by the intervention of the defendant. The defendant affords his aid; the fraud is successful. The party defrauded commences a suit against the party defrauding, who sets up the defence that he was not *beneficially* interested in the fraud; that not cheating for himself he should be discharged. It is not at all material to the plaintiff, whether the person who coerces a second payment of an execution is or is not to receive the spoil. The jury, by this instruction, were bound to return a verdict for the defendant, though the execution was *paid*, unless the defendant was *beneficially* interested.

5. The testimony of Allen was inadmissible. The purposes or intentions of Bean are not important. 3 Stark. Ev. 995 & Seq. Parole Evidence. The injury to the plaintiff is the same, whether a wrongful act is done with bad or with good intentions.

F. Allen and *Rogers*, for the defendants. The facts in this case are these: — Herrick conveys to Bean land which he had bargained to Smyth, and receives the whole consideration for the conveyance. He and Smyth divide. Bean commences a suit in equity, alleging the sale to be fraudulent. Smyth, believing Herrick to have acted in good faith, assumes the defence of this suit. The jury found the sale fraudulent. Smyth having expended $1000 in the defence of Herrick is unwilling to

perform his bond. The only question is, whether the plaintiff shall pay this execution.

Bean's note, belonging to Smyth, was assigned to E. & S. Smith, as security on the bond. There is a confusion in the use of the term paid. Every assignment involves a pay ment. Bean has received payment, but still this execution is not paid. It retained all its original vitality. No particular form is necessary to constitute an assignment. It may well be made by delivery. Being assigned, its collection must be enforced by the assignee in the name of Bean. It has never been offset. It has never been paid by Herrick. It may have been paid as between assignor and assignee, but not as between debtor and creditor.

Some of the instructions given were in favor of the plaintiff, and therefore afford no ground for exception.

The last requested instruction was properly withheld. The proposition is monstrous, that the defendant should be responsible for all acts done in his name. The requested instruction proceeds upon the idea that the order is to determine the case for the plaintiff.

The assignee procured a renewal of the execution, and enforced its collection, without the knowledge of the defendant. The order does not ratify any preceding, nor direct any subsequent act. The language is peculiar. It is a mere authority — not a direction. To predicate instructions on the order, would have been erroneous, and it was properly refused.

The evidence of Warren was properly admitted. The plaintiff introduced the order as evidence of an act done — of an authority given. The defendant may control that by evidence of as high a nature. This was properly received as part of the *res gesta*. The circumstances accompanying a transaction may be shown. If Bean gave the order to exonerate the officer, it was not such an interference as would charge him in this suit.

No money came to the hands of the defendant. The form of action is wrong. If the plaintiff has any cause of action it is by an action of the case.

The opinion of the Court was by

SHEPLEY J. — The plaintiff being the owner of certain lands made a contract for the sale of them to R. M. N. Smyth, who contracted to sell them to the defendant. Before the conveyance, which was from the plaintiff to the defendant, certain representations were made respecting them, which were alleged to be fraudulent. The defendant afterward filed his bill against the plaintiff, and such proceedings were had as resulted in the recovery of a judgment against the plaintiff for $399,51, damages, and $120,84, costs. 3 Fairf. 262. While that suit was pending, on the first of October, 1833, R. M. N. Smyth with Edward Smith, as his surety, executed a bond to the plaintiff, conditioned to save him harmless from all damages and costs arising out of it. On the twenty-third of the same October, the plaintiff delivered to E. & S. Smith a negotiable promissory note, made by the defendant and others in part payment for the land, as the property of R. M. N. Smyth, who states, that it was held by them "as security for the signature of E. Smith on the bond and for other transactions."

On this note E. & S. Smith had recovered a judgment against the defendant for about $2300, which, as Strickland says, the defendant informed him, was "paid by $830,50, cash, $959,55, being a receipt of Smith's for land deeded back, and the execution, *Bean* v. *Herrick*, was received in offset of the execution against him." And there is testimony that Bean said his execution against Herrick was paid. And so far as it respects Bean there can be no doubt, that he had received his pay for it by having it allowed in part payment of the execution in favor of the Smiths against him. The effect of the reception of that execution by the officer for such a purpose was not in law a satisfaction of that judgment. The delivery to the officer, as the agent for the Smiths, being for a valuable consideration, would transfer the equitable interest in it to them. There must be other proof than the mere delivery for the above purpose to shew a payment by the plaintiff. The fact that the beneficial interest in the execution had vested in E. & S. Smith, and that one of them was bound to indemnify the plaintiff against it, would not operate as a payment by the plaintiff or

his agent. Adverse judgments between the same parties are not extinguished but by an order of the Court, by some act of the parties, or some action of an officer having both executions for collection. It might in this case have been very equitable, and perhaps on motion the Court might have ordered, that the lesser judgment should be satisfied by setting it off against so much of the greater, but until some other act than the possession of the execution by a firm, one of which was bound as a surety for another to pay it, both would continue in force. Whether the execution, *Bean* v. *Herrick*, was paid or assigned was submitted to the jury, who must have found, that it was assigned by delivery. And if so assigned, it remained unsatisfied so far as it respected the plaintiff; and Edward Smith, although a surety in manner before stated, might legally enforce the collection of it, or assign it *bona fide* to others. And the plaintiff in such case could have no legal ground of complaint against the defendant for permitting it to be collected, or for giving an order to the officer to pay the money to the assignee. There could be no foundation for the position assumed by the plaintiff, that he had paid the money twice.

It is insisted, that R. M. N. Smyth was not a competent witness for the defendant. If the plaintiff should prevail in this suit on the ground, that the Smiths had paid the execution for him before he paid it himself, the witness would be relieved from his bond to the plaintiff and be liable to Edward Smith, and in case of failure to recover be would continue liable to the plaintiff. The only difference to the witness would be a change of his liability from one to the other, and any bias on his mind arising out of a preference of one to the other would effect his credibility not his competency.

The statement of Mr. Allen was not received to contradict, vary, or change the legal effect of the written order, but to shew the circumstances under which it was drawn, and that the consideration for it was the former assignment or delivery of the execution, and not any such new or beneficial interest as would constitute a second payment to him. And this he might properly shew, for it tended to rebut the allegation in the writ, that he had received money, to which the plaintiff was equita-

bly entitled. The case was presented to the jury in such a manner that, they must have found, that the payment to defendant was made, not by the plaintiff, but by the Smiths, and it is unnecessary therefore to inquire how far the defendant might have been liable as the party to the record, if the execution had been in fact twice paid by the defendant.

Exceptions overruled.

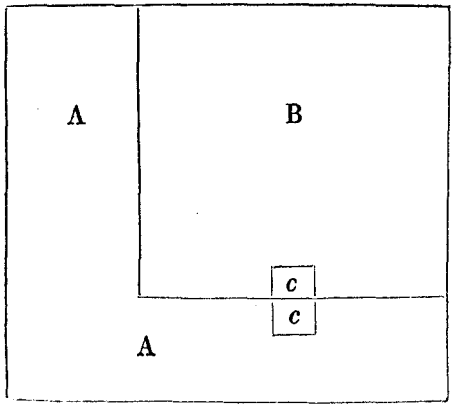
OLIVER CROSBY *versus* JOHN BRADBURY.

A conveyance of "a certain saw mill site, in and with the saw mill, machinery, &c. thereon standing," &c. "meaning to convey all the premises which said A B (grantor) purchased of C D by deed dated, &c. with all the privileges and subject to all the restrictions therein expressed: reference thereto being had for a more particular description of the premises," will pass the mill and the whole land under the same, notwithstanding the grantor acquired by the deed to which reference was had, but a part of the premises upon which the mill was erected.

The term mill site embraces all the land the mill covers.

Erroneous or defective references to the sources of title will not be permitted to vary a prior description clearly and definitely given.

THIS was a writ of entry. Plea *nul disseizin*, as to that part of the plan marked A A and a disclaimer as to that part of the plan marked B. The following plan describes the premises demanded.



The demandant accepted the disclaimer and joined issue as to the disseizin. The demandant to establish his title introduced a deed from William Bradbury to Elihu Baxter, dated August 3d, 1835, conveying, "A certain saw mill site in Levant village with the saw mill, machinery and fixtures thereon standing, including shingle machine, and cutting off saw, also one undivided fourth part of mill common," also several other parcels of land lying in Levant and Corinth, particularly described therein, "meaning to convey to said Baxter all the premises which said William Bradbury purchased of Benjamin Garland, by deed dated March 19, 1832, and recorded in Penobscot Registry, book 28, page 448, with all the privileges and subject to all the restrictions therein expressed, reference thereto for a more particular description of said premises."

Said Baxter under this deed entered into possession of the whole of said demanded premises A A and B.

The demandant also introduced a mortgage deed from said Baxter to said William Bradbury, of these premises, using the same language, dated August 3, 1835, and assigned to demandant August 22, 1835, under which he claims the whole demanded premises.

The whole of the demanded premises is now covered with a saw mill, and was so covered at the time of the date of the deed from Bradbury to Baxter. The shingle machine is situated about two thirds in that part of the plan or diagram marked A A, and is described by the part marked C C. The cutting off saw was situated in the part A A, in the upper story of the mill, on the same floor with the principal saw, the carriage necessarily runs back into the part A A, when the mill is in operation.

The tenant to establish his title to the part A A, offered a deed from Benjamin Garland to William Bradbury, dated March 19, 1832, recorded Book 28, p. 448, conveying "a certain site for a saw mill in said Levant bounded as follows, to wit, beginning at the northwest corner of the old saw mill in Levant village formerly owned by Samuel E. Dutton, Esq. thence westerly on the mill-dam twenty-five feet, thence southerly on a line parallel with the west side of said old saw mill,

thirty-five feet below the lower end thereof, thence easterly at right angles with the last mentioned line twenty-five feet, thence northerly on a line to strike the southwest corner of said old mill, thence on the west side thereof to the first mentioned bound," also certain other tracts not in controversy particularly described therein — " with the privilege of drawing water from the mill pond, sufficient to work one single saw mill and to carry a lath or sash machine, and also one undivided half of the mill pond and booms for the safe running of lumber and logs, &c." with certain restrictions as to water. The boundaries in this deed mentioned so far as relates to the mill site and privilege of water, are the exterior lines of that portion of the plan marked B.

The tenant also offered a deed from Benjamin Garland to William Bradbury dated July 9th, 1832, and duly recorded, conveying a parcel of land in Levant, and thus bounded, beginning at the northwest corner of a certain site for a saw mill, conveyed by me to said Bradbury, dated March 19, 1832, and recorded in the Registry of deeds, book 28, page 448, thence westerly on the mill-dam two feet, thence southerly, on a line parallel with the west side of the old saw mill, fifty feet below the lower end thereof, thence easterly at right angles with the last line twenty-four feet, thence northerly to a point in the south boundary line of said mill site, twenty-two feet from the west side thereof, thence westerly to the southwest corner of said mill site, thence northerly on the west line thereof to the first mentioned bound, without any additional privilege of water over and above what was conveyed by the aforesaid deed. This deed conveys that portion of the plan marked A A.

The tenant also introduced an execution in his favor against said William Bradbury, and a levy of the same on that part of said plan marked A A embraced in the last mentioned deed.

Upon the foregoing statement of facts, it was agreed that the Court shall render such judgment as in their opinion will be conformable to law.

The cause was argued in writing.

J. Crosby, for the demandant, with whom was *Hobbs*. W. Bradbury, at the time of his conveyance, Aug. 13, 1835, was the owner of the premises in dispute, having acquired them by conveyances from Garland other than the one referred to in his deed of that date. This deed conveys a saw mill site, saw mill, machinery, &c. thereon standing. The language of this deed is attempted to be restricted because it refers to the origin of the title. The only question is its true construction; in other words, what was the intention of the parties; for that must govern. The description is not of a part of a mill, as would be the case if the construction claimed by the tenant were the true one, but of a *mill*, &c. The mill, &c. is referred to as standing on the premises; that is a monument of a fixed and permanent nature, and must govern. *How* v. *Bass*, 2 Mass. R. 380. The conveyance of a mill, *eo nomine*, passes the land under the mill. *Blake* v. *Clarke*, 6 Greenl. 436; *Maddox* v. *Goddard*, 15 Maine R. 218. Two thirds of the shingle machine, C C, and the cutting off saw, is situated in the part A A. But the conveyance is of the machinery, cutting off saw, &c. It could hardly have been the intention of the party to retain land covered by them. They passed then by the deed, and the land covered by them. *Farrar* v. *Stackpole*, 6 Greenl. 154; *Goddard* v. *Bolster*, 6 Greenl. 427. Baxter went into possession of the premises in dispute immediately after his conveyance. The contemporaneous acts of a grantee, especially when with the knowledge of the grantor, are admissible to explain the intent of the parties. *Livingston* v. *Ten Broek*, 16 Johns. 14; *Leland* v. *Stone*, 10 Mass. R. 459; *Towle* v. *Bigelow*, 10 Mass. R. 379; *Vose* v. *Handy*, 2 Greenl. 332. The object of the parties in the conveyance, is to be considered in arriving at the true construction of the language.

The first portion of the description conveys the premises in dispute; the reference to the deed of Garland is repugnant thereto and void. It is not a reservation, exception, or limitation of the preceding words. *Allen* v. *Tufts*, 3 Pick. 272; *Jackson* v. *Clark*, 7 Johns. 217; *Stearns* v. *Rice*, 14 Pick.

411; *Jackson* v. *Root*, 18 Johns. 60; *Keith* v. *Reynolds*, 3 Greenl. 393. The reference to the source of title is always of minor importance in determining the meaning of parties in a conveyance. *Winn* v. *Cabot*, 18 Pick. 553; *Drinkwater* v. *Sawyer*, 7 Greenl. 366. No construction should be adopted contrary to reason and common sense. That claimed by the tenants would render the property useless to both parties; neither owning any thing, which would be of any value without the consent of the other.

Cutting, for the tenant. A person owning property has a right to convey any specific portion and to locate such portion as he chooses. The demandant's title then is traced back for its boundaries to the deed of Garland of Aug. 3, 1835. If then the specific description of boundaries in the deed is to be regarded, the demandant has no claim beyond the boundaries designated as B. Definite boundaries given in a deed will limit the generality of a term previously used, which if unexplained would have included a great quantity of land. *Allen* v. *Allen*, 14 Maine R. 387; *Thorndike* v. *Richards*, 13 Maine R. 430.

The opinion of the Court was by

Weston C. J. — The title of the demandant is deduced principally, by reference, from the deed of William Bradbury, then the owner of the entire property, to Elihu Baxter, dated August 3, 1835. That conveyed "a certain saw mill site in Levant village, with the saw mill, machinery and fixtures thereon standing, including shingle machine and cutting off saw." It is agreed that the mill, then and now standing, covers the whole demanded premises, as well the part defended, as the part disclaimed. This description would very clearly pass the whole mill and the land under it. *Whitney* v. *Olney & al.* 3 Mason, 280; *Blake* v. *Clark*, 6 Greenl. 436; *Maddox* v. *Goddard*, 15 Maine R. 218. In the first case the construction is even carried farther. Story J. there says, "the land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, passed by force of the word "mill."

The term mill site, must embrace at least all the land the mill covers.

The deed adverted to, after describing and conveying certain other parcels of land in Levant and Corinth, not in controversy, has this clause, "meaning to convey to said Baxter all the premises, which said Wm. Bradbury purchased of Benjamin Garland, by deed dated March 19, 1832, and recorded in Penobscot registry, book 28, page 448, with all the privileges and subject to all the restrictions, therein expressed; reference thereto for a more particular description of the premises." Upon referring to that deed, besides the parcels in Levant and Corinth, it is found to contain only the part disclaimed, delineated with such exactness, that it cannot be extended to the part defended. It has certain specifications as water rights, which do not appear in the deed to Baxter, except by reference. It is in this point of view more particularly that the reference performs its office; for as to the land conveyed, the prior description was clear and explicit.

If Bradbury had been the owner only of the part disclaimed, the restricted construction, for which the defendant contends, would have been better supported. Yet in that case, the use of terms, embracing the whole mill, as the mill site does also all the land under it, would hardly be consistent with good faith. The grantee may not have been conusant of the sources of Bradbury's title. They are often adverted to without proper attention to entire accuracy; and should not be permitted to restrict a description, so definite, tangible and perfect, as is to be found in the deed in question. It did convey, what was derived from Garland's deed of March; but it also plainly and manifestly conveyed more unless mill and mill site, which are the leading terms of the conveyance, are to be so mutilated, as to embrace only a section of each. The reference contains no negative words, that the grantor conveyed only what Garland had in that deed conveyed to him; although that would have been the fair implication, if no discrepancy of description had been disclosed, by a comparison of the two deeds. Had the conflicting part been false instead of being only de-

fective, where the intention is plain, from a previous clear description of the subject matter, it could not have the effect to defeat the intention. In such case, the maxim of the civilians, *falsa demonstratio non nocet* is to be applied. *Worthington & al.* v. *Hylyer & al.* 4 Mass R. 196; *Vose* v. *Handy*, 2 Greenl. 323.

Cases are to be found, where an erroneous or defective reference to the sources of title, have not been suffered to vary a prior description clearly and definitely given. *Willard & al.* v. *Moulton*, 4 Greenl. 14; *Cutler v. Tufts*, 3 Pick. 272; *Drinkwater* v. *Sawyer*, 7 Greenl. 366; *Winn* v. *Cabot*, 18 Pick. 553. The intention of the parties is not only clearly indicated by the terms they have used; but by the act of the grantee in taking possession of the whole mill, and the acquiescence of the grantor at that time.

Judgment for the demandant.

WILLIAM ATKINSON *& al. versus* THOMAS G. BROWN.

In a contract between the plaintiffs and the defendant in relation to the building of a house for the defendant, by the terms of which the plaintiffs were to lay all the brick work, and do the plastering in the same — and the defendant was to procure the joiner work to be done, and in which it was among other things stipulated that the house was to be completed by the 17th Sept. "and the plastering as soon after as the joiners shall have it ready;" *it was held*, that the plaintiffs were by the terms of this contract to fulfil their engagement the same year.

That the defendant being bound to procure the joiner work, and no time being fixed in which it was to be ready, the implication was, that it was to be ready in a reasonable time.

That if not ready, the defendant had no cause of complaint for any non-performance on the part of the plaintiffs.

And that the plaintiffs were not obliged to complete their contract the ensuing season.

THIS was a petition to enforce a lien under a written contract for performing certain work upon two houses belonging to the defendant.

The contract between the parties was dated the 30th day of June, 1836. It provided among other things, that the plaintiffs should lay all the brick of the defendant's house, &c. plaster said house, &c. — the walls of said house to be completed by the twentieth of September next, and the plastering as soon after as the joiners shall have it ready, the plaintiffs to work on the building themselves, unless prevented by sickness, with two or more good workmen, and that one or both should be there all the time; the defendant to procure the joiner work to be done, and to furnish all the materials for completing the house, and to have them as near, and as convenient as usual, at the time the plaintiffs shall want them, &c; and to pay the plaintiffs for any loss in waiting for materials, &c.

From the report of SHEPLEY J. by whom the cause was tried, it appeared that the joiners' work was not completed in 1836, and that the next season, the plaintiffs did not work on the house, and that the defendant procured the plastering to be done by others. It appeared that the plastering, so far as the house was prepared the first season, was completed. The mason work in the north tenement was done in 1836, but the joiners' work in the south tenement was not finished so that the plastering could be done.

The defendant's counsel contended that by the contract, the plaintiffs were obliged to have finished the plastering the second season, or should have offered to have done it, if not prepared for them the first season.

The plaintiffs denied they were so bound, and if they were, that they were not obliged to do it without notice of its being prepared, and a request to do it.

The defendant was defaulted for the amount of the plaintiffs' claim, subject to the opinion of the Court, whether they are entitled to recover. Such judgment is to be entered as the rights of the parties require.

Cutting, for the defendants.

Gilman & Rogers, for the plaintiff.

The opinion of the Court was by

WESTON C. J. — The plaintiffs did not complete the work they stipulated to do, under the contract; and are therefore not entitled to prevail, unless their failure in part is excused by the act or neglect of the defendant. We are of opinion, that it is fairly deducible from the contract, that the plaintiffs were to fulfil their engagement in the season of 1836. The house, that is, its exterior walls, was to be completed by the seventeenth of September of that year; "and the plastering as soon after, as the joiners shall have it ready."

The joiner work was to be procured by the defendant. That was to precede the plastering. The contract makes no distinction between the north and south tenements. No time being fixed, within which the joiner work was to be ready, the implication is, that it was to be ready, within a reasonable time. If the plastering was to be done in 1836, it was reasonable and necessary that the joiner work should be ready the same season. There was nothing to prevent it, if the defendant had employed a sufficient number of hands. As far as it was ready, the plastering followed, according to the agreement. But if the defendant thought proper to delay the completion of the south tenement, until the following season, he has no right to complain that the plaintiffs did not plaster that part of the house. They might have been under other engagements for the next year. He can have no valid defence, on this ground, to their claim of payment for what they have done under the contract. And even if they were bound to proceed, when that tenement was ready, after the defendant had delayed it so long, being a matter peculiarly within his privity and knowledge, he should have notified them, and called upon them to finish their undertaking. Instead of taking this course, he procured others to do the service.

Judgment for the plaintiff.

SAMUEL SHERBURNE *versus* ABIJAH JONES.

Where the grantor remains after the conveyance in possession of the premises conveyed, the presumption of law is that he is there rightfully, and as the tenant of the grantee.

In the case of a tenancy at will the crops belong to the tenant.

EXCEPTIONS from the District Court, ALLEN J. presiding.

This was an action of trespass for taking and carrying away three tons of hay. Plea, general issue. The plaintiff, to maintain the issue, read in evidence a deed of release from William Sherburne to himself, dated June 2, 1830, of the lot of land on which the hay had been cut. He then produced the return of the defendant, a deputy sheriff, upon an execution, *John Huckins* v. *William Sherburne*, dated Aug. 29, 1836, by which it appeared that he had seized and sold three tons of hay, as the property of said William Sherburne, according to law. He then called Elisha Gibbs, by whom he proved that the conveyance before mentioned was made in payment of a debt due from the grantor to the grantee; that said William Sherburne had lived on the place twenty-five years; and that he had carried on the place in the same manner since the execution of the deed as before, and that the place had always been taxed to him; and that, as he supposed, the hay grew on this place.

It was admitted that the hay had not been taken away by the defendant, nor by any person acting for or under him.

Upon this evidence the counsel for the defendant moved for a nonsuit, which the Court, being of opinion, that as it was admitted that the hay had not been taken and carried away by the defendant or by any person acting for or under him, the action was not maintainable, ordered a nonsuit; to which order the plaintiff excepted.

A. G. Jewett, for the plaintiff. The plaintiff was the owner of the premises on which the hay had been cut, and the defendant was his servant. If the relation between them was a matter in dispute, it should have been submitted to the jury. The Court, had no right to decide what that relation was. The officer

was estopped by his return. He was liable without an actual removal of the hay. Having seized it, he became by that act, a trespasser. *Gibbs* v. *Chase*, 10 Mass. R. 125; *Morgan* v. *Vary*, 8 Wend. 613; *McCombie* v. *Davies*, 6 East, 538; *Wall* v. *Osborn*, 12 Wend. 39; *Wintringham* v. *Lafoy*, 7 Cow. 735; *Reynolds* v. *Shuler*, 5 Cow. 325.

J. Appleton, for the defendant, cited *Bailey* v. *Fillebrown*, 9 Greenl. 12; *Currier* v. *Earl*, 13 Maine R. 217; 2 Kent's Com. 113; *Dockham* v. *Parker*, 9 Greenl. 137; *Butterfield* v. *Baker*, 5 Pick. 522; *Boynton* v. *Willard*, 10 Pick. 166; *Lathrop* v. *Cook*, 14 Maine R. 415.

The opinion of the Court was by

SHEPLEY J. — To establish his title to the property, the plaintiff proved that on the tenth day of June, 1830, he purchased of William Sherburne the farm on which he resided. The witness stated that William had lived upon it twenty-five years, and so far as he knew, he had carried on the place in the same manner since the execution of the deed as before, and that it had always been taxed to him. It was hay in the barn on this farm, that was seized by the defendant, as an officer, on the twenty-ninth day of August, 1836, and sold on the second day of September following, by virtue of an execution against William. There was no direct proof that the hay was made from grass which grew on that farm, although the witness supposed that it was. The testimony does not disclose the terms on which William had continued to occupy the farm for six years after the conveyance. It is not to be presumed that he was there unlawfully. The counsel for the plaintiff contends that it was for the jury to decide in what character he resided there. And he would be correct, if there were testimony on that point for their consideration. But in the absence of all such testimony, the question before the Court was, whether the plaintiff had proved that he was the owner of the hay. And finding the testimony to be, that William continued to carry on the farm in the same manner since as before the deed, and that it had been taxed to him, the Court could not presume

that he was the hired man of the plaintiff, or that he was supported there by him. Nor would a jury have been authorized to make such an inference. The plaintiff should have proved the character of his possession to be such as would leave the products of the farm the property of the owner of it. And that the hay, which was seized, was a part of those products.

The legal presumption from the facts proved, would rather be, that William was the tenant of the plaintiff, and therefore the owner of the crops. *Bailey* v. *Fillebrown*, 9 Greenl. 12. The testimony does not prove that the plaintiff was the owner of the hay. And it is not necessary to consider the other point.

Exceptions overruled.

THE COUNTY OF HANCOCK *versus* THE EASTERN RIVER LOCK AND SLUICE COMPANY.

The adjudication of one fishwarden of the insufficiency of a sluiceway, and of the proper dimensions for one is not valid, "except in case of a refusal or neglect of the Court of County Commissioners to appoint, or of the fishwarden by them appointed to discharge the duties prescribed by St. 1835, c. 194, § 5.

The special law of 1836, c. 181, § 1, does not alter the law in this respect.

Where, by the provisions of a statute, two are required to act, except in certain cases, the law does not presume, that the case contemplated by the exception exists, but the contrary.

THIS was an action of debt founded upon a statute of this State, passed March 24, 1835, entitled "an act for the preservation of the salmon, shad and alewive fisheries, in the Penobscot river, &c.;" and also upon an act additional to said act passed March 30, 1836.

The plaintiffs to sustain their action introduced evidence of the qualification of James Stubbs as fishwarden for the county of Hancock, for the year 1836. It was admitted on the part of the defendants that they were the owners of the dam across said stream, and that alewives were used to pass up said Eastern river into the pond above, prior to the erection of said

dam. The plaintiffs proved that salmon and shad had been taken above the dam. They then called said Stubbs, who testified, that on the 17th of May, 1836, he examined said dam and found there was no sufficient fishway for the passage of the fish, by or through said dam, and that on the same day he gave notice in writing to Joseph R. Folsom, the agent of the defendant, that there was no sufficient fishway, and what was required to make a sufficient passage or sluiceway, and gave them ten days in which to make one. He further testified that no sufficient fishway was made within the time allowed, nor up to the 10th of July, and that said Folsom said they should not make any.

Emery J. who tried the cause, instructed the jury that the opinion of the fishwarden was made by the statute, conclusive evidence, and that if they believed his testimony they would find for the plaintiffs, for the number of days they claimed, such daily sum not less than five dollars nor more than thirty dollars, as in their opinion would be right.

The jury returned a verdict for the plaintiffs which is to stand if the Court should be of opinion, that upon the evidence, the plaintiffs made out a case; otherwise, the verdict to be set aside and a new trial granted.

W. Abbott, for the defendants. The examination of the fishway was made by but one warden, Stubbs. He could not legally make it alone. No evidence of neglect on the part of the other wardens to perform their duty is shown.

One warden cannot act unless it be shown that no others were appointed, or that being appointed they refused to act. This must be shown affirmatively. *Stoughton* v. *Baker & al.* 4 Mass. R. 530; *Stephenson* v. *Gooch*, 7 Greenl. 154.

J. A. Poor, for the plaintiffs. The St. of 1836, Spec. Laws c. 181, § 1, authorizes a suit by one fishwarden or more. The object of this act was to enable the wardens to act with the least possible delay. The action of one is to be presumed as right till the contrary is shown.

The opinion of the Court was by

SHEPLEY J. — The act of 1835, c. 194, § 5, provides for the appointment of a fishwarden by the commissioners for the counties of Hancock, Penobscot, and Waldo. And that "it shall be the duty of such fishwardens, or any two of them jointly [or in case of refusal or neglect of such court to appoint, or of any fishwarden by them appointed to discharge the duties assigned by this act] of any one of them as soon as may be after the tenth day of May, annually to examine, if there be sufficient passage or fishways." And the fishwarden or wardens, who may be entitled to act, are required to give the notice. By this act the duties cannot be performed by one warden unless there be a neglect by others either to appoint or to perform the duty. The additional act of 1836, published with the Special Laws, c. 181, § 1, makes "all persons required by the provisions of the act to which this is additional to open and construct good and sufficient passage ways for fish," liable to a penalty for refusing or neglecting to comply with the order, "after being duly notified by any one or more of the county fishwardens appointed agreeably to the provisions of the act, to which this is additional."

The design probably was, that the notice should be given by "any one or more" as one or more of them should be entitled to act by the provisions of the act of 1835. If however it should be regarded as authorizing one to give the notice in all cases, it does not authorize one in all cases to perform the important duty of judging of the sufficiency, and of prescribing the dimensions of the fishways. On the contrary it imposes the penalty only on those, who neglect or refuse to open passage ways being required to do so "by the provisions of an act to which this is additional."

The case does not shew, that the commissioners in the other counties neglected to appoint wardens; or that the wardens neglected their duties.

The counsel for the plaintiffs contends, that it is to be presumed, that the warden acted correctly, and that no others were appointed. Where two are required to act except in

certain cases, the law does not presume, that the case contemplated by the exception exists, but the contrary. And the facts authorizing the warden to act in a case within the exception must be proved, before the duty is shewn to have been legally imposed. To enable the plaintiffs to recover, they should have proved, that one was authorized within the exception in the act to perform the duty.

Verdict set aside and new trial granted.

JORDAN SPENCER & *als. versus* ABIGAIL GARLAND.

The discharge of a poor debtor from arrest or imprisonment by giving a bond according to the provisions of St. 1835, c. 195, § 8, is not a satisfaction of the judgment, and does not impair the rights of the creditor to obtain satisfaction out of any property or estate of the debtor not exempted by law.

The bond is only a substitute for the detention of the body, and not a satisfaction of the judgment.

THIS was debt on a judgment, and the right of the plaintiff to recover was submitted to the Court on the following statement of facts.

It was admitted that the judgment declared on had been duly recovered; and that the defendant had been arrested on an execution upon said judgment, and been discharged from arrest and imprisonment by giving the bond required by the statute for the relief of poor debtors, with the conditions of which he had neglected to comply.

If upon the above facts this action can be maintained, the defendant is to be defaulted; if not, the plaintiffs are to be nonsuit.

N. Wilson, for the plaintiffs.

I. Washburn, for the defendant.

The opinion of the Court was by

SHEPLEY J. — The act of 1835, c. 195, for the relief of poor debtors, authorized their discharge from arrest or imprisonment on execution by their giving a bond according to the

provisions of the eighth section, or when the creditor neglected to advance the money or give the security required by the fifteenth section. A voluntary discharge by the creditor or officer might operate as a satisfaction of the judgment, but not one made by an officer in obedience to law. The twelfth section however, to remove all doubt, provided, that the discharge of the debtor should not in such cases impair the rights of the creditor to obtain satisfaction out of any property or estate of the debtor not exempted by law. The bond is only a substitute for the detention of the body; and was not intended to be a satisfaction of the judgment. It only changes the form of the remedy. If satisfaction be obtained by an action upon it, the judgment will also be satisfied as well as the bond, which is collateral to it. If the bond has in this case been forfeited, it does not appear, that more than one year had not elapsed after the forfeiture before the commencement of this suit; and after that time no suit could be brought upon the bond. And if this action cannot be maintained the effect will be, that the defendants by giving a bond and neglecting to perform the condition without any payment extinguish the judgment, and deprive the plaintiffs of the right to collect the debt. The statute for the relief of poor debtors cannot receive such a construction.

Exceptions overruled.

JOHN MASON *versus* CHARLES HUTCHINGS, JR.

The oath of a creditor "that the debtor within named is about to change his residence and abscond beyond the limits of the State," is not a sufficient compliance with the provisions of St. 1835, c. 195, which requires that "no person shall be arrested or imprisoned on mesne process" except "when he is about to depart and establish his residence beyond the limits of the State," &c. and does not authorize the arrest of the debtor.

If the debtor be arrested when the oath taken is thus defective, the arrest is unauthorized, and the officer so arresting is not responsible to the creditor for not complying with the statute provisions applicable to the case of a legal arrest.

The provisions of the statute by which, in certain cases, an arrest may be made, must be strictly complied with.

THIS was a special action of the case against the defendant, as sheriff of the county of Hancock, for the default of one J. P. Fowles, a deputy sheriff under him, in not legally serving the writ hereafter mentioned.

From the report of WESTON C. J. who tried the cause, it appeared that on the 22d Aug. 1836, the plaintiff sued out a writ of attachment against one Jeremiah Jackson, described therein as of the city of New York, and returnable to the then next term of the S. J. Court, to be holden at Bangor, for the county of Penobscot. There was attached to this writ the following certificate: —

"STATE OF MAINE.

"Penobscot, ss. Bangor, Aug. 22, 1836.

"Then personally appeared John Mason, the creditor within named, and made oath that the amount or principal part of the debt claimed by him, the said plaintiff creditor, as aforesaid, is actually due and unpaid; and that he has sufficient reason to believe, and doth believe, that the debtor within named *is about* to change his residence and abscond beyond the limits of the State with property or means exceeding the amount required for his immediate support.

"Before me, FRANCIS H. UPTON, J. P."

This writ was placed in the hands of Fowles for service, whose return was in these words:

"Hancock, ss. Aug. 22, 1836. I have arrested the body of the within named Jackson, and he gave me a pledge for his appearance at court in Bangor. J. P. Fowles, Dep. Sh'ff."

At the October Term, 1836, of this Court, judgment was rendered in favor of the plaintiff. An execution was issued thereon, and seasonably placed in the hands of Fowles, and by him returned "in no part satisfied."

It was admitted that at the return day of the writ, Fowles offered to the plaintiff the benefit of the pledge taken by him, which he declined receiving.

Upon this evidence a nonsuit was entered, to be confirmed if in the opinion of the Court the defendant is not liable. But if in their judgment he is liable, it is agreed that the nonsuit is to be set aside, and a default entered.

G. B. Moody, for the plaintiff. The certificate in this case conforms to that prescribed by St. 1831, c. 350, § 12. The exact words of the St. 1835, c. 195, § 3, are not used in the certificate. The latter statute repeals all inconsistent provisions. If the certificate in this case was inconsistent with section 3d of the St. of 1835, the arrest was illegal, and not otherwise.

No particular form of words is imperatively required by the last statute. Section 3d sets forth the circumstances under which, and the debts for which, an arrest may be made. The intention to depart and establish a residence elsewhere, are the circumstances, and they are to be verified by oath. In all statutes regulating forms of process, the words to be used are specifically stated; as, in St. 1821, c. 63. No definite form of words being prescribed by St. 1835, any language setting forth the facts by virtue of which an arrest may be made, is sufficient. The certificate in this case was not merely not inconsistent with that required by the latter statute, but it contains every essential therein required. The phraseology is the same, except that it uses "abscond and change his residence" where in the former statute "depart and establish his residence beyond the limits of the State" was used. These expressions

are contained in the sections setting forth the facts which justify an arrest. The meaning of these expressions is the same; "to abscond," includes "to depart;" and "to change" a residence, involves the idea of establishing a new residence; else it would mean simply a loss of residence. To change, and abscond, imply the breaking up of the old and the establishing a new residence. It is immaterial that the change is mentioned in the first and the departure in the latter part of the certificate. The change referred to is not one within, but one out of the State. Both statutes being passed for the benefit of poor debtors, the words, though slightly varying, must have a similar construction. The case of *Whiting* v. *Trafton*, 4 Shep. 398, does not apply. The question there was on the sufficiency of a certificate. Two were annexed. The one sworn to in New Hampshire was void, as being made without the State. The other was defective, as neither complying with the provisions of the St. of 1831 or 1835, nor referring at all to the fact of residence.

J. McDonald, for the defendant. The legislature for years have passed laws for the benefit of poor debtors, to relieve them from the liability to be imprisoned for debt. They have been more and more liberal towards them, and have thrown around their person a high wall of protection which the creditor passes at his peril. If the creditor would take the pound of flesh, he must see that he spills not a drop of blood — that he does it with a knife that shall heal the veins and arteries as he separates them. He must strictly comply with every requisition of the statute; else he is without its protection. By the statutes of 1831 and 1835, "*no person*" was liable to arrest but under certain circumstances, respectively specified in those statutes. The oath taken, as appears by the certificate, was not in accordance with the St. of 1835, but followed the language of that of 1831. But the statute of 1835 enlarged the rights of the debtor, and changed the prerequisites to be observed, on the part of the creditor, to authorize an arrest. The language of the statutes would not have varied, had not the will of the legislature varied. The material fact that the debtor is about

to establish his residence beyond the limits of the State, is required to be sworn to by the creditor, in the last statute; and it not having been done in this case, the certificate is a nullity, and the arrest illegal.

The opinion of the Court was by

SHEPLEY J. — The suit of the plaintiff against Jackson was founded upon a contract; and in such cases it is provided by St. c. 195, that "no person shall be arrested or imprisoned on mesne process" except "when he is about to depart and establish his residence beyond the limits of this state with property or means exceeding the amount required for his own immediate support." And the oath of the creditor, his agent, or attorney, is required to be certified on such process in proof of the facts to authorize the arrest. The affidavit in this case states "that the debtor within named is about to change his residence and abscond beyond the limits of the State." There is a material difference between a change of residence, and the establishment of a residence without the limits of the State. The former may be temporary and within the State, the latter requires, that it should be permanent and without the State. To allege that he had absconded beyond the limits of the State, would tend rather to disprove than to prove, that he was about to establish a residence. The facts stated in the affidavit might be true, and yet the debtor might not be about to establish his residence beyond the limits of the State. If a strict compliance were not required, it would be easy to evade the provisions of the statute and to make use of process to arrest in many cases, for which no provision was made. It was decided in *Whiting* v. *Trafton*, 16 Maine R. 398, that, when the arrest was unauthorized, no action could be maintained against the sheriff for neglecting to take sufficient bail.

Nonsuit confirmed.

State *versus* Alden G. Handy.

In an indictment for forgery, the instrument alleged to be forged, was set forth as an acquittance or discharge for the sum of forty-eight dollars. The paper forged was on its face an order for the sum of forty-eight dollars; but on its back was an order for the further sum of one dollar. It was held, that there was a variance between the allegation and the proof.

This was an indictment for the forgery of the following instrument which was alleged to be an acquittance or discharge for the payment of money.

The instrument alleged to be forged was set forth in the indictment as follows: —

"St. Albans, Aug. 4th, 1833.

"C. C. Cushman, Esq.

"Sir, The bond you took for me on the Alden G. Handy demand must be attended to before it is out. He has paid me $48 to go on it, and if he pays the rest before it is out you may allow him the $48 he has paid, for me. He thinks he gave the bond in Sept. Yours, &c. Elijah Wood, Jr."

The instrument thus set forth in the indictment, had on the back of it the following words: —

"He says he has worked for me one day, for which I owe him $1, making in all $49, which you may allow on the execution."

Elijah Wood, Jr. who signed the paper, alleged to be forged, testified that where the figures $48 occur on the inside of the paper there was orignally written the figures $20, and where the figures $49 occur on the outside, the figures $21 were originally written by him, and that he gave the paper as a direction to Mr. Cushman to allow the sum of $21.

It appeared in evidence that the paper was received and treated as an order to allow the sum of forty-nine dollars.

The counsel for the prisoner, contended that there was a variance between the indictment and proof; first, in that the paper was incorrectly described as an acquittance or discharge of $48 instead of the sum of $49, and the lines commencing with, "he says he has worked," &c. are not set forth in the indictment, constituting, as the counsel contended, a

material part of the same instrument. Secondly, that the paper was incorrectly set forth as "an acquittance or discharge."

These objections, SHEPLEY J. before whom the trial was had, overruled, and a verdict of guilty was taken, subject to the opinion of the Court whether the indictment can be sustained.

G. F. Shepley, for the defendant. The parts omitted are material and should have been set forth in the indictment. 2 East's P. C. 975; *Rex* v. *Lyon*, 10 Petersd. 61; *Mason's* case, 1 East, 180. The instrument alleged to be forged should be truly set forth. The indictment alleges it to be of the tenor following, and having attempted to set it forth, it should be truly recited. *Rex* v. *Powell*, 2 Black. R. 787; *Com.* v. *Stow*, 1 Mass. R. 54. The instrument must be set forth either according to its tenor or according to its strict legal effect. Neither is done here. It is not an order for $48, but for $49.

It is not correctly set forth as an acquittance or discharge. This was a letter and was to operate as a discharge only on certain conditions, but was not a discharge of itself, and should not have been so described.

Goodenow, Attorney General, *contra*. All that is required in an indictment, is that it should be so certain, that it may be intelligible to the prisoner and the Court, and that the record should be a bar to all further proceedings in relation to that subject matter.

So much of the paper as is on its face was truly described, and may be considered as one instrument, of which there has been a forgery. The purport of an instrument refers to what is on its face. 2 East's P. C. 981; *Com.* v. *Parmenter*, 5 Pick. 279.

The indorsement on the back was another forgery, and it can afford no ground of complaint that the prisoner was not indicted for that. This was a paper of value and not a mere letter. 2 Hale's P. C. 185; Roscoe's Crim. Ev. 577.

BY THE COURT. — Several questions of interest have been raised in this case, but it will not be necessary to consider all

of them. The order is set forth in the indictment for the sum of forty-eight dollars. But upon inspection of the instrument alleged to be forged, it appears that there is the further sum of one dollar due. It is then an order for the sum of forty-nine dollars, and the instrument not having been truly set forth, the exceptions are sustained, and the verdict set aside.

THOMAS SMALLWOOD *versus* MILFORD P. NORTON *& al.*

In a suit against an attorney for negligence, it is sufficient proof that he was employed, to show that he acted and was recognized on the records of the Court as acting as such.

An attorney charged with the collection of a demand, having procured an attachment to be made of the debtor's property, which was replevied from the possession of the officer making the attachment, is bound to act as such in the defence of the replevin suit, and is responsible if he is guilty of negligence in the defence.

He cannot relieve himself from responsibility by the employment or substitution of other counsel.

If the plaintiff in replevin becomes nonsuit, it is the duty of the counsel for the defendant, for the omission of which they are responsible, to move for judgment for a return of the property replevied, and that the writ be placed on file, that the record may be properly made up.

Without such judgment, a failure to return would not be a breach of the bond.

In a suit on the bond in a replevin suit, where the plaintiff had become nonsuit, evidence would not be admissible, in reduction of damages to show that the property was in the plaintiff.

In a suit against an attorney for negligence in not moving for a return of property replevied in a suit in which the plaintiff in replevin had become nonsuit, and that the writ should be placed on file, it is not competent for him to show, in reduction of damages, that the plaintiff in replevin was the real owner of the property replevied.

THIS was assumpsit against the defendants, for neglect of duty, as attorneys at law.

On the trial of the cause, before EMERY J. the plaintiffs proved by the testimony of John H. Richardson, that in the winter of 1835, he sent a demand in favor of the plaintiff against one Kimball, for collection.

It appeared that on Feb. 19, 1835, a suit was instituted by the defendants, who indorsed the writ, and that an attachment of personal property in the possession of Kimball was made by one Leavitt, a deputy sheriff, by whom the writ was served. The property attached was replevied from said Leavitt by David Fiske.

Both actions were entered at the May Term of the Court of Common Pleas, and the defendants entered their appearance for Smallwood in the suit against Kimball, and for Leavitt, in the replevin suit against him. On the 20th of June, they advised the plaintiff that the suits had both been continued, and that they were satisfied that Fiske had no title to the property replevied, and that they should hold it, and secure the plaintiff's debt by it.

At the October Term, 1835, Kimball was defaulted, and judgment rendered on default, Oct. 17, and execution was taken out on Dec. 15, following. This execution was returned by an officer, no part satisfied, but his return was without date. On March 8, 1836, an alias execution issued, but there was no evidence that it had ever been placed in the hands of an officer.

The replevin suit was further continued to the Jan. Term, 1836, and on the twenty-third day of the term, Fiske became nonsuit. No papers were filed in the case, and it appeared from the testimony of the clerk, and from the dockets, that the judgment of the Court was not recorded, because no papers had been put upon file before the middle of the vacation after the rendition of judgment. It did not appear that any motion had been made by the defendants for a return, or that the replevin writ should be placed on file. The names of the defendants, as attorneys of Leavitt, appeared on the docket for the May Term, 1835, and their names were brought forward on the dockets of the subsequent terms. At the Jan. Term, 1836, senior counsel was employed by Mr. Norton, of which the plaintiff was duly apprized, who entered his appearance before the nonsuit.

It appeared from the testimony of Leavitt, that he employed Mr. Norton to defend the suit, but that he had no conversation with the other defendant on the subject; that Kimball had failed; and that the sureties in the replevin bond were good.

The defendants offered to prove that the property attached on the plaintiff's writ against Kimball, which was replevied by Fiske, was the property of said Fiske; but the evidence was not admitted.

It was proved that the copartnership between the defendants was formed in January and was dissolved in July of the same year.

The Court ruled that the action was maintainable upon this evidence, upon which ruling a default was entered, subject to the opinion of the Court upon the rejection and admission of the evidence offered. If the testimony offered by the defendants should have been received, or if the plaintiff upon the proof introduced is not entitled to recover, the default is to be taken off and a nonsuit to be entered.

Cooley, for the defendants. The property attached belonged to Fiske. Proof of that fact was rejected. The defendant was not concluded by that judgment. Had the officer been sued for not selling the property attached, he might have shown in defence that it was the property of another. *Blake* v. *Shaw*, 7 Mass. R. 505; *Fuller* v. *Holden*, 4 Mass. R. 499. This evidence should have been received. The complaint is of negligence on the part of the defendants, in not moving for a return of property, that it might be levied on. If done, it would not have bound the title to the property. The plaintiff might have brought trespass or trover, and the nonsuit would have been no bar. *Knox* v. *Waldoborough*, 5 Greenl. 186.

The plaintiff has no right of action in relation to the replevin suit. There was no proof that the defendants were attorneys for him in that suit.

The copartnership was dissolved in July, 1835, after which time other counsel was employed; and if there was any negligence, it was his. 1 Wend. 293. The defendants owed the plaintiff no duty in relation to that suit. He was not a party

to, nor had he any right to control it. The property attached was the special property of the officer. The officer was accountable to him under certain contingencies. The bond was given to the officer, who alone controls it. *Ladd* v. *North*, 2 Mass. R. 514. The officer from whom the property was replevied, if any one, had a claim against the defendants.

But there was no need of moving for a return. It was unnecessary; and if necessary, the neglect affords no ground for a suit. Nor has the plaintiff any cause of complaint that no motion was made for the writ to be placed on file. It was not properly in the keeping of the plaintiff in replevin. It should have been returned to Court. It was the negligence of the officer by whom it was served, that it was not so returned—not the defendants'.

Hobbs, for the plaintiff. The defendants were bound to take charge of the replevin suit. That they did so, appears by the dockets. It was their duty to have made the bond in that case available to the plaintiff after nonsuit; to see that the proper judgment was entered; that the writ was on file; that the costs were taxed; and that the record was properly made up.

The evidence offered to show ownership in Fiske, was properly excluded. The return of the officer, as to the attachment, is conclusive on all. *Bott* v. *Burnell*, 9 Mass. R. 98; *Bannister* v. *Higginson*, 3 Shep. 73; *Estabrook* v. *Hapgood*, 10 Mass. R. 313; *Bott* v. *Burnell*, 11 Mass. R. 163; *Stinson* v. *Snow*, 1 Fairf. 263. The rights of the parties to the replevin suit were settled by the nonsuit. The bond in that case was for the protection of the plaintiff, and the nonsuit was a breach. *Pettygrove* v. *Hoyt*, 2 Fairf. 69. The defendant should have moved for a return. *Badlam* v. *Tucker*, 1 Pick. 286. Whether the nonsuit was on the merits or not, the defendants should have moved for a return. *Quincy* v. *Hall*, 1 Pick. 356. It was their duty to act in this case for the protection of the rights of the plaintiff, who was the party in interest in the replevin suit. *Dearborn* v. *Dearborn*, 5 Mass. R. 319.

The opinion of the Court was by

WESTON C. J. — Richardson acted as the agent of the plaintiff, and his testimony was admissible as such. The defendants were engaged as attorneys to prosecute and collect the plaintiff's debt. They were under legal obligation, to discharge this duty, with competent skill and fidelity. The object of the suit, instituted by them for the plaintiff, was to obtain judgment, and as the fruits of it, satisfaction of the execution, which issued. They had caused the debtor's property to be attached; and it was their duty, by all legal means, to make that attachment available. They became professionally charged with all legal ancillary proceedings, necessary to make the attachment effectual. *Dearborn* v. *Dearborn*, 15 Mass. R. 316. With regard to the averment, that the defendants were employed, and undertook to act, as attorneys of the common pleas, it is sufficiently proved by their acting as such for the plaintiff, and being recognized as acting in that capacity, on the records of that Court.

A process in replevin was instituted at the suit of David Fiske, to defeat the attachment, procured by the defendants, for the benefit of the plaintiff. That is necessarily brought against the officer, who acts in trust for the attaching creditor, although he has nominally the management of the defence. The plaintiff was the *cestui que trust*, and the defendants their attorneys. From this relation alone, they would have been received to defend the replevin. But one of the defendants was also retained by the officer. Such being the connection between these suits, the plaintiff having a direct interest to defeat the replevin, the object of which was to render his attachment unavailable, the defendants owed a duty to the plaintiff, in defending against the replevin process, as well as to the officer. That they so understood it, and assumed to act for the interest of the plaintiff in both suits, is apparent from their letter of June twentieth, 1835. But independent of that letter, it was their duty to take care of his interest. And they could not relieve themselves from this responsibility, by the employment or substitution of other counsel.

When the plaintiff in replevin became nonsuit, it was their duty to see that the writ was put on file, that the record might be duly made up. They should also have moved for judgment for a return of the property replevied. Without such a motion, no such judgment can be entered in cases of nonsuit, nor would in such case a failure to return be a breach of the replevin bond. *Badlam* v. *Tucker & al.* 1 Pick. 284; *Pettygrove* v. *Hoyt & al.* 2 Fairf. 66. If the defendants had fulfilled their professional duties to the plaintiff, by taking such measures as to render the replevin bond available, by the regular entry of judgment upon nonsuit, and for a return, in a suit on the bond, it would have been held forfeited, and the officer, in trust for the plaintiff, would have been entitled to judgment for the value of the property, as well as for the damages. Nor do we think, that proof could be received in a suit on the bond, that the property was in Fiske. Judgment for return should be complied with in terms, or the obligors held liable to respond in damages. It would be against the legal effect of that judgment, to open the question of property in a suit on the bond. The time to have tried that question was, while the suit in replevin was pending. It would be a very extraordinary derangement of the regular course of legal proceedings, to suffer the plaintiff in replevin to abandon a process, expressly provided to enable him to vindicate his title to property taken from the custody of the law, and subsequently to try his rights, under the bond, which he is required to give to prosecute his replevin with effect. If such evidence would not be available in defence of the bond, it cannot avail the defendants, for neglecting the proper legal steps to render the bond effectual, for the benefit of the plaintiff. But, aside from the question of title, he would have been entitled to the twelve per cent. which the officer would at all events have recovered for his use.

The liability of the defendants being sustained by the proof, we are satisfied, that under the general issue, a cause of action is sufficiently set forth in the second count. The default is to stand, and the case referred, for the assessment of damages, as has been agreed by the parties.

JOHN DOUGLAS *& al. versus* HEZEKIAH WINSLOW.

The interest of each partner in the partnership property is his portion of the *residuum* after all the debts and liabilities of the firm are liquidated and discharged.

A creditor of one of the firm may attach their goods so far as his debtor has an interest in them, subject to the paramount claims of the creditors of the firm.

THIS was an action of trespass brought by the plaintiffs as copartners against the defendant, a deputy sheriff, for taking and carrying away a certain quantity of goods belonging to their copartnership. The writ was dated Oct. 10, 1837.

The defendant first attached the goods in dispute by virtue of a writ in favor of Jenness & March, against Thomas G. Brown, one of the plaintiffs, on July 18th, 1837. The goods then attached were retained by him, and were attached subsequently on Nov. 8th, 1837, by virtue of a writ in favor of Alfred Willard & Co. against Tho's G. Brown & John Douglas, as copartners under the name of Tho's G. Brown & Co. Judgment was obtained in these suits, and the executions were seasonably placed in the hands of a deputy sheriff, by whom the property attached was sold and the proceeds applied to the payment of the last mentioned suit against the firm of T. G. Brown & Co.

There was evidence tending to show the existence of a firm as alleged by the plaintiff, but this point was rendered immaterial by the decision.

Upon these facts being proved or admitted, EMERY J. who presided at the trial, ordered a nonsuit with leave for the plaintiff to set it aside upon the report of the Judge.

J. McDonald, for the plaintiffs, contended that partnership funds must first be applied to the payment of partnership debts, and the creditor of one of the firm can sell only the interest of that partner after the joint debts have been paid. *Church* v. *Knox*, 2 Day, 514; *Prince* v. *Jackson*, 6 Mass. R. 242; *Fisk* v. *Herrick*, 6 Mass. R. 271; *Wilson* v. *Conine*, 2 Johns. 280; *Moody* v. *Payne*, 2 Johns. Ch. 548; *Knox* v. *Simmons*, 4 Yeates, 477; *Gilman* v. *N. A. Land Co.*, 1 Pet.

U. S. R. 460; *Harrison* v. *Sterry*, 5 Cranch, 289; *Commercial Bank* v. *Wilkins*, 9 Greenl. 34.

The rights of partners in the firm property, are different from those of tenants in common in a chattel. Matter of *Smith*, 16 Johns. 109. Partners are joint tenants, and not tenants in common. 1 Mad. Ch. 93; *Exparte Young*, 2 Ves. & Beame, 242. A joint tenancy cannot be severed. *Shaw* v. *Hearsey*, 5 Mass. R. 521; *Hewes* v. *Bayley*, 20 Pick. 98. The partnership property itself cannot be attached to answer the debt of one member of the firm. All that can be attached is that *quantum* of interest which the debtor partner could extract out of the concerns of the partnership after all claims against the firm should be paid. *Dutton* v. *Morrison*, 17 Ves. 193. The sheriff can sell only subject to the debts of the firm. The separate creditor takes as the debtor himself held the property, subject to the rights of the other partners. The sheriff cannot seize the partnership effects themselves, for the other partner has a right to retain them for the payment of the partnership debts. *Fox* v. *Hanbury*, Cowp. 445; *Taylor* v. *Field*, 4 Ves. 369; *Young* v. *Keighly*, 15 Ves. 559. The sheriff sells only the *interest* of the partner in the partnership property; but neither the sheriff nor a purchaser has a right to the *possession* of the property. *Cram* v. *French*, 1 Wend. 311; *Dunham* v. *Murdock*, 2 Wend. 554. The *King* v. *Sanderson*, 1 Wight, 50; *Church* v. *Knox*, 2 Conn. R. 516. The levy under the execution only gives a right to an account. All that a court of law can do is to issue execution against the *interest* of the separate partners, and not against the effects themselves. This interest is the partner's share in the surplus after the payment of partnership debts. *Nicol* v. *Musford*, 4 J. C. 522; S. C. 20 Johns. 611. A court of law cannot take jurisdiction of accounts between partners. *Rogers* v. *Rogers*, 1 Hall, 391. The remedy therefore should be sought in a Court of Equity. The original seizure of the goods on a writ against one of the firm, was tortious, and it is no defence, that having wrongfully taken them they were after the commencement of this suit taken by virtue of a writ against the firm.

Trespass may be maintained, the original taking having been wrongful. *Green* v. *Morse*, 5 Greenl. 291; *Nelson* v. *Merriam*, 4 Pick. 249; *Foss* v. *Stewart*, 2 Shep. 312; *Campbell* v. *Phelps*, 1 Pick. 62; *Agry* v. *Young*, 11 Mass. R. 220; *Root* v. *Chandler*, 10 Wend. 110; *Vail* v. *Lewis*, 4 Johns. 450; *Phillips* v. *Hale*, 8 Wend. 610.

The plaintiffs have no separate interest in the partnership property until it is relieved from partnership liabilities. They are the mere trustees for those who have claims against the firm. Though Brown might have had a resulting interest in the partnership; still the defendant is liable, as he did not seize that interest, but the property itself. He has executed process unlawfully, and thus has become a trespasser.

Moody and *J. A. Poor*, for the defendant, insisted that the plaintiffs could not maintain trespass for attaching the interest of a member of the firm. The cases cited relate to the appropriation of the funds of the partnership. They were cases in equity, where the contest arose between different claimants. In no case was a suit at law brought by the partners. Their remedy is in equity. Collyer on Partnership, 81–2. The attachment was valid as against the firm. The creditors of the firm subsequently interfered; and the goods attached were applied to pay the debts of the firm.

The opinion of the Court was by

Weston C. J. — The authorities cited for the plaintiffs very clearly establish the doctrine, that partnership creditors have a priority over the separate creditors, in relation to the partnership funds. It was recognized in Massachusetts at an early period; and is the settled law of that State and this. *Pierce* v. *Jackson*, 6 Mass. R. 242; *Commercial Bank* v. *Wilkins*, 9 Greenl. 28. The interest of each partner is in his portion of the residuum, after all the debts and liabilities of the firm are liquidated and discharged. Equity will not aid the separate creditor, until the partnership claims are first adjusted. And they will interpose to aid the creditors of the firm, when a separate creditor attempts to withdraw funds, in regard to which

they have a priority. These principles are illustrated and sustained in many of the cases cited for the plaintiffs.

But at common law, according to the English practice, a separate creditor of one of the firm, may seize and sell on execution the interest of his debtor in the partnership stock. No case has been referred to at law, where this has been prevented by any movement or interference, in behalf of the partnership. They have in England no attachment of property upon mesne process, except that of foreign attachment, which depends upon its own peculiar principles.

But in this State and in Massachusetts, a separate creditor may attach the goods of a firm, so far as his debtor has an interest in them, subject to the paramount claims of the creditors of the firm. This right has been repeatedly exercised; and has never been defeated, so far as the cases have come to our knowledge, unless in behalf of partnership creditors. In the case of *Pierce* v. *Jackson*, Parsons C. J. says, "a creditor of one of the firm, has a right to attach the partnership effects, against all creditors, whose demand is not upon the company." That the debtor himself should join with his partner in a suit to prevent this, has never before, that we are aware of, been attempted. The existence of the right, and its exercise, subject to the superior rights of the partnership creditors, is assumed in the case of the *Bank* v. *Wilkins*. It may be inconvenient to other partners to have their operations thus broken in upon, and partnerships virtually dissolved, for the benefit of separate creditors; but it is a hazard, to which they are necessarily subjected, when they unite in business with others, incumbered with separate debts. In *Allen & al.* v. *Wells & al.* 22 Pick. 450, the superior claims of partnership creditors are discussed and admitted, but the right of a separate creditor to attach, when he is not thereby brought in conflict with them, is conceded.

Were the law otherwise, a wide door would be open to delay and defraud creditors. A man with funds to a very large amount, half of which is due to others, has nothing to do but to invest them in a partnership, and he may thus set his creditors

at defiance, or oblige them to wait, until the partnership concerns are liquitated and closed by the slow process of a court of equity. While the policy of the law has been to withdraw the body of the debtor from coercion and restraint, it has been equally its policy, with certain exceptions, which humanity requires, to afford adequate remedies, by which all his property may be made available to satisfy his creditors. It lends its aid to defeat all devices, to delay or defraud them; and it will not suffer legal principles, established for beneficial purposes, to be perverted to their prejudice.

The defendant was justified in making the attachment at the suit of a separate creditor, and relinquishing it for the benefit of partnership creditors. Upon the view we have taken of the case, it has become unnecessary to decide the question raised, as to the sufficiency of the proof of the existence of a partnership between the plaintiffs. *Nonsuit confirmed.*

JAMES T. HARRIMAN *versus* DANIEL WILKINS.

The plaintiff in replevin is not a trespasser in taking the goods replevied, if he offer sureties satisfactory to the officer, though in fact insufficient.

If a deputy sheriff takes an insufficient bond in replevin, he is guilty of official misconduct, for which the sheriff is responsible.

The officer being required in replevin to take a bond "with sufficient surety or sureties," is not justified if he take insufficient sureties by showing that the plaintiff in replevin was a person of abundant property.

The statute of limitations against the sheriff for taking insufficient sureties in replevin, commences running from the time when the plaintiff in replevin, after judgment for a return, has failed to return upon demand the property replevied.

A verdict will not be set aside because the verdict of a former jury was delivered them, with the papers in the case, unless fraudulently or designedly done with intent to influence them.

THIS was an action of the case brought against the defendant, late sheriff of this county, for the default of Joseph T. Copeland, then one of his deputies, for taking an insufficient surety upon a replevin bond, in a suit of replevin brought by Jonathan and David Greene against the plaintiff.

Plea, the general issue. The defendant likewise filed a brief statement, in which he relied upon the statute of limitations.

From the report of SHEPLEY J. who tried the cause, it appeared that said Greenes, on the 9th day of August, 1833, sued out their writ against the plaintiff, in which the sheriff was commanded to replevy a chaise and harness then in plaintiff's possession, and valued at $100, and that said Copeland served and replevied the same, taking Jonathan Greene as principal, and Frederick Parker as surety, in double the amount; that suit was prosecuted, and at June Term, 1837, the said Harriman recovered judgment against said Greenes for a return of said chaise and harness, and for one dollar damages and costs. On the 23d of September, 1837, an officer having the execution issued on that judgment, demanded the chaise and harness of Jonathan Greene, but it was not delivered, and the execution was returned in no part satisfied.

Evidence was introduced tending to prove that Frederick Parker, at the time he signed the bond, was, and that he was not, in good credit and sufficient as a surety for the amount of the bond. This evidence was submitted to the jury, and for the purpose of enabling them to decide upon the facts, they were instructed to find a verdict for the plaintiff, if they should find the surety at the time not to be of good credit for the amount of the bond, and they were instructed that the credit and circumstances of the principal in the bond were immaterial.

The jury found a verdict for the plaintiff. If the statute of limitations is a legal bar to the action, the verdict is to be set aside, and the plaintiff nonsuited. If the instructions were otherwise incorrect, there is to be a new trial. And if the statute is not a bar, and the instructions were correct, judgment is to be rendered on the verdict, unless a new trial should be granted for the cause set forth in the defendant's motion for a new trial.

The defendant moved for a new trial, because the verdict of the jury by whom the cause had been tried in the Court below, had been delivered to the jury with the papers in the case.

G. G. Cushman, for the defendant.

The cause of action accrued at the time when the plaintiff was dispossessed of his property. Insufficient sureties are the same as no sureties. A bond with sufficient sureties is a prerequisite to the service of the writ. *Sparhawk* v. *Bartlett*, 2 Mass. R. 198. Without this the deputy has no right to act, and his taking is a trespass. St. 1821, c. 63, § 9, provides the form of replevin bond. If there was then a cause of action for not properly serving the writ, the limitation then accrued. *Purple* v. *Purple*, 5 Pick. 226; *Johnson* v. *Richards*, 2 Fairf. 49; *Rice* v. *Hosmer*, 12 Mass. R. 133; *Morris* v. *Van Voast*, 19 Wend. 283; *Lisher* v. *Pierson*, 11 Wend. 58. The allegation in the plaintiff's writ is, that the surety when taken was insufficient. If this be true, the cause of action then accrued. Angel on Limitations, 181; *Williams College* v. *Balch*, 9 Greenl. 74. The defendant in the replevin suit should have pleaded in abatement this defective service.

There is a material distinction between replevin and bail. In bail, the plaintiff has no opportunity to protect himself till after the termination of his suit. He may never recover judgment, or if he should, it may be paid. In replevin, the sheriff has no right to serve but upon receiving a sufficient bond; and if the bond be an insufficient one, he should plead that fact in abatement.

The verdict was improperly delivered to the jury; it constitutes no part of the record. Parties act at their peril, and if a paper which may affect the verdict, and which is inadmissible, is sent out with the papers, it is sufficient cause for a new trial.

J. Godfrey, for the plaintiff, argued that the instructions given were correct according to the case of *Chase* v. *Stevens*, 2 Fairf. 133. Surety or sureties stand in the relation of pledges in the English practice. If the sheriff return insufficient pledges, it is the same as if none were taken. 5 Jac. Law Dic. 592; *Sparhawk* v. *Bartlett*, 2 Mass. R. 198. The jury have established the insufficiency of the surety; that being established, the liability of the sheriff necessarily follows. The replevin bond was on condition. No action accrued till the

breach of condition, for till that time there could be no suit against the sureties. The statute of limitations commenced running when judgment for a return was rendered in the replevin suit. *Holmes* v. *Kerrison*, 2 Taunt. R. 323; 1 Wm. Bl. 353; *Rice* v. *Hosmer*, 12 Mass. R. 130; *Mather* v. *Green*, 17 Mass. R. 60.

Rogers, in reply. An action does not lie for the default of the deputy in taking insufficient bail. It is not an act *colore officii*. The case in 19 Wend. 283, establishes that proposition. The language in the statute of New York is similar to that of this State. The cases cited show that an officer has no right to serve without a sufficient bond, and having none, if he make service without such bond it is not an act for which the sheriff is responsible. If the deputy do an act unauthorized by law, it is not by color of his office. The declaration avers the taking of an insufficient bond. If the deputy, in violation of his duty, injured the plaintiff, the right of action arose when the injury was done. If the defendant would contest the sufficiency of the pledges, it should be at the return day of the writ, and it is no hardship that he should then be called upon to determine whether he will abide the result, or except to the sufficiency of the bond. 2 Saunders on Pl. and Ev. 645; *Shorl* v. *McArthy*, 3 B. & A. 626; 5 B. & C. 254; *Wilcox* v. *Plummer*, 4 Pet. 172.

"Sufficiency" in the statute is not necessarily confined to the surety. Though there may be many plaintiffs in replevin all are not obliged to sign. If many, a consideration of their number and ability would enter into the consideration of the sufficiency of the bond. The jury should have taken into consideration the ability of the principal.

The opinion of the Court was by

SHEPLEY J. — In making service of the writ of replevin and in taking the bond, the deputy was acting in his official capacity. The plaintiff in replevin could not be a trespasser in taking the goods, if he offered sureties satisfactory to the officer. And if the officer took a bond to the defend-

ant in replevin with insufficient sureties, he was guilty of official misconduct, for which the defendant must be responsible. In the case of *Purple* v. *Purple*, 5 Pick. 226, the officer was regarded as a trespasser because he took the bond to himself instead of to the defendant in replevin. The case of *Morris* v. *Van Voast*, 19 Wend. 283, was decided upon the peculiar provisions of the statute of that State differing from ours.

The officer is required to take a bond "with sufficient surety or sureties." And reliance is of necessity placed upon the surety, for all persons are entitled to the writ whether of ability to respond in damages or not. In such cases the officer is put upon a guarded watchfulness to take good security for one, from whom he takes valuable property and delivers it over to another. And he could not be justified for taking an insufficient surety by shewing, that the plaintiff was a person of abundant property. There would not be a compliance with the letter or spirit of the law.

The defendant's counsel contended, that the action barred by the Statute, c. 62, § 16, which provides "that all actions against sheriffs for the misconduct or negligence of their deputies shall be commenced and sued within four years next after the cause of action." An action upon the case to recover damages for such misconduct or neglect cannot be maintained without proof of actual injury. Whether the plaintiff in this case would be injured by the misconduct of the officer could not be known, until he had recovered judgment for a return of the property, and the defendant in replevin had failed to restore it. The general rule in actions of tort is that the statute commences to run from the time when the consequences of the act arise or happen, and not from the time when the act was done. *Roberts* v. *Read*, 16 East, 2115; *Gillon* v. *Boddington*, 1 C. & P. 541. The cases relating to the negligence of attorneys, cited for the defendant, were actions of assumpsit, in which a different rule prevails.

If the verdict of a former jury had been fraudulently or designedly delivered to the jury to influence them, and it had

been proved by competent testimony, it might have afforded sufficient reason for setting aside the verdict. There is nothing in the motion for a new trial in this case to authorize it.

Judgment on the verdict.

JOSHUA LANE *versus* JOSEPH STEWARD.

The indorsement by the holder of a note "good to J L, or order, without notice," does not dispense with demand on the maker; nor can such indorsement be considered as a guaranty.

When a note thus negotiated appears by indorsement to have been partially paid on the day of its maturity, such indorsement authorizes the conclusion of due presentment.

Parol evidence is admissible when there is a written contract of indorsement to prove a waiver of demand.

A waiver of demand on the maker is sufficiently established by proof that the indorser, at the time of the indorsement of the note, said that if the maker did not pay the note when it became due, he would; and that after it became due, he told the holder that if he would commence a suit against the maker and could not collect it, he would pay it.

The indorser of a note is not discharged by the holder's releasing the property of the maker attached, and taking a statute bond, though done at the solicitation of the maker and for a valuable consideration.

Neither is he discharged by the refusal of the holder to receive from the maker a conveyance of sufficient real estate as security, and give day of payment.

A sale of a promissory note at a greater discount than legal interest, does not make the transaction usurious.

ASSUMPSIT against the defendant as guarantor and indorser of two promissory notes, signed by John Sargent, Jr. and William T. Sargent. One note was for $440, and interest, dated July 15, 1835, and payable to the defendant or order, in one year, and by him indorsed before maturity to the plaintiff, in the following manner, viz. — "Good to Joshua Lane or order, without notice. Joseph Steward."

The other note was for $150, and was dated June 1, 1835, payable in one year from date, and indorsed in the same manner as the first.

The writ contained the usual money counts. It was dated April 16, 1839.

From the report of the case by SHEPLEY J. before whom the cause was tried, it appeared that the last mentioned note had been transferred by the plaintiff to one Wildes, to whom $49,60 had been paid by Sargent on June 1, 1836; that Wildes afterwards sued Sargent on March 11, 1837, and caused all his real estate in the county to be attached; that execution was duly obtained in this suit, and that on Dec. 4, 1838, the sum of $20,76 was realized for the sale of an equity of redemption belonging to said Sargent; and that the balance was paid to said Wildes by the plaintiff before the commencement of this suit.

It was agreed that the plaintiff commenced an action against said Sargent on the larger note, and on Sept. 17, 1836, caused all his real estate to be attached; that judgment was recovered Jan. Term, 1837, in said suit, and the execution duly issued and placed in the hands of the officer by whom it had been served, within thirty days from the rendition of judgment.

John Sargent, Jr. testified that the plaintiff and officer called on him with the execution before the expiration of the thirty days, and that he then offered to convey to the plaintiff his house in which he lived, worth three thousand dollars, and which was unincumbered, though the records shew a mortgage to James Read, which was paid, and take a bond for the reconveyance of the same on payment of the amount of the execution in six months, but the plaintiff declined receiving it. The plaintiff then agreed to relinquish the attachment of the Sargents' real estate, and to take a statute bond in six months, if Sargent would give him a note for twenty dollars, payable in six months, which he did, but subsequently advertised said note, and never paid it. He further testified that he disclosed agreeably to the conditions, and took the poor debtor's oath; that when said notes became due he was doing a large business, having a stock of goods to the amount of three thousand dollars, which he sold out on July 27, 1836.

John Lane testified that he called with the plaintiff at the defendant's on Sept. 1837; that the plaintiff asked defendant for some money; that defendant agreed to let him have some; that plaintiff asked defendant to pay the note for $440, after it became due, and he, defendant, requested the plaintiff to commence an action against Sargent, and said if the plaintiff could not collect it of Sargent, he would pay it. He further testified, subject to all legal objection, that at the time of the indorsement of the notes declared on, the defendant said if Sargent did not pay the notes when they became due, he would.

It was agreed that the sum paid the defendant by the plaintiff for said notes, was five hundred and twenty-eight dollars, on Jan. 4, 1836.

It was thereupon agreed that a default should be entered by consent, subject to the opinion of the Court upon the facts admitted or legally proved, and that the Court might deduce such inferences from the facts proved or admitted, as a jury might, and render such judgment as in their opinion the law of the case might require.

Hobbs, for the defendant. The contract between the parties is either one of indorsement or guaranty. If the plaintiff claims to recover against the defendant as an indorser, the action cannot be maintained, no demand being proved. The necessity of a demand is not waived by the terms of the guaranty. Notice only is waived. The effect of that contract was only to require one of the pre-requisites to charge an indorser. The Court will not look beyond the terms of the contract. The declarations of Stewart are inadmissible to vary its terms. A waiver of all rights to notice does not dispense with demand. *Berkshire Bank* v. *Jones*, 6 Mass. R. 524; Bailey on Bills, 125.

If demand and notice are to be considered as waived, the defendant is discharged, by the plaintiff releasing, for a valuable consideration, the property attached, and giving further time to the debtor. By taking a note and bond for six months, the

right of action against Sargent was suspended for that time. Chitty on Bills, 9th ed. 442.

If this was a guaranty, the defendant is discharged by the laches of the plaintiff, in not making demand on the maker at the maturity of the note, he being then solvent. *Oxford Bank* v. *Haynes*, 8 Pick. 423; Ohio Cond. R. 436. If Steward's declarations are received, the defendant is discharged, if, as was proved to be the case, the note was collectable. To charge a guarantor, it must be shown that the note could not have been collected of the maker. 14 Wend. 231. Here the evidence shows that payment of the note might have been enforced, had reasonable diligence been used.

A. W. Paine, for the plaintiff, maintained the following positions: —

1. A waiver of demand by parol may be proved, notwithstanding the indorsement is good without notice, the waiver being no part of the contract. 1 Phil. Ev. 475; *Taunton Bank* v. *Richardson*, 5 Pick. 446; *Fuller* v. *McDonald*, 8 Greenl. 213; *Union Bank* v. *Hyde*, 6 Wheat. 572; *Boyd* v. *Cleveland*, 4 Pick. 525; *Farmer* v. *Sewall*, 16 Maine R. 456.

2. If a demand was necessary on the maker, the promise of Steward to pay, is evidence of presentment. Chitty on Bills, 235; *Gibbon* v. *Coggan*, 2 Camp. 188; *Taylor* v. *Jones*, 2 Camp. 105; *Jones* v. *Morgan*, 2 Camp. 474; *Greenway* v. *Hindley*, 4 Camp. 52; *Hopes* v. *Alden*, 6 East, 16; *Lundie* v. *Robertson*, 7 East, 231; *Wood* v. *Brown*, 1 Stark. 217; *Dixon* v. *Elliot*, 5 C. & P. 437; *Walker* v. *Laverty*, 6 Munf. 487; *Martin* v. *Ingersol*, 8 Pick. 1; *Pierson* v. *Hooker*, 3 Johns. 68.

3. The express promise proved, is sufficient to support the action, it being made upon the consideration of incurring the expenses of a suit against Sargent. *Stewart* v. *M'Guire*, 1 Cow. 100; *Union Bank* v. *Geary*, 5 Pet. U. S. R. 99; *Lunt* v. *Padelford*, 10 Mass. R. 236; *Bank of Utica* v. *Sneider*, 3 Cow. 662; *Brooks* v. *Ball*, 8 Johns. 337. The conditions

upon which the defendant promised to pay, have been complied with.

4. The neglect to levy, and the refusal to take real estate, do not impair the plaintiff's right to recover. *Page* v. *Webster*, 15 Maine R. 249.

Hobbs, for the defendant. The defence rests on two grounds; the want of demand upon, and the giving time to the maker. The form of the indorsement changes the character of the defendant, from indorser to guarantor. The waiver of notice is a waiver of his rights as indorser. As guarantor, the defendant insured the solvency of the principal at the maturity of the note. *Warrington* v. *Furber*, 8 East, 245. The principal in this case was solvent, and a demand should have been made in a reasonable time on the maker. Com. Dig. Pr. & Surety K. 2; *Moakly* v. *Riggs*, 9 Johns. 69; *Reed* v. *Cutts*, 5 Greenl. 189. Notice of such demand, and non-payment, should have been given the defendant. *Bank of New York* v. *Livingston*, 2 Johns. Cas. 409; *Sturgis* v. *Robbins*, 7 Mass. R. 301; *Holbrow* v. *Wilkins*, 1 B. & C. 10; *Oxford Bank* v. *Haynes*, 8 Pick. 423.

But whatever may have been the original liability, here a new credit was given to Sargent; and time was given for a valuable consideration, and the attachment of the real estate released, and thus the defendant discharged. *Kennebec Bank* v. *Tuckerman*, 5 Greenl. 130.

The opinion of the Court was delivered by

Shepley J. — The defendant being the payee and holder of two negotiable promissory notes indorsed them to the plaintiff, "good to Joshua Lane or order without notice." This cannot be considered a contract of guarranty. It is in substance an engagement to be accountable as indorser without notice. And such a contract does not dispense with a demand upon the maker. *Burnham* v. *Webster*, 17 Maine R. 50; There was a partial payment actually made by the maker on the day it became due, on the note for one hundred and fifty dollars; and it authorizes the conclusion, that it was duly pre-

sented for payment; and notice of it being waived the plaintiff's right to recover is established.

To prove a waiver of demand upon the maker and a promise to pay the other note, the plaintiff introduced testimony, "that at the time of the indorsement of the notes declared on, the defendant said, if Sargent did not pay the notes, when they became due, he would." And that the witness "heard the plaintiff ask the defendant to pay the note for $440, after it became due, and the defendant requested the plaintiff to commence an action against Sargent, and said, if he could not collect it of Sargent, he would pay it." It has been decided, that parol testimony to prove a waiver does not contradict the written contract between the indorser and holder, but only shews, that the party had waived one of the conditions of it. *Taunton Bank* v. *Richardson*, 5 Pick. 436. And that when the language of a written waiver was equivocal, "the sense, in which the parties used the words, in which they express themselves, may fairly be sought in the practical exposition furnished by their own conduct or the conventional use of language established by their own customs or received opinions." *Union Bank* v. *Hyde*, 6 Wheat. 576. And that a promise to pay, if not paid by the other parties when due, made by an indorser at the time of indorsing, may be regarded as a waiver of a demand upon the maker. *Boyd* v. *Cleveland*, 4 Pick. 525; *Fuller* v. *M'Donald*, 8 Greenl. 213. These cases authorise the admission of the testimony and a conclusion from it, that the defendant waived a demand upon the maker.

It is contended, that the plaintiff, by releasing the property attached, and by arresting the maker on execution and taking a statute bond discharged the defendant; especially when it was done for a valuable consideration received. One of the points decided in *Page* v. *Webster*, 15 Maine R. 258, was, that a release of property attached did not discharge an indorser. If the plaintiff had a legal right to release the property attached, the indorser cannot be injured or justly complain, that he received a payment from the debtor as a consideration for its exercise. If any money were in fact received he might

claim to have it applied in part payment. By causing an arrest of the body and taking the bond provided by the statute he only elected to pursue one of the remedies, which the case afforded. And he cannot be considered as giving time to the principal by taking a bond on six months; for the time was determined by the law and not by the plaintiff.

The offer of the debtor to convey his house, and the refusal of the plaintiff to receive it as security, did not discharge the indorser. He cannot impose upon the holder the burden and risk of taking security and giving day of payment, which would deprive him of the right to resort to the indorser.

The notes were free from usury between the original parties; and it was decided, in *French* v. *Grindle*, 15 Maine R. 163, that a sale at a greater discount than legal interest did not in such case prove the transaction to be usurious. The plaintiff, according to the rule established in that case, can recover from the defendant, of whom he purchased, only the amount which he paid with interest.

Judgment for the plaintiff.

ZABDIEL BRADFORD & *ux. versus* CAROLINE J. W. HAYNES.

A specific legacy is a bequest of a particular article, capable of being designated and identified.

The devise of the residue of the real estate, after the happening of a contingency, or after certain objects have been accomplished by the disposition or appropriation of portions of it, is not specific, but general.

A bequest providing for the education and maintenance of a minor son, and disposing of the residue of the estate after the payment of certain pecuniary legacies and devises, is not a specific legacy or devise; and it is no defence to the payment of such legacies or devises, that the bequest to the son will absorb the estate.

When the testator by will directed that his minor son should be educated and supported till twenty-one years of age from his estate, and bequeathed certain pecuniary legacies to the use of other of his relatives, and the residue of his estate, which might remain in the hands of his executor, he bequeathed to his son in fee at his arrival at twenty-one years of age, or to his issue, if he should have any, in case of decease before that period, but if he should die under age and without issue, then to other relatives; *it was held*, that the legacy to the son was not specific.

In a suit brought by a legatee to recover a legacy, *it was held*, that it was no defence in whole or in part that the estate had deteriorated in value, by losses in bad debts and by the assignment of a large portion of the personal estate to the widow, there being assets sufficient to pay the particular legacies.

THE facts in this case sufficiently appear in the opinion of the Court.

This case was argued in writing at very great length.

W. D. Williamson, for the defendant, referred to and commented on the following cases, to support the position that the legacy to the son of the testator was specific, and that the evidence offered should have been received. *Wyman* v. *Brigden*, 4 Mass. R. 154; 2 Dane's Abr. 240; *White* v. *Winchester*, 6 Pick. 52; *Farwell* v. *Jacobs*, 4 Mass. R. 634; *Baker* v. *Dodge*, 2 Pick. 619; *Hayes* v. *Seaver*, 7 Greenl. 237; *Hubbel* v. *Hubbel*, 9 Pick. 562; Toller on Executors, 339; 2 Dane, 250; *Darlington* v. *Pulteney*, Cowp. 260; *Harris* v. *Fly*, 7 Paige, 425; 2 Sel. N. P. 695—715; 1 Dane, 584; 4 Dane, 324; *Fairfax* v. *Fairfax*, 5 Cranch, 19; *Chapin* v. *Hastings*, 2 Pick. 361.

J. McDonald, for the plaintiff, cited the following authorities. St. 1821, c. 51, § 4, 7, 10, 43; 2 Dane's Abr. 216; *Scott* v. *Hancock*, 13 Mass. R. 162; *Jones* v. *Brown*, 1 Pick. 311; *Hastings* v. *Dickinson*, 7 Mass. R. 153; *Washburn* v. *Washburn*, 10 Pick. 374; *Hayes* v. *Jackson*, 6 Mass. R. 149; St. 1830, c. 470, § 7; *Webber* v. *Webber*, 6 Greenl. 128; *Whitney* v. *Whitney*, 14 Mass. R. 88; *Nelson* v. *Jaques*, 1 Greenl. 144; *Fay* v. *Valentine*, 8 Pick. 527; *Towle* v. *Lovett*, 6 Mass. R. 394; *Newcomb* v. *Wing & al.* 3 Pick. 170; 3 Bac. Abr. 482; 5 Ves. jr. 149; *White* v. *Winchester*, 6 Pick. 48; *Hall* v. *Cushing*, 9 Pick. 395.

The opinion of the Court was by

WHITMAN C. J. — This is a suit, instituted to recover a legacy of five hundred dollars, payable in one and two years after the decease of the testator, and by him bequeathed to the wife of the said Bradford, the defendant being the administratrix *de bonis non* of the deceased, with the will annexed. It is admitted, that the times of payment of the legacy had long since elapsed; and that a demand therefor, had been duly made before the commencement of the suit; and that two hundred dollars had been paid and applied towards the discharge of the same.

It seems that the testator left an estate, by the inventory of which, duly returned into the probate office, it appears, to have been of the value of $24,426,92; 8,584,92, of which was personal, and the residue real estate. There are in the will sundry legacies, of specific articles, of the personal estate, amounting per inventory to $565,00. The defendant, who is the widow of the testator, waived the provision made for her in the will; and the judge of probate assigned to her $3569,69, of the personal estate, as inventoried; and the use and improvement of one third part of the real estate as and for her dower.

The testator, in his will, directed that his minor son, then about five years old, should be educated, and supported, till twenty-one years of age, from his estate; and bequeathed one

other legacy, of $1200, to the use of others of his relatives. The residue of his estate, which might remain in the hands of his executor, or his substitute and successor, he bequeathed to his son in fee, at his arrival at twenty-one years of age, or to his issue, if any he should have, in case of his decease before that period. But if he should die under age, and without issue, then to certain relatives of the testator. And he bequeathed his whole estate, with the exception of the specific legacies before named, to the executor named in his will, and to any successor to be appointed in his stead, by the judge of probate, in trust, to sell and dispose of as he might think proper, with the exception of the homestead of the testator, which has been set off to the defendant towards her dower, for the purposes named in the will, viz., to pay debts and legacies, and for the support of his son; and also to pay certain bequests to the defendant, in lieu of dower, which she waived, as before stated. The defendant is the successor, duly appointed, to the executor named in the will.

The defence set up is, that there are not assets remaining sufficient to allow of the payment of more than has been paid, if so much. She contends that the bequests, providing for the education and maintenance of the son, and of the residue remaining on his arrival at twenty-one years of age, &c. are in the nature of specific legacies and devises; and, being such, that they will absorb all that remains of the estate in her hands; and even require that the plaintiffs should refund a portion of what has been by them received. To support this branch of her defence, her counsel cites numerous authorities; but the Court is unable to discern that they do, in anywise tend to that purpose.

In the first place it may be remarked, that the general leaning of courts is against making legacies specific, so as to avoid a contribution, in case of a deficiency of assets. 3 Desauss, 373. *Walton* v. *Walton*, 7 Johns. Ch. R. 258. In the present case nothing can be clearer, to the view of the Court, than, that the bequests made in favor of the son, have none of the characteristics of specific legacies and devises. A specific

legacy, as its term imports, is a bequest of a particular article or articles, capable of being designated and identified. *Purse* v. *Snaplin*, 1 Atk. 508. And again, particular legatees are always preferred before residuary legatees. *Ibid.* And the devise of real estate, to be specific, must designate the particular estate intended to be devised, or be in such terms that it can be ascertained what particular estate is in view, by the testator. The devise of the residue of the real estate remaining after the happening of a contingency, or after certain objects have been accomplished by the disposition or appropriation of portions of it, is not specific, but general. 2 Comyn, 582. Hayw. 228.

It is moreover insisted by the defendant, that the estate of the testator has become deteriorated in value, and lessened in quantity, by the general depression in value of estates, and by losses in bad debts, and by the assignment of a large portion of the personal estate, and of dower in the real estate to herself; and she complains that she was not permitted to give evidence on the trial of the two first items; and that, if such evidence had been admitted, it would have appeared, that there must, at least, be an apportionment of a remnant only, of the estate among the legatees. But on looking into the evidence in the case, the defendant does not seem to be borne out in her premises, and of course not, in her conclusions. If the evidence offered had been admitted, and had been effectual to the full extent contended for, there would still have remained assets sufficient to pay the two particular legacies. This state of the case renders it unnecessary to consider whether the evidence rejected should have been admitted or not.

We have therefore come to the conclusion, that judgment must be entered on the default, in conformity to the agreement of the parties, for the amount of the legacy claimed, with interest from the times when payable, by the terms of the will, deducting what has been paid, with interest thereon from the time of payment.

William Robinson *versus* John R. Blen.

A demand upon the maker of a note, in order to charge an indorser must be satisfactorily proved to have been made on the day when the note falls due.

The declaration of the holder of a note to the indorser, that he has called on the maker the day the note became due, and that he refused to make payment thereof, is not evidence for him of such fact, although it was not denied by such indorser.

Where the truth or falsehood of a material fact is known to a party to whom the fact is asserted to exist, his omission to deny its existence is presumptive evidence of its truth. When not known, his silence furnishes no evidence against him.

This was assumpsit against the defendant as indorser of a note of hand signed by one Isaac F. Spaulding. The facts in the case sufficiently appear in the opinion of the Court.

The cause was argued in writing.

Gilman, for the defendant.

Abbott, for the plaintiff.

The opinion of the Court was by

Whitman C. J. — This action is upon a note of hand, made by one Isaac F. Spaulding to the defendant, and by him indorsed. When it came on to be tried, the plaintiff, to prove a demand upon the maker, introduced John Crowell as a witness, who testified, that he was present, when the plaintiff presented the note to the maker for payment, who admitted that it was due, but declined paying it, saying he had made arrangements with other persons, who were to pay it. The witness could not state, that this was on the 31st of July, 1837, when the note became payable, but said, that he thought it was the latter part of the summer of 1838; that he could not say whether it was one, two, three or four days, or a week after the note fell due; that he signed a paper at the time, which was presented to him by the plaintiff, which appears to be in the following words, viz. "William Robinson will present the note to Isaac F. Spaulding for payment, in the presence of one or two persons, who should be requested to make a mem-

orandum of it, signed with their names. John Crowell witness."

Another witness was introduced, who proved that the plaintiff saw the defendant, on the 31st of July, 1837; and stated to him, that he had called on the maker of the note for payment, without effect. The defendant then moved for a nonsuit, upon the ground that the demand upon the maker was not proved. The Court declined to order it. The defendant thereupon was defaulted, with leave to move to take it off, if upon a report of the facts, by the Judge, who tried the cause, the whole Court should be of opinion, that the jury, upon the evidence, would not be justified in finding a verdict for the defendant.

A demand upon the maker of a note, in order to charge an indorser, must not only be made, but it must be satisfactorily proved to have been made on the day when the note falls due, provided there be no circumstance dispensing with the necessity of such demand; and in this case no such circumstance is relied upon. The witness, relied upon to prove the time of the demand, is unable to state it. The writing which he signed is without date, and affords him no aid, by which he could be enabled to fix the time.

The witness by whom notice to the indorser was proved says, that the plaintiff then alleged, that he had called upon the maker, who had refused payment; and that this was on the 31st of July, 1837. This is not evidence, that the maker had been called upon on that particular day, or on any other day. It was but the declaration of the plaintiff, which cannot be evidence for him. If the declaration had been made to the defendant, in reference to a fact, which the defendant must have known to be true or false, and he had not denied it, the presumption would be against him. But, in the present case, there is no reason to believe, that he could have known whether the fact was or was not so. His not denying it, under such circumstances is no evidence against him.

We return therefore to the only legitimate evidence against the defendant, as to the fact of there having been a seasonable

demand upon the maker; and are constrained to say, that, according to the rules of law, it would not have justified the jury in finding it to be a fact proved in the case, that a demand upon the maker had been seasonably made; and therefore, that they would not have been justified in finding a verdict against the defendant. The default must be taken off, and the action stand for trial.

JOHN WILKINS *versus* GEORGE S. FRENCH *& al.*

The mortgagor is seized of an estate of freehold, and while in possession may convey the mortgaged premises, or may bequeath them as and for dower, or they may be assigned by the judge of probate, and the dowress may enter under such assignment, and hold the same and redeem the mortgaged premises.

The widow, by virtue of such assignment, has the right in equity during her life, and the reversion remains in the heirs at law, and in such case, either may redeem.

If the heir at law or his assignee redeem, he may oust the widow, unless she should redeem by paying such sum as he may have paid for redemption, in which case she and her heirs would hold till the amount paid by her should be refunded.

A mortgage is a mere charge upon the land mortgaged, and whatever will give the money will carry the estate in the land along with it.

The mortgage being only security for the debt, the mortgagor has all the rights he ever had against all but the mortgagee.

THIS was an action of ejectment, submitted to the Court on an agreed statement of facts, which are substantially set forth in the opinion of the Court.

Cutting, for the plaintiffs. The wife in this case joining with her husband in the mortgage, and relinquishing her right to dower, the plaintiff purchasing the equity, holds the whole estate freed from the widow's claim to dower. *Popkin* v. *Bumstead*, 8 Mass. R. 491. She may bar herself of dower by her separate deed subsequent to, and in consideration of her husband's sale. *Fowler* v. *Shearer*, 7 Mass. R. 14. Mrs. French can claim no title to the premises in dispute, under

the proceedings of the probate court. She was not dowable in the premises, and the judge of probate had no jurisdiction, he having no authority to assign dower to a widow in premises mortgaged in fee by her husband. *Sheafe* v. *O'Neil*, 9 Mass. R. 9. In this case, he transcended still further his power by assigning not a third but the whole of the mortgaged premises.

By St. 1821, c. 4, § 1, it is enacted that when the heir or tenant of the *freehold*, shall not, within one month next after demand, assign, &c. The heirs were the tenants of the freehold, and the judge of probate could not compel them to do it. The husband did not die seized, and the widow had relinquished her right; she was not dowable by § 6, of the same act. The demanded premises were not such real estate as would authorize probate jurisdiction in the matter of dower under c. 51, § 32. The court of probate having no jurisdiction, all the proceedings are void. *Newhall* v. *Sadler*, 16 Mass. R. 122; *Hunt* v. *Hapgood*, 4 Mass. R. 117; *Smith* v. *Rice*, 11 Mass. R. 507; *Wales* v. *Willard*, 2 Mass. R. 120; *Sumner* v. *Parker*, 7 Mass. R. 79; *Cutts* v. *Haskins*, 9 Mass. R. 543; *Smith* v. *Bouchire*, 2 Str. 993; *Perkins* v. *Proctor*, 2 Wils. 382.

The case of *Smith* v. *Eustis*, 7 Greenl. 41, does not overrule that of *Sheafe* v. *O'Neil*, or give the probate court jurisdiction over mortgaged estates. Even if dowable, the widow was only dowable of one third of the right of redemption, but she could not take the whole premises in lieu of dower in other premises. *Gibson* v. *Crehore*, 5 Pick. 146.

G. B. Moody, for the defendants. If the assignment by the judge of probate was void, as against the heirs and the mortgagee, then the plaintiff cannot recover because, if void, the widow was a disseizor of the heirs of the mortgagor, claiming possession by a title independent of and adverse to them, in which case the purchaser of the equity acquired only a right of entry and in order to maintain a writ of entry, he must actually enter. *Poignard* v. *Smith*, 6 Pick. 176.

The main question is, whether the assignment of dower was utterly void as against the heirs of the mortgagor and all other persons. The only case cited in support of this proposition is *Sheafe* v. *O'Neil*, 9 Mass. R. 9. That was an appeal by the mortgagee from the decision of the court of probate, before which court the report of the commissioners had been contested. The opinion of the Court evidently implies, that the assignment would be valid in all cases, where it is not contested by the mortgagee; but that there can be no effectual assignment against his *consent*. In the case at bar, the mortgagee has acquiesced for years in the assignment and in the possession of the widow under the assignment, and in her taking the rents and profits of the property assigned. The heirs of the mortgagor have acquiesced in the assignment, and the plaintiff claiming through them, can be in no better situation than they are. If they had wished, they could not successfully have interposed to prevent the assignment. The assignment was valid as against all but the mortgagee. This construction is that of the commissioners who digested, and of the legislature who adopted the Revised Statutes, as appears by c. 108, § 14, c. 95, § 15, Rev. St.; *Smith* v. *Eustis*, 7 Greenl. 102; *Gibson* v. *Crehore*, 5 Pick. 146. Had the mortgage been removed, the heirs would have had a seizin in fact, and the assignment would be valid. The mortgagee having never entered, so far as the interest of the heirs is concerned, it is as if the mortgage was discharged, and the mortgagor seized of the premises. 4 Kent's Com. 45. If valid as against the heirs, the creditors cannot vacate it.

An assignment of dower may be made by the heirs; and if the proceedings in this case are not valid as a judicial proceeding, they amount to an assignment *in pais* by the heirs, and may be supported as such. *Conant* v. *Little*, 1 Pick. 189; *Jones* v. *Brown*, 1 Pick. 317; *Baker* v. *Baker*, 4 Greenl. 70. If binding on the heirs, those succeeding to their rights cannot complain.

The objection that dower should have been assigned in one third of the premises, is not made by the mortgagee, nor the

heirs, and is not one which can be interposed by the demandant.

The opinion of the Court was by

WHITMAN C. J. — By the facts agreed upon, in this case it appears, that this is an action of ejectment, wherein the plaintiff demands seizin and possession of certain real estate, in the writ described. It appears that Zadoc French, the father of the said George, and the husband of said Beulah, the defendants, mortgaged the demanded premises to Ebenezer French, to secure to him the payment of $12000; and that the said Beulah, by her separate deed, indorsed on the back of said mortgage, duly relinquished to said Ebenezer her right of dower, in the same premises. And the rights of the said Ebenezer, through sundry mesne conveyances, have been transferred to one Edward D. Peters; so that he has become the assignee of the mortgaged premises, with all the rights which the said Ebenezer had to the same, by virtue of his said mortgage, and the relinquishment by the said Beulah; and the debt due, to secure which it was originally given, remains, in a great measure, uncancelled; and measures have been taken by said Peters in order to a foreclosure of said mortgage. Said Zadoc died in 1831, intestate, leaving said George, Ebenezer and Frederick F. French his only heirs. Said Beulah, in 1831, applied to the probate court to have her dower assigned to her, in the estate of which the said Zadoc died seized, and the same was thereupon assigned to her; and included the demanded premises; the said mortgagee or his assignee, having never disturbed the mortgagor or his heirs in his and their actual possession of the same; and the said Beulah, since she became possessed thereof, has held quiet possession of the same. The said George holds under the said Beulah. In 1838, the right in equity to redeem the premises, which remained in the said heirs of Zadoc, was sold on execution, after a due course of proceeding, to the plaintiff; so that he has become the holder of whatever right in equity remained in said heirs. Upon these facts it is agreed that judgment shall be entered upon nonsuit or default,

according to the opinion of the Court, as to the law applicable thereto.

The counsel for the plaintiff contends, that, as Zadoc French, the ancestor, had in his lifetime, conveyed the demanded premises in fee and in mortgage, which, at the time of his decease and at the time of the setting off of the widow's dower, remained so incumbered, he could not be considered as having died seized thereof; and therefore that the probate court had no authority to decree an assignment of dower, in and of the same. If the plaintiff is right in his premises, his conclusion would seem to be correctly deduced. In support of his position the plaintiff cites *Popkin* v. *Bumstead*, 8 Mass. R. 491 This case shows, that a widow cannot have dower in premises to which she had released her right of dower to a mortgagee, against the vendee of the equity of redemption, who had paid the amount due in discharge of the mortgage, which does not seem to be at all analogous to the case at bar. He also cites 5 Pick. 146, which does not seem to have a direct bearing upon the point at issue. He further cites, *Sheafe* v. *O'Neal*, 9 Mass. R. 9. In this case it was determined that a widow cannot have dower assigned her by the probate court in premises to which she had released it to the mortgagee, so long as the mortgage remained uncancelled, and against the claim of the mortgagee. The marginal note to the case is, that "the judge of probate has no authority to assign dower to a widow in premises mortgaged in fee by her husband." This is hardly borne out by the case itself. Mr. Justice Sewall, in delivering the opinion of the Court, all along alludes to the state of that particular case, in which the mortgagee had appeared in court, and contested the right of the widow to dower, and had brought the case, by appeal, into the S. J. Court. The Court considered, that, as it would be of no avail, in such case, to assign dower to the widow, it would be an unsuitable exercise of jurisdiction.

The language of Judge Sewall, however, in some parts of his reasoning, seems to convey the idea contained in the marginal note. He says in one place, "Of this estate, therefore,

the mortgagor did not die seized and possessed in fee, the fee being in the mortgagee." And this position seems to be in accordance with the views of Mr. Justice Wilde, as expressed in delivering the opinion of the Court, in *Parsons* v. *Weld & al.* 17 Mass. R. 417. Judge Trowbridge, to whose opinions the jurists of Massachusetts and Maine have been in the habit of paying great deference, in his treatise upon mortgages, would seem, also, to have countenanced a similar doctrine. And in the time of Lord Coke the law was held so to be.

These high authorities seem imposing. But the law, by lapse of time and change of circumstances and the improvements of science, in a succession of generations, becomes modified, and adapted to the varying wants of society. Anciently an estate mortgaged, and not redeemed at the time stipulated for payment, became absolute in the mortgagee. Courts of equity at length, without any legislative enactment for the purpose, broke in upon this strictness of the ancient common law; and admitted of redemptions long after the time stipulated for payment. And, as Judge WILDE remarks, in the case before referred to, "It cannot be denied that these principles, and rules of equity, have had a favorable operation in the administration of justice." And, that "it is not surprising, that they should have gained some footing in the Courts of common law." Accordingly we find, that great common law judge, Lord Mansfield, in the case of *Martin* v. *Mowling*, 2 Burrows, 978, is reported to have said, that "a mortgage is a charge upon the land, and whatever would give the money will carry the estate in the land, along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will pass by a will, not made and executed with the solemnities required by the statute of frauds. The assignment of the debt or forgiving it, will draw the land after it, as a consequence." These *dicta* of Lord Mansfield are criticised by Judge Trowbridge; and conjectured by him to have been put down by the reporter by mistake, or without the accompanying qualifications or limitations. But the opinion is very lengthy; and, if not furnished by him in writing, must

have undergone his examination, and have had his deliberate approbation as reported. No Judge was ever more celebrated and admired for his luminous and improved views of the common law, and the adaptation of it to the advancing state of society, than he was. Judge Trowbridge had doubtless, drawn his conclusions from the more ancient sources of the common law; and no doubt found it difficult, in common with the rest of us, to forego his veneration of Lord Coke. The doctrine of Lord Mansfield, however, in regard to mortgages, would seem not to have been entirely repudiated by the jurists of modern times. The estate of the mortgagee in lands, after his decease, and before foreclosure, is regarded as personal assets in the hands of an administrator. A devise, by a testator, of all his lands, does not embrace lands, mortgaged to him, though in fee, if he be not in actual possession and the mortgage foreclosed. 8 Veazie, 256; *Att. Gen'l* v. *Vigor*, 1 Atkins, 605; 1 Vernon, note 1, 3d. Lond. Ed. A mortgagor in possession is considered as the owner against all but the mortgagee; and may sell and convey in fee; the mortgage being considered only as security for debt. *Gould* v. *Newman*, 6 Mass. R. 259; *Blaney v. Bearce*, 2 Greenl. 132. He has the same rights that he ever had, except as against the mortgagee. *Hatch* v. *Dwight & al.* 17 Mass. R. 259; *Wilder* v. *Houghton*, 1 Pick. 89. Judge Story, speaking of a mortgage says, (*Gray* v. *Jenks & al.* 3 Mason, 520,) "a judge at law, sometimes deals with it in its enlarged and liberal character, stripped of its technical and legal habiliments;" and that, "in equity, the mortgagor is deemed the owner; and the mortgage itself as mere security for the debt." "The mortgagor has a right to lease, sell and, in every respect, to deal with the mortgaged premises as owner; so long as he is permitted to remain in possession, and so long as it is understood, and held, that, every person, taking under him, takes subject to all the rights of the mortgagee, unimpaired and unaffected." 4 Kent's Com. 157. And the same learned author, in page 158, of the same volume, holds the following language. "The narrow and precarious character of the mortgagor, at law, is changed under

the more enlarged and liberal jurisdiction of the Courts of equity. Their influence has reached the Courts of law; and the case of mortgages is one of the most splendid instances, in the history of our jurisprudence, of the triumph of equitable principles over technical rules; and of the homage which those principles have received, by their adoption in the Courts of law." And, again ib. p. 159, and 160, "the equity of redemption is considered to be the real and beneficial estate tantamount to the fee at law; and it is held to be descendable by inheritance, devisable by will and alienable by deed; precisely as if it were an absolute estate of inheritance at law. The Courts of law have also, by gradual and almost insensible progress, adopted these equitable views;" and, "except as against the mortgagee, the mortgagor while in possession and before foreclosure is regarded as the real owner; and a freeholder with the civil and political rights belonging to that character." The author is fully borne out by the authorities which he cites, and which need not be repeated here. And even Judge Sewall himself, in delivering the opinion of the Court, in *Bird* v. *Gardner*, 10 Mass. R. 364, which was a writ of dower, in a case in which the husband was the vendee of mortgaged premises unredeemed, notwithstanding his remarks in *Sheafe* v. *O'Neal*, says expressly that, "the title of Bird, the demandant's husband, was a seizin during coverture, whereof she was entitled to dower, against all other persons than the mortgagee and his assigns." And in Kent's Com. vol. 4, p. 162, it is laid down, that a tenant in dower or by the courtesy may redeem, which would seem clearly to imply that a widow may be endowed of mortgaged estates, otherwise she could not be placed in a situation to redeem.

If the mortgagor is a freeholder and owner, and has power, while undisturbed in his possession, to convey, subject only to the rights of the mortgagee, surely he might bequeath the mortgaged premises to his wife, as and for her dower, and she might enter and redeem. And no reason is apparent why the Judge of Probate, under similar circumstances, might not assign dower, nor why the dowress might not, under such assign-

ment, enter and hold the same, and be considered as entitled to redeem. In such case she would be deemed to have the assignment of the right in equity during her life, and the reversion thereof would remain in the heirs or their assignee, who in this case is the plaintiff. In such case, either may redeem. If the plaintiff should redeem he may oust the defendant Beulah, unless she should redeem of him, by paying him the amount he might have paid for redemption; in which case she would hold during her life, and her heirs after her, until the amount paid by her had been refunded. The plaintiff therefore must become nonsuit.

TIMOTHY HERRIN *versus* CHARLES BUTTERS, JR.

Where by the terms of a contract the time of its performance was to be extended beyond a year, it is within the statute of frauds, though a part of it was by the agreement to be performed within a year.

To bring a case within the statute of frauds, it must have been expressly stipulated by the parties, or it must, upon a reasonable construction of their contract, appear to have been understood by them, that the contract was not to be performed within a year.

A G B contracted in writing with S to clear eleven acres of land in three years from the date of the contract, one acre to be seeded down the (then) present spring, one acre the next spring, and one acre the spring following, as a compensation for which, he, A G B, was to have all the proceeds of said land three years, except the two acres first seeded down. A G B assigned verbally his interest to the extent of half of the contract, to H, who verbally assigned said half to C B; said H and C B respectively agreeing verbally to perform one half of the contract. A G B and C B commence the performance of the contract, but do not complete it. S sues A G B, and recovers damages for non-performance, which are paid by A G B. H being called on by A G B for half of the damages so recovered and paid, pays the same to him; and then commences a suit for the same against C B — *it was held*, that the contract between them (H and C B) was void by the statute of frauds, and that he was not entitled to recover.

EXCEPTIONS to the ruling of PERHAM J. The facts in the case fully appear in the opinion of the Court.

A. Sanborn, for the defendant. The contract in this case was not to be performed within a year from the making there-

of, and is therefore within the statute of frauds. St. 1821, c. 53, § 1. It is not taken out of the statute by the fact that part was to be or was performed within a year. Comyn on Contracts, 23, 232; *Boydell* v. *Drummond*, 11 East, 142; Bul. N. P. 202; 3 Bl. Com. 160; 2 Stark. Ev. 682; *Boyd* v. *Stone*, 11 Mass. R. 342; *Kidder* v. *Hunt*, 1 Pick. 329; *Jackson* v. *Pierce*, 2 Johns. 221.

J. Appleton, for the plaintiff, contended that the contract might have been performed within a year; and that to bring a case within the statute, it must be specially stipulated that the contract is not to be performed within a year. *Kent* v. *Kent*, 18 Pick. 569; *Peters* v. *Westborough*, 19 Pick. 365; *Fenton* v. *Embler*, 3 Burr. 1278. The agreement to pay for the work which had been done, was not within the statute. The contract to perform the plaintiff's work, was in reality a contract of indemnity. The defendant was either to perform, or indemnify the plaintiff against the consequences of non-performance. But such a contract is not within the statute, as the liability arising therefrom may arise at an early day. In this very case, it arose upon the defendant's refusal to perform, which was within the year. The plaintiff then had a right of action against him upon the contract to save harmless. *Blake* v. *Cole*, 22 Pick. 101; *Weld* v. *Nichols*, 17 Pick. 539; *Chapin* v. *Lapham*, 20 Pick. 467.

The opinion of the Court was by

Whitman C. J. — In this case it appears, that one Isaac Shaw entered into an agreement, in writing, with one Asa G. Butters, bearing date the 21st of March, 1833, in the following terms: — "Said Butters doth agree to clear a piece of ground, containing eleven acres, on lot No. 8, in the 10th range of lots in Exeter, to be done in three years from date, in a clean and workmanlike manner, and [one acre] well seeded down this present spring, and one acre the spring following, and nine acres in the spring of 1835. And the said Shaw, on his part, doth agree to let the said Butters have all the proceeds of said land three years, in consideration of a faith-

ful performance of the above agreement, excepting the two first acres seeded down, which the said Shaw is to have the grass after seeded down."

It further appears that a subsequent agreement was entered into between the said Asa and the plaintiff, whereby the latter became bound to do and perform one half of what the said Asa had stipulated, as aforesaid, to perform ; and the benefits of the consideration therefor were to be enjoyed equally between them. And, afterwards, on the tenth of May, 1833, the defendant verbally agreed with the plaintiff, that he would pay the plaintiff for what labor he had performed in pursuance of his said contract, and assume the plaintiff's liabilities therein, in consideration of the benefits from thence to be derived. And it appears, that the plaintiff had done about two days work under said contract, worth $1,75, and that the defendant went on in company with said Asa, and they performed, each, about thirteen days work on the land; and then abandoned the undertaking. And that said Shaw had recovered of said Asa the sum of $85,45, for the non-fulfilment of his said contract, the one half of which the plaintiff had refunded to the said Asa for the breach of his contract with him. And this action is now brought to recover of the defendant the amount, so paid by the plaintiff, for the breach of the contract, made as aforesaid, between him and the defendant.

The defendant places his defence upon the ground, that the contract was verbal, and, as he contends, not to be performed within a year from the time it was made.

The case comes before us upon exceptions taken by the defendant to the ruling of the Judge of the Court of Common Pleas ; the verdict having been returned for the plaintiff. The ruling excepted to was in the charge of the Judge to the jury. The Judge charged the jury, that, if any part of the contract was to be performed within a year, it was not within the statute of frauds. This instruction was unquestionably erroneous ; and the exception must be sustained, and a new trial be granted.

The counsel for the parties, however, have argued the cause, quite at length, without adverting to the particular point to which exception was taken. Their arguments have proceeded altogether upon the hypothesis, that the contract between the plaintiff and defendant, had been adjudged to be an agreement to be performed within a year. This seems to be the real point in controversy, in reference to the merits of the case and the decision of it will be in effect decisive of the cause.

It has not been customary for the Court to go aside from the question presented in a bill of exception. But as a new trial must be granted in this case, and the question argued may, and probably will be presented to us again, in proper form for decision, if not now decided; and as the counsel have now fully argued it, we think it may be well to express our views in reference to it.

It is urged, that the defendant might have cleared up the land, and have seeded it down in one year, and thereby have performed his contract. This may have been within the range of possibility; but whether so or not must depend upon a number of facts, of which the Court are uninformed. This however is not a legitimate inquiry under this contract. We are not to inquire what, by possibility, the defendant might have done, by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties, that the contract might be performed within one year? If not, the case is clearly with the defendant. But the contract is an entirety, and all parts of it must be taken into view together, in order to a perfect understanding of its extent and meaning. We must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other; and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Here the defendant was not to avail himself of the consideration

for his engagement, except by a receipt of the annual profits of the land, as they might accrue, for the term of three years. But whether this be so or not, it is impossible to doubt that the parties to this contract perfectly well understood and contemplated, that it was to extend into the third year for its performance, both on the part of the plaintiff and defendant. Its terms most clearly indicate as much; and by them it must be interpreted.

In the case, *Moore* v. *Fox*, 10 Johns. 244, the Court say, to bring the case within the statute, it must appear to be an *express* and *specific* agreement that the contract is not to be performed within one year, and cite the case of *Fenton* v. *Embler*, 3 Bur. 1278, where the same language is used by the Court. But in the case of *Boydell* v. *Drummond*, 11 East, 142, in which there was no express or specific agreement, that the contract should not be performed within a year, the Court say, that the whole scope of the undertaking shows, that it was not to be performed within a year, and was therefore within the statute. This seems to show, very clearly, what is to be understood by an *express* or *specific* agreement, that a contract is not to be performed within a year. In the case, *Peters* v. *Westborough*, 19 Pick. 364, Mr. Justice Wilde, in delivering the opinion of the Court, says, it must have been expressly stipulated by the parties, *or it must appear to have been so understood by them*, that the agreement was not to be performed within a year. But who can doubt what the express and specific understanding of the parties in the case at bar was? and that it was not to be performed within one year? Or, at any rate, that it appears to have been so understood by them?

BENJAMIN S. FOSTER *versus* DAVID N. BUFFUM.

Where suits were simultaneously commenced against the maker and indorser of a promissory note, and judgment was obtained against the maker, which was satisfied, in the absence of any agreement to the contrary, the indorser is entitled to costs in the suit against him.

THIS was a suit against the indorser of a note signed by Sheppard Sawtell. Suits were commenced at the same time against the maker and indorser. Judgment was rendered against the maker and the execution which issued thereon was satisfied by a levy upon the real estate of the maker.

This suit against the indorser was continued till after the satisfaction of the judgment against the maker, when the counsel for the plaintiff moved to enter neither party which was resisted by the opposing counsel, by whom costs were claimed; WESTON C. J. allowed the defendant costs, to which the plaintiff filed exceptions.

J. A. Poor, for the plaintiff.

N. Wilson, for the defendant.

The opinion of the Court was by

SHEPLEY J. — The plaintiff had obtained judgment against the maker of the note, and that judgment had been satisfied and paid, while this suit was pending against the indorser. It does not appear, that the defendant made any agreement to adjust this suit, or that the plaintiff could have recovered a judgment against him, if he had not satisfied his judgment against the maker. When this action came on for trial therefore the Court could not deprive the defendant of his right to proceed to trial; and the plaintiff having already received payment of the note, could not prevail against him; and the defendant, as the prevailing party, would be entitled to his costs.

Exceptions overruled.

Isaac Dennison *versus* Thomaston Mutual Insurance Company.

It is not necessary to render a policy of insurance void, that there should be a wilful misrepresentation or suppression of the truth. A mere inadvertent omission of facts material to the risk, and such as the party insured should have known to be so, will avoid it.

The insured is only bound to state in reply to interrogatories on that subject, the distance and situation of those buildings, which a man of ordinary capacity would judge likely to endanger, in case of fire, the building insured; not those which by any possibility, might cause its loss.

The expression of an opinion, if honestly entertained and communicated, is not a misrepresentation, however erroneous it may prove to be.

This was an action upon a policy of insurance against fire upon the plaintiff's dwellinghouse and store, &c. in Washington block, in the city of Bangor, bearing date Jan. 5, 1837.

On the trial of the cause, before Shepley J. the plaintiff introduced the policy of insurance, which was in the usual form. Among the conditions of insurance referred to, and made a part of the policy, was this: — "No insurance will entitle the insured to any indemnity for loss or damage, if the description by the applicant of the building or property insured be materially false or fraudulent; or if any circumstance material to the risk be suppressed," &c.

In the application for insurance, in reply to the inquiry, "what distance from other buildings?" the answer given, (so far as material to this case,) was, "east side of the block, small one story sheds, and would not endanger the building, if they should burn." To the inquiry, "what are the buildings occupied for, that stand within four rods? how many buildings are there, to the fires of which this may in any case be exposed?" no answer was given.

Warren Preston, Esq. called by the plaintiff, testified, that he was the agent of the insurance company, when the policy was taken out; that the plaintiff called upon him to obtain insurance, and was informed that the company were not inclined to take property in the city; that he wrote to the company, stating generally the situation of the buildings, and received an

answer, saying, that "Mr. Dennison had better forward an application, to enable the president to decide understandingly;" that he handed the plaintiff a blank application to be filled up; that the plaintiff requested him, the witness, to fill it up, saying, he did not understand it; that he went with him into the building, and the back part, so that he could see all the buildings in the rear, and having seen them, he made out the answers to the questions; that both of them came to the conclusions therein stated; that he sent on the application and representation so made out and signed by the plaintiff, and received in return the policy which he handed the plaintiff; that on Monday after the fire, the plaintiff came and notified him of the loss, and he, by his request, and within ninety days, wrote the company, stating the facts in relation to the loss.

It appeared from the testimony introduced by the plaintiff, that fronting on Wall-street and east of the building insured, stood a two story wooden building, about thirty by sixty feet, occupied for stores, belonging to one Prince; and that from the back wall of the building insured, to the rear of the wooden building designated as Prince's, the distance was fifty-nine feet; that north of Prince's, and separated by a passage of four feet, stood a wooden building belonging to one Call, which fronted on Wall-street; that the building insured fronted Main-street, was of brick, three stories on Main and four stories high in the rear towards Wall-street; that in the rear of the building, and between it and Prince's, stood a one story wood shed; that northerly and adjoining stood another brick building, similar to the one insured, called Richards' building, and in the rear of that also a wooden shed; that the fire commenced in the second story of Call's building, and extended to Prince's, and thence to the wooden shed in its rear; that the fire took on the coving of Richards' building, from Call's building, and extended from thence to the plaintiff's; that the wood shed in rear of Richards' building was on fire when the fire took first in Richards' building; that all these buildings were burnt, except a wood shed torn down; that there was but little air,

except that caused by the fire; that it was ebb tide, and that the wells were not to be depended upon.

There was evidence, likewise, that all the wooden buildings were on fire when the coving caught. There was likewise testimony as to the condition of the fire department, and its exertions in relation to the extinguishing of the fire.

There was much evidence in relation to the fire, and the situation of the buildings; but as the facts sufficiently appear from the opinion of the Court, and the preceding statement, it is not fully reported.

A verdict was found for the plaintiff, subject to the opinion of the Court whether the plaintiff, on this testimony, or so much of it as may be legally admissible, is entitled to recover; the defendants' counsel objecting to all that part of it relating to the condition of the fire department and its exertions, and the statements of its members and others relating to those matters. If the plaintiff is entitled to recover, judgment is to be entered on the verdict; and if entitled to recover interest from an earlier date than sixty days after affidavit furnished and notice annexed, the verdict is to be amended accordingly.

Preble, for the defendants. From the evidence introduced, it appears that the office was unwilling to take risks in Bangor; that it intended to decide upon all applications made; and that the question of the propriety of taking the risk was to be determined by the proper officer of the company, and by no one else. In the application made, questions were put, such as were considered material and important by the office. The plaintiff, in his answer, says that the buildings on the east would not endanger the building insured, if they should burn, and neglects entirely to state their distance, though inquired of in relation thereto. Instead of submitting any thing to the judgment of the office, he assumes the responsibility of danger to himself. All danger from these buildings the plaintiff took upon himself. The assured, by the contract of assurance, is responsible for the correctness of all facts stated by him in his application. The defence rests upon the ground that the risk was taken by

an office at a distance, on representations of the assured, which were materially defective. Error in judgment is sufficient; there is no need of the imputation of fraud. If the statements upon which the contract is based are materially defective, the insurance is void. 1 Phillips on Insurance, 80, 103, 111; 2 Phil. on Ins. 96.

The inquiry made, was for the purpose of eliciting facts, not opinions. The concealment of material facts need not be intentional; so far as the rights of the parties are concerned the intention is immaterial.

That the situation of these buildings did endanger the house insured; and that the fact of their position was material, is evident from the result. Here the question being directly put as to the position and distance of the buildings on the east, the case is stronger for the defendants, than had no inquiries been made. 1 Phil. 104. To sustain the verdict the Court must say that the buildings, from which the fire was communicated, and by which the loss was occasioned, did not endanger the building insured.

Preston was not the agent of the defendants to fill up the applications, or to assume any risk whatever, nor does he so assert himself to be. He was merely an agent to receive and transmit applications; he had no authority to take risks. The whole evidence shows that the risk was taken by the defendants solely, upon the application of the plaintiff. If he was agent of any one, he was of the assured. 2 Phil. on Ins. 186. The plaintiff knew that he was no agent of the defendants, and that he had no authority to decide any fact, upon their responsibility.

Rogers and *Cutting*, for the plaintiff. It is conceded that a concealment or misrepresentation of a material fact will avoid a policy. There is a material distinction between misrepresentations and concealments. The answer in this case states the existence of buildings to the east of the house insured, but adds that they do not endanger the building. This is merely an erroneous opinion. It is neither misrepresentation, concealment,

nor assumption of liability on the part of the plaintiff. Concealment consists in the suppression of material facts. Hughes on Ins. 350; Marshall on Ins. 464; Phillips on Ins. 110. The law in this respect proceeds on the ground that such concealment is a fraud on the insurer. *Curry* v. *Com. Ins. Co.* 10 Pick. 536. The materiality depends on the state of facts at the time when the insurance is effected, and not on subsequent events. Hughes on Ins. 353; *Huguenin* v. *Bayley*, 6 Taunt. 186; *Maryland Ins. Co.* v. *Rudin's Adm'r.* 6 Cranch, 338; *Livingston* v. *Maryland Ins. Co.* ib. 274; *Fletcher* v. *Com. Ins. Co.*, 18 Pick. 419.

The omission to disclose the distance of buildings is not concealment, nor if it was known to the defendants, is it material from what source that knowledge was obtained. Hughes on Insurance, 352. Here the fact was known to the agent of the defendant, and his knowledge binds them. Story on Agency, 131. If the defendants relied upon any omissions in the application, it was their duty to notify the plaintiff that it would be vacated for that cause. Any other course would be a fraud on the plaintiff.

If there was any omission of facts, the plaintiff is not responsible therefor. The agent of the defendant examined the property, made out a description, returned the same to them, upon which they assumed the risk, took the notes of the plaintiff and having done this, they are not to be permitted to deny his authority. So far as this risk is concerned, the jury have found that no material fact has been concealed, and their decision on all the facts is conclusive. *Borden* v. *Hingham M. F. Ins. Co.* 18 Pick. 523.

The opinion of the Court was by

Whitman C. J. — A verdict was taken for the plaintiff subject to the opinion of the Court, upon a report of the Judge, before whom the trial was had, of the evidence, and rulings by him made in the progress of the trial. And it is agreed, that such judgment shall be entered, either upon the verdict or upon nonsuit, as the Court may deem reasonable.

The action is upon a policy of insurance against fire, underwritten by the defendants, on the dwellinghouse of the plaintiff, situated in Bangor, which was consumed by fire. The defendants, for their defence, rely upon what they consider to have been a misrepresentation made at the time the policy was effected. The misrepresentation alleged is contained in the answer to a written interrogatory, propounded to the plaintiff, as to the distance of other buildings from the premises insured. The answer was in these words; "East side of the block are small one story woodsheds, and would not endanger the buildings if they should burn."

In evidence it appeared, that small sheds projected out from near the back part of the brick block of buildings, (one of which was the house in question,) twenty-four feet, being twelve feet in width, and eight feet stud; and leaving a passage-way, in the rear of them, of fourteen feet wide, adjoining some two story wooden buildings, standing on another street, forty-nine feet from the plaintiff's house, and in which the fire which consumed the plaintiff's house originated.

The first question, which arises, is, was this a misrepresentation, or was there a suppression of the truth tantamount thereto, and material to the risk. It does not seem to be necessary, in order to avail the defendants in their defence, that the misrepresentation or suppression of the truth should have been wilful. If it were but an inadvertent omission, yet if it were material to the risk, and such as the plaintiff should have known to be so, it would render the policy void.

In the case at bar, it has now been rendered undeniable, that the burning of the two story buildings, on another street, endangered the plaintiff's house; and to the interrogatory propounded it now would seem, that the existence of those buildings might with propriety, have been stated. But this does not prove, that, before the occurrence of the fire, it would have been deemed material to name them, as being near enough to put the plaintiff's house in jeopardy. It is not an unfrequent occurrence, after a disaster has happened, that we can clearly discern, that the cause, which may have produced

it, would be likely to have such an effect, while, if no such disaster had occurred, we might have been very far from expecting it. In this case it is essential to determine whether the plaintiff was bound to have known that a fire originating in the two story wooden buildings, would have endangered the burning of his house. If as a man of ordinary capacity, he ought to have had such an apprehension, then he ought to have named those buildings in reply to the interrogatory propounded; for, what a man ought to have known, he must be presumed to have known. This knowledge, in a case like the present, must have been something more than, that by possibility a fire so originating might have endangered his house. This kind of knowledge might exist in regard to a fire originating in almost any part of a city like Bangor; for a fire originating in an extreme part of it, if the wind were high and favorable for the purpose, might endanger all the buildings, however remote, standing nearly contiguous one to another, to the leeward of it. Any danger like this could not have been in contemplation, when the interrogatory was propounded. Such buildings only as were so nearly contiguous as to have been, in case a fire should originate therein, productive of imminent hazard to the safety of the plaintiff's dwelling, could have been in view by the defendants. And the question is, were the two story wooden buildings of that description?

In reference to this question, it may not be unimportant to consider, that the defendants, at the time when this policy was effected, had an agent residing in Bangor, whose business it was to attend, in their behalf, to the applications for insurance from that quarter. It may be believed, that the selection of this individual was the result of knowledge, with regard to his intelligence and capacity for such purpose. It was not, however, his business, perhaps, to prepare representations to be made by applicants for insurance. But it did so happen, that he assisted the plaintiff in preparing the answers to the standing interrogatories, one of which is the interrogatory before named, intended to produce a representation upon which to

found the estimates of the propriety of assuming the risks proposed. He, it seems, examined the premises, looked at the wood sheds, and the two story wooden buildings beyond them. To him it did not seem to have occurred, that the vicinity of those buildings was such as to render it necessary that the two story wooden buildings should be named in answer to the interrogatory; for he, at the request of the plaintiff, penned the reply thereto as he thought proper.

It does not appear that any witness has testified, that, anterior to the disaster, he should have anticipated such an event as within the range of probability. What other individuals of intelligence did not foresee to be likely to occur, could not reasonably be expected of the plaintiff. And what he could not be expected to know, he cannot be considered as culpable for not knowing. And what he could not be expected to apprehend, he could not be bound to communicate; and, in not communicating any such fact, he could not be considered as guilty of concealing it, even inadvertently, and much less wilfully.

As to the wooden sheds, they were named; and the description given of them is precisely in conformity to the truth. They were named, however, in connexion with an opinion, that if they took fire, they would not endanger the house. There is, then, no misrepresentation with regard to their existence. The misrepresentation complained of, in reference to them, is merely in matter of opinion. But opinions, if honestly entertained, and honestly communicated, are not misrepresentations, however erroneous they may prove to be. That this opinion was uttered *bona fide*, and in perfect singleness of heart and purpose, may well be believed, and may fairly be deducible from the fact, that it was expressed in concurrence with the unquestionable belief, at the time, of its correctness, by the confidential friend of the defendants. An opinion so uttered, if not in good faith, might well be complained of, as it might tend to throw the defendants off their guard. In such case, it might tend to show a fraudulent design; and in connexion with evidence of misrepresentation of facts, even short of what

otherwise might be necessary to vacate a contract, would be likely to have that effect.

But it is by no means clear, if the fire had not originated elsewhere than in the sheds, that it would have been attended with essential danger to the main building. The neighbors and firemen of the city, might be expected to be able to extinguish a fire so originating. Such buildings are easily pulled to pieces; and an engine brought to bear upon them would do great execution. It may therefore, even now, be very questionable, whether the opinion complained of may not be adopted as well founded to a very considerable extent at least.

As to the testimony of the witnesses, touching the condition of the fire department and its exertions, and whatever relates thereto, we see no ground, from thence arising, to question the correctness of the finding of the jury. The most that can be said of that part of the evidence is, that it is irrelevant, and not of a tendency to influence a jury one way or the other.

We are of opinion, therefore, that judgment must be entered upon the verdict, with interest as agreed.

REUBEN GORDON *versus* DANIEL WILKINS.

In case of a demand seasonably made by an officer having an execution, upon the officer by whom the attachment on the original writ was made upon which such execution issued, where the property attached is bulky and is deposited in a suitable and convenient place for safe keeping, and the officer upon whom the demand is made is ready and willing to deliver the property attached at the place of its deposit, so that it may be taken on execution, and offers so to do, and is prevented from delivering the same by the failure of the officer making the demand to go with him and receive it, he is discharged.

It is otherwise, if the property be at an inconvenient and unreasonable place of deposit.

A demand made by the officer having the execution, upon the officer by whom the attachment was made, on the last day of the continuance of the lien created by the attachment, will be presumed to have been in sufficient season on that day to enable the officer by whom the attachment was made, to discharge himself.

It is the practice of this Court, in their discretion, to submit special questions to a jury, to be by them answered.

THIS was an action against the defendant, who was sheriff of the county of Penobscot, for the default of Joseph Leavitt, one of his deputies, in not keeping property attached by him on a writ in favor of the present plaintiff against one William P. Parrott, so that the same might be sold on the execution subsequently obtained, which was within thirty days from the rendition of judgment, placed in the hands of deputies of Otis Small, the then sheriff. From the return of Joseph Leavitt on the writ, *Gordon* v. *Parrott*, it appeared that he had returned as attached, 200 M ft. pine mill logs as the property of said Parrott. Judgment was recovered on said action, and execution issued thereon Sept. 2d, 1837. From the return of A. Jones, deputy sheriff under said Small, it appeared that he, on the 12th of Sept. 1837, demanded of said Leavitt the property attached, but that said Leavitt neglected to deliver up the same. From the return of A. H. Hitchcock, deputy-sheriff of said Small, on the same execution, it appeared, that on the 2d of Oct. 1837, he demanded the logs attached on the original writ of Leavitt, who neglected to produce them, and therefore he returned the execution in no part satisfied.

There was evidence tending to show that the property attached as Parrott's belonged to an insolvent company of which he was a member, and for which he was acting as agent, and there was likewise evidence tending to show that the property was purchased on his own account.

The demand made by A. Jones, for the property attached, was proved to have been made at the door of the postoffice, two miles distant from the place where the lumber had been deposited; and it was further proved that when said demand was made, Leavitt replied that he was ready to go with him and show him the property attached, that to this Jones made no reply, but went away, leaving Leavitt there.

SHEPLEY J. who tried the cause, instructed the jury that the demand made by Jones, if the testimony on that subject was believed, was ineffectual; but that the demand made by Hitchcock was sufficient.

He further instructed them, that if the property attached was the property of a company, which company was insolvent, that the interest which Parrott had in it might have been sold on the plaintiff's execution against him, unless it had been appropriated by the company in payment of the company debts, or unless some creditor of the company had claimed to have it so applied.

The jury returned a verdict for the plaintiff, and in answer to certain inquiries by the Court, they specially found that the logs attached belonged to Parrott, and not to the company; that when the demand was made, they were not in the mill pond in which they had been originally attached, and so that the attaching officer, Leavitt, could have delivered them up.

Rogers, for the defendant. The demand by Leavitt was insufficient. The first instruction given, proceeds on the assumption that the officer might make repeated demands during the thirty days, and by each subsequent avoid the effect of his prior demand. This is denied. One demand having been made, it could not be waived without the consent of Leavitt. The demand made by Hitchcock was insufficient. That demand was made on the last day of the existence of the lien.

The hour of the day is not stated when it was made. It may be considered as having been made on the last moment of the last hour of the day. The officer who made the attachment is not to be considered as having the property about him. He is entitled to a reasonable time in which to deliver it up. But from the demand made he had not that reasonable time. Nor can the special finding of the jury be invoked in aid of the instruction given. Correct instructions are legally the right of a party; and incorrect instructions cannot be cured by the finding of the jury.

The company of which Parrott was a member being insolvent, his interest in the property was not subject to attachment. *Com. Bank* v. *Wilkins*, 9 Greenl. 34; *Pierce* v. *Jackson*, 6 Mass. R. 242; *Lyndon* v. *Gorham*, 1 Gal. 367; *Rogers* v. *Batchelor*, 12 Pet. 221; *Evernhim* v. *Ensworth*, 7 Wend. 326; *Dob* v. *Halsey*, 16 Johns. R. 34; *McCutchen* v. *Marshall*, 8 Pet. 221.

Cutting, for the plaintiff. If the Court were correct in submitting questions to the jury, the defendant has no case. He stood by without objecting, and permitted it to be done. Such, too, has been the usual practice. *Merriam* v. *Mitchell*, 13 Maine R. 150. The jury having found the logs were not in existence, a demand was unnecessary. So, too, the property of the logs having been found to be in Parrott, the instructions given in relation to the law of co-partnership become immaterial.

The opinion of the Court was by

TENNEY J. — This is an action against the defendant as sheriff of the county of Penobscot, for the default of J. Leavitt, his deputy, in not retaining certain pine mill logs, which were returned by said Leavitt as attached upon a writ in favor of the plaintiff against one Parrott. At the time judgment was rendered in the original action and execution issued, the defendant had ceased to be sheriff, and Leavitt was not an officer. Within thirty days of the rendition of the judgment, the execution was successively in the hands of one Jones

and one Hitchcock, both deputy sheriffs, who severally returned thereon, that they had made demand upon Leavitt, of the property attached and he failed to deliver it. Evidence was introduced, in order to explain the refusal of Leavitt upon the demand made by Jones, and it was insisted by the defendant's counsel, that Leavitt was discharged from all liability by reason of what took place between him and Jones.

The lien upon property attached upon a writ continues thirty days after judgment, unless he who is entitled to the benefit thereof sooner discharges it by himself, or some one duly authorized. The attaching officer has not the power to surrender it and thereby relieve himself from further liability without the act of the party, who caused the attachment; he is bound to retain it in safety till the expiration of the thirty days, if there be no demand before. But a delivery on a legal demand, will at any time previous, release him; and he may be discharged also under certain circumstances even without a delivery, on demand being made. If the article be bulky and difficulty attend a removal, it would be an unreasonable requirement, that he should be responsible for a failure to deliver it, on a demand at a place inconvenient and unusual for the deposit and safe keeping thereof, provided he had it at a convenient and suitable place, and professed on a demand to be ready to go to the place, where it was to be found and make the delivery; and if the demand should be met by a readiness in the other party, to do all in his power to put the property into the hands of the one claiming it, and it should appear, that a delivery could and would have been made, but for the neglect of the other, in not going and taking possession, the liability would cease. If Leavitt had proved, that he had the property attached, at some convenient and suitable place, and manifested that he was prepared to do all in his power to deliver it to Jones, and was only prevented by the failure of the latter to go with him and take it, he ought to be held discharged. But if the property did not exist at a place of convenience, it would have been an idle and a useless ceremony to have gone. Leavitt gave no information where it was to be found, and the

jury have by an answer to a question proposed, returned that it was not at the time of demand at the place in which it was when attached. It is settled, that a demand on a note payable at a time and place certain is unnecessary in order to entitle the holder to recover, but a readiness at the time and place may be shown in defence. There is no proof that the property could have been delivered by Leavitt at any place, when it was demanded by Jones, he therefore could not have been discharged by his offer at the time.

The Judge instructed the jury that the demand made by Hitchcock, according to his return upon the execution, was effectual to hold the sheriff; but it is contended on the part of the defendant, that that demand was not in season. Judgment was rendered on the second day of September; the attachment would expire only with the second of October following and would not be impaired by lapse of time till afterwards. A demand was made on that day, and the presumption is that the officer performed his duty, and made it in season, to allow Leavitt to discharge himself if able and disposed to do it. We think the Judge did not err in this instruction.

The propriety of submitting special questions to be answered by the jury has had the sanction of judicial practice for a long time in this State and in Massachusetts, and has been recently confirmed and established in this State. It is not perceived however in this case, in what manner the general verdict could be impeached, if this practice were not in conformity to legal principles; there is sufficient to support it independent of the answers to the special questions.

Neither are we induced to believe that the instructions in relation to the liability of partnership property to pay the debts of an individual of the firm, so far as he may have an interest therein are incorrect, provided no claim of a creditor of the company is interposed. We think the authorities cited to overthrow or to shake such a doctrine are inapplicable. The propriety of the practice has been examined in a late case, and it is there established, that such property may be holden, consistently with the instruction given by the Judge.

Judgment on the verdict.

HENRY WARREN *versus* PHILIP H. COOMBS.

Bills of exchange payable out of the State, are to be considered as foreign bills, and the ordinary notarial certificate is evidence of demand and notice.

Damages on a protested draft, cannot be recovered against the drawer or indorser, when the principal has been paid by a levy of an execution recovered in a suit in favor of the holder against the acceptor.

Proof that a bargain was made between the plaintiff and defendant that the former should furnish the latter with money at the rate of five per cent. a month, does not authorize the presumption that the draft in suit was taken in pursuance of and under such agreement.

In a suit against the indorser on bills of exchange in which usurious interest has been reserved, but which have been paid by a levy on the real estate of the acceptor the defendant is not entitled to costs.

THIS was assumpsit against the defendant as indorser of five bills of exchange, payable at the Suffolk Bank, Boston, and as promissor of one note of hand.

On the trial, before SHEPLEY J. the plaintiff, to prove demand and notice, read the protests of the notary public, by whom they had been presented for payment, July 26, 1837, and an agreement by which the defendant and John J. Coombs, who was a party to the drafts in suit, agreed to be accountable for all drafts drawn by them and accepted by Philip Coombs.

The defendant then read a copy of a judgment recovered in this Court, October T. 1839, in the suit, *Asa Warren* v. *Philip Coombs*, for $3937,36, and no costs, and in which costs were rendered for the defendant. The declaration in that suit was upon the bills declared upon in the first four counts in this case, upon which judgment was rendered and an execution issued which was satisfied November 27, 1839, by a levy on real estate made and accepted.

The suit, *Asa Warren* v. *Philip Coombs*, was brought in the name of Asa Warren, by his consent, and for the benefit of the plaintiff in this suit, by whom the same was controlled.

It appeared from the testimony introduced, that the present plaintiff had been called as a witness by the defendant, in the suit, *Asa Warren* v. *Philip Coombs*, and had testified that in

1835, John J. Coombs had applied to him for the loan of money for himself, Philip H. Coombs and Philip Coombs; that the price was five per cent. a month from 1835 to 1838; that Coombs wanted a settled price, and that they agreed upon five per cent. a month as the rate; that he agreed to raise the money for him and commissions; that he had paid up to last August, (1838,) the rate of interest on this paper except commissions, that he was employed to raise money for a large number of persons and among the rest for the Messrs. Coombs, and had raised a number of hundred thousand dollars, and paid a per centage of two, three or four per cent. a month; that he hired the money for this paper, and paid the interest received except the commissions; that he raised the money in his own name and let Coombs have it as his own money.

Upon this evidence the defendant consented to be defaulted subject to the opinion of the Court, and judgment is to be rendered according to the rights of the parties.

Hobbs, for the defendant. The plaintiff claims to recover damage on four drafts, the principal and interest of which has been paid. If they are paid, damages are not recoverable. Chitty on Bills, 403; Bailey on Bills, 223; *English* v. *Darley*, 2 B. & P. 61; *Sargent* v. *Appleton*, 6 Mass. R. 85. The levy in this case was payment. Where the principal and interest are paid, no damages can be recovered. *Bangor Bank* v. *Hook*, 5 Greenl. 174. Still less could the drafts on which judgment had been recovered in the name of Asa Warren, be negotiated after payment, and suits be commenced upon them in the name of the present plaintiff. The evidence shows the drafts to be tainted with usury.

Rogers, for the plaintiff. St. 1821, c. 88, gives the holder of a bill damages as against an indorser. Damages are a penalty for non-payment, to which usury is no defence. The judgment on the drafts does not show that they were tainted with usury. The defendant cannot invoke that judgment as a bar to the present suit. *Reading* v. *Weston*, 7 Conn. R. 409; *Beaman* v. *Hess*, 13 Johns. 52; *Knights* v. *Putnam*, 3 Pick.

184. The acceptor is not liable for damages, and they were not recovered in that suit.

The action in this suit is properly brought. Bailey on Bills, 220; *Porter* v. *Ingraham*, 10 Mass. R. 88; 1 Dane's Abr. 415; *Austin* v. *Bemiss*, 8 Johns. 275; 2 Dall. 115.

The opinion of the Court was by

TENNEY J. — This is an action against the defendant, as indorser of five bills of exchange, drawn in Bangor, payable in Boston, by John J. Coombs on Philip Coombs, and by him accepted, in favor of the defendant, who indorsed the same. A note is also embraced in the writ, concerning which there is no controversy. Judgment has been obtained against the acceptor on four of the same bills in the name of Asa Warren, which has been satisfied fully by a levy upon real estate. These bills must be treated as foreign bills, and the ordinary notarial certificate on such is considered as proving what is set forth therein; and it appearing from the certificates introduced in this case, that the demand and notice were seasonable, and made according to established usage, the bills are to be regarded as properly protested for non-payment, and so entitling the holder to legal damages, unless they have been relinquished by some party thereto, having power to control them; and on this branch of the case, the question is, whether the plaintiff is entitled to the damages, inasmuch as Asa Warren, who it seems was the plaintiff's trustee, has received payment of the principal, interest, and costs, of the acceptor of these four bills.

This is not a new question in this State. It was presented in the case of *Bangor Bank* v. *Hook*, 5 Greenl. 174. The Court there say, "that the damages given by the statute are allowed to indemnify the holder for the expense he incurs or is supposed to incur in receiving the money at the place where the bill is drawn, and transmitting to the place of destination, where it was originally made payable. If a bill made payable in a foreign country, protested for non-payment or non-acceptance, is afterwards there paid and received, there arises no claim for re-exchange, or that which is substituted here, the

ten per cent. damages. The plaintiffs were under no obligation afterwards, either to sue the acceptor, or to receive from him the contents of the bill, without damages, to which they were entitled as against the drawer or indorsers." Again, it is said, "the damages are incident to the principal. If that be paid, or as far as paid, at the place appointed, the incident or accretion, which would otherwise attach to it, ceases." Other authorities are consistent with and support this doctrine. *Porter* v. *Ingraham*, 10 Mass. R. 88. It is held, that where the holder of a bill, protested for non-payment, afterwards receives the whole amount of the bill from the acceptor, he cannot recover damages of the drawer or indorser. Bayley on Bills, 387.

If actions be pending against the acceptor, and another party who is liable to the damages arising from the dishonor of the bill, the holder is entitled to require the costs in the latter, in a settlement of the action against the acceptor.

We think the action being against the acceptor in the same four bills which have been paid after the suit came to judgment in the name of Asa Warren, will not change the principle. It cannot be said, the action being *inter alios*, that Asa Warren could not take away the plaintiff's rights. If both actions were pending at the same time upon the same bills, it is not easy to perceive that there could be two holders and no privity between them, or if there was a subsequent negotiation or transfer, that it did not carry with it all the rights and liabilities which had before attached. But we are relieved from any difficulty on this head, for it is admitted, the other suit was for the benefit of the plaintiff in this.

Another defence is set up to the bill dated June 1, 1837, for $340, which is usury; and the proof of this arises from the testimony of the plaintiff in the suit of Asa Warren upon the other four bills, he having been called by the defendant in that suit. That testimony, so far as it is relevant, is to be regarded as his confessions; and therefrom it appears, that in 1835, John J. Coombs applied to him to furnish money for himself, Philip and Philip H. Coombs; that he agreed to procure it on

certain conditions, for the premium of five per cent. a month; whether on his own account or as the agent of others who were disposed to loan it for such interest was another question, the necessity of considering which is superseded by the view we take on other branches of the case. It appears further from his testimony, "that he had paid up to last August [1838] the rate of interest on this paper, [the four first named bills,] excepting commissions; that he was employed to raise money for a large number of persons, and among the rest for the Messrs. Coombs, and had raised a number of hundred thousand dollars, and paid a per centage two, three, or four per cent. a month; that he hired money for this paper, [the said four bills] and paid the interest received, excepting the commissions; that he raised the money on his own name, and let Coombs have it as his own money." The foregoing is all the evidence, touching the interest received, secured, or taken above six per cent. on the bill of June 1, 1837; and there being no reference in particular to this bill, are we justified in concluding, that the bill was taken by the plaintiff under that arrangement? That was a bargain founded upon no consideration, and which if carried into effect, would be in violation of law. Upon either ground, it could not be enforced. Though we may presume a contract, when morally binding, but having no legal obligation, will be fulfilled, yet there can be no presumption, unsupported by evidence, that one which is forbidden by statute will be carried into effect, especially where it may be visited by a severe penalty.

But we have no evidence, that the plaintiff ever received this bill of John J. Coombs, with whom the negotiation alluded to in his testimony took place; for aught that appears to the contrary, it came into his hands in the regular course of business; and if so, whether taken at a greater or less discount, that is not to operate to his disadvantage. At any rate, we see nothing which draws us to the conclusion that any more than at the rate of six per cent. per annum was taken and reserved by the plaintiff on this bill, so as to make it subject to any deduction.

Whether the other four bills were infected with any usurious taint, so as to affect the costs, we think it not now competent for us to inquire. Although they are in the case, the defendant insists that they are paid, and resists a judgment for damages, which would accrue as incidental. It is seen, that we think the law sustains this defence ; and if these bills are paid for one purpose, they are for another, and if damages cannot be recovered, because the basis, on which they rest, is taken away, we are not aware, that the same are before us, so that we can apply to them any evidence, in order to attach another incident to that which is considered as out of existence; and if those bills were subject to be impeached, we cannot now regard them as the foundation for costs for the defendant. We think the default must stand, and judgment is to be rendered for the amount of the bill dated June 1, 1837, and for the note declared on, and for costs.

HENRY WARREN *versus* PHILIP COOMBS.

In a suit on two drafts, where the defence relied upon was usury, and the verdict was for a less sum than the amount due; *it was held*, that such verdict established the fact of usury.

A suit brought on two acceptances, in one of which more than legal interest is reserved, is within the provisions of the statute against usury, and the defendant is entitled to costs.

THE facts in this case appear in the opinion of the Court.

Rogers, for the plaintiff.

Hobbs, for the defendant.

The opinion of the Court was by

TENNEY J. — This suit is upon two acceptances. No defence was set up to one, but to the other the defendant introduced the statute of usury in reduction of damages. The verdict being for a less sum, than the aggregate amount of the two, and it appearing by the pleadings that this defence was

alone relied upon, we are to conclude, that the jury were satisfied that the statute had been violated. The only question before us is, how shall costs be awarded? It is insisted, that, as one acceptance was free from any taint, under the general statute, the prevailing party shall recover his costs, and therefore the plaintiff is here entitled thereto. The language of the statute is, "In a suit brought where more than legal interest shall be reserved and taken, the party so reserving and taking shall recover no costs, but shall pay costs to the defendant." The verdict being taken for the plaintiff on both acceptances, the suit thereon must now be regarded as entire. The provision of the statute, under which the defendant claims costs, is an exception to the general rule, and was intended undoubtedly as a penalty, to prevent the reserving and taking usurious interest, and is not to be evaded. Is not this a suit, where more than legal interest has been taken and reserved within the meaning of the statute? We think the case fairly finds that it is; consequently we have nothing to do, but to give effect to the requirements of the statute.

Judgment on the verdict without costs, and costs for the defendant.

ROBERT PATTEN *versus* ABNER STARRETT *& al.*

Exceptions allowed after a default voluntarily and unconditionally submitted to by a defendant are irregularly taken, and will be dismissed.

A plea in abatement setting forth that no service has been made on one of the defendants without alleging such defendant to be co-promissor or obligor is bad.

When the place of residence of a defendant has been mis-described and the officer in consequence thereof has returned *non est inventus*, the writ may be amended by inserting his proper place of residence and service be made on such defendant by virtue of St. 1835, c. 700.

A new description of a defendant is inserting a new defendant within the mischief to be remedied by that statute.

EXCEPTIONS from the District Court, ALLEN J. presiding.

This was an action of debt entered at the May Term of the District Court, 1839. The writ was dated March 1, 1839. At the said May Term, and on the fourth day thereof, the defendant filed a plea in abatement of said writ, for the cause, "that no service of said writ had been made on David Starrett, one of the defendants therein named, who at the time the same was sued out, resided and has ever since resided in China, in the county of Kennebec, in this State, where the writ might have been served on him."

The name of said David Starrett was originally inserted in the writ, by which he was described as resident in Orono, in the county of Penobscot.

To the plea in abatement, the plaintiff filed the following replication, "And now the plaintiff when, where, &c. comes and saith that his writ aforesaid ought not to abate as aforesaid, but should be maintained against the said defendants, in support of which he presents the following statement of facts, viz. that at the same term, at which his said action was entered, he moved this Honorable Court, for leave and leave was granted, to summon in David Starrett, now of China in the county of Kennebec, which has been done, all of which he is ready to verify. He therefore prays judgment against the said defendants and for his costs."

To the replication there was a demurrer and joinder.

The Court sustained the replication, and adjudged the plea bad, and ordered the defendants to answer over. The defendants were then defaulted in said action.

To the above ruling of the Court, exceptions were filed and allowed.

I. Washburn, Jr. for the defendants. Before the passage of St. 1835, c. 700, an original writ could not be amended by inserting new defendants, and if service was made on one only of many defendants, the writ was abated on motion. *Guild* v. *Richardson*, 6 Pick. 364. St. 1821, c. 59, § 5, clearly shows that when the parties live in this State, service should be made on both. In this case both defendants lived in the State and the names of both were inserted in the writ, but service

was made on only one. The plaintiff seeks to avoid the effects of his defective service, by the provisions of St. 1835, c. 700. To avail himself of this statute he must clearly bring himself within its provisions. The cases to be remedied by this statute were, when some of the defendants were unknown, and the plaintiff by plea in abatement was advised of their names and place of residence. The statute does not apply to the case where all the defendants were known, but through neglect or carelessness, service was omitted to be made on some. The defendants' names were all included in this writ. The statute allows an amendment by the insertion of the names of *other persons*, &c.; and provides that on the return of the *amended* writ the *additional* defendant shall be deemed to be a party, &c. By recurring to the provisions of the statute it will be seen that its language expressly excludes the plaintiff's case; and that the relief it affords, is confined to those cases where the other defendants were not originally in the writ. Here there was no additional defendant upon whom that service was to be made.

The replication is bad for informality — for not averring that the writ was amended — that the Court ordered service — and that there was a legal service on the defendant summoned in.

N. Wilson, for the plaintiff. The defendants having been defaulted, are thereby precluded from further appearing in the case.

The amendment made was properly allowed. *McLellan* v. *Crofton*, 6 Greenl. 307; *Ordway* v. *Wilbur*, 16 Maine R. 263; *Fogg* v. *Greene*, ib. 282. The Statute of 1835 authorized the amendment, and service has been made according to its provisions. The officer not being able to find the David Starrett named in the writ, returned that fact. Unless a case like this is within the provisions of the statute, it becomes a dead letter and utterly useless.

The opinion of the Court was by

WHITMAN C. J. — In this case a bill of exceptions was taken and allowed, after a default had been voluntarily and

unconditionally suffered to be entered in the District Court. This was an irregularity. The statute provides, that either party, aggrieved at any order, &c. of the District Court, may take exceptions thereto, and proceed therewith to the Supreme Judicial Court for a revision of the decision objected to. But this presupposes, that the party, so proceeding, has done no act, whereby he must, necessarily, be considered as having consented, that judgment should be entered up against him. A default, voluntarily submitted to, by a defendant, amounts, virtually, to a consent, that judgment should be entered up against him. This action therefore must be dismissed from the docket of this Court; and the District Court will proceed as may be deemed proper in the case.

As the parties, however, have furnished us with arguments in writing on the points intended to be raised, and as it may be of some practical importance that they should be decided, we have considered the matter. In the first place the plea in abatement, setting forth that no service had been made on one of the defendants, named in the writ, without alleging that he was a joint co-promissor or obligor, was bad. Without such fact it is of no importance, to the defendant appearing, whether the other person named be summoned or not. The replication which was filed was wholly unnecessary, and irregular; on demurrer and joinder to which the Court did right in going back to the first fault, and adjudging the first plea bad.

Leave was granted, it seems, by the Court to the plaintiff to amend by altering the description of the defendant not summoned, and causing him to be summoned, and be made a co-defendant. This amendment and procedure have been and still are considered as a subject of controversy, as we learn from the arguments.

Our statute provides, that the plaintiff, in an action upon a contract, may be allowed to amend by the insertion of an additional defendant, and summoning him, &c. The question is whether any thing more had been done, in this instance, than was within the purview of this statute. The individual,

named in the writ, as a co-promissor, was wrongly described, as to his place of abode, so that the officer in serving the writ, was obliged to return *non est inventus*, as to him. He was, then, to every intent and purpose, as if he had not been named in it. A new description of him was, in effect, inserting a new defendant. It was inserting one that could, in lieu of one that could not, be found. This seems clearly to be within the mischief, intended by the statute to be remedied ; and we are satisfied, that the procedure was well warranted by its provisions.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTIES OF WASHINGTON AND AROOSTOOK,

JULY TERM, 1841.

GEORGE H. DELESDERNIER *versus* JABEZ MOWRY.

The fact of seizin is shown by proof of a conveyance to an ancestor of the demandant from one seized, and entry under such deed, and a descent cast; and to impeach such a title on the ground that the conveyance was made to defraud creditors, the tenant must show it fraudulent, that the creditors have by some act avoided the same, and that he is entitled to set up their title against the demandant or those from whom he derived his title.

The deed of a Marshal of the U. S. purporting to convey to the tenant the title of the U. S. by virtue of a levy against such fraudulent grantor without proof of the authority of the Marshal to execute it, will not pass the title of the U. S. nor show that the tenant represented that title.

THIS was an action of entry on the seizin of the plaintiff's ancestor, Lewis F. Delesdernier, Jr. Plea, general issue.

It appeared that in 1815, Lewis F. Delesdernier, senior, conveyed the premises to his sons, Lewis F. Delesdernier, Jr. and William Delesdernier, who soon after went into actual possession, and remained there till Lewis, Jr. the plaintiff's father, died.

The defendant introduced a judgment in favor of the United States against Lewis, senior, recovered in 1812; also, another judgment, obtained by *scire facias* on the first judgment, on

which last judgment execution issued, and was partly satisfied by levy by the United States, in 1821, on a part of the premises.

The defendant introduced the deed of Benjamin Green, Marshal of Maine, dated 1830, in which it is stated, that by the authority of the United States, said Green sold the premises set off on the execution aforesaid, to defendant, at auction, in 1825. This was a deed of release. There was no testimony to show that Green had authority to sell and convey as aforesaid, except the deed itself. To this testimony the plaintiff objected, but the same was used. The defendant disclaimed as to a small part of the demanded premises, which disclaimer was accepted. He claimed several small portions of the demanded premises, being all except what he disclaimed and what was included in the levy of the U. States, by purchase from several individuals, whose titles were derived from Lewis, senior, after the conveyance to Lewis, jr. and William, before named. One of these portions was conveyed to Samuel Mowry, and from Samuel Mowry to the defendant, in 1839, after the commencement of this action. The plaintiff objected to the introduction of those deeds, but they were admitted.

The defendant contended that the deed from Lewis, senior, to Lewis, jr. and William, was fraudulent, or was without consideration, and testimony was admitted, though objected to by the plaintiff, tending to show that Lewis, senior, before the conveyance was made, stated his intention to convey the estate to his two sons, to prevent it from being taken by the United States, and because they had suffered loss of their property in the service of the United States.

Shepley J. who tried the cause, instructed the jury that Lewis, senior, could not convey his estate at that time without receiving a valuable consideration, in such a manner as to prevent the conveyance from being inoperative as against the United States; that if the deed was made by the grantor and received by the grantees for the purpose of defeating or delaying the United States or other creditors of the grantor in the collection of their debts, the deed as against them would be

inoperative, although the grantees had paid a full and valuable consideration for the estate.

That if they should find the deed from Lewis, senior, to Lewis, jr. and William, to have been fraudulently made, or made without a valuable consideration, the seizin of Lewis, jr. would be defeated, and they would return their verdict for the defendant.

T. J. D. Fuller, for the plaintiff. The plaintiff, by the deeds introduced by him, has made out a *prima facie* case. The defendant would rebut that by showing title in the U. S. By the deed to Delesdernier, jr. the grantee acquired a seizin in law and fact. The conveyance was good as against the grantor. *Drinkwater* v. *Drinkwater*, 4 Mass. R. 354; *Ricker* v. *Ham*, 14 Mass. R. 137. The tenant cannot show title in any person out of the demandant, unless he show it in some one under whom he claims. *Shapleigh* v. *Pillsbury*, 1 Greenl. 271; *Wolcott* v. *Knight*, 6 Mass. R. 418. The deed of Green was improperly received. No proof was shown of his authority to convey; and without such authority the deed was void. This deed being defective, the tenant was a mere intruder without color of title.

Hobbs and *Bridges*, for the tenant. The deed of 1815, was found by the jury to have been fraudulent. The instructions given were in accordance with the law as established in *Howe* v. *Ward*, 4 Greenl. 195. By the levy the seizin of Delesdernier, jr. was defeated and the legal seizin vested in U. S. The tenant went in under color of title, claiming the land as his own. If the title never passed from the U. S. he is to be considered as in possession in subservience to the title of the U. S.

The tenant had a right to contest the seizin of demandant. Since St. 1826, c. 444, § 2, every legal ground of defence is open to him. The plaintiff, to recover, must prove his seizin, and the defendant may disprove it by showing title in a stranger. Co. Lit. 11, b.; 4 Kent's Com. 381. He may prove the seizin of such stranger without claiming title under him. *Stan-*

ley v. *Perley*, 5 Greenl. 369; Jackson on Real Actions, 156. If the tenant may show title in another, he may equally well show the demandant's title fraudulent. *Dunn* v. *Snell*, 15 Mass. R. 483; *Greene* v. *Thomas*, 2 Fairf. 318; 2 Stark. Ev. 292.

It was not necessary to show the authority of Greene. His deed was admissible to show the extent of the defendant's claim. *Ross* v. *Gould*, 5 Greenl. 204. The title in U. S. was properly received to rebut the seizin of the demandant. The deed of Mowry operated as a confirmation of the tenant's title, and was properly admitted for that purpose. Jackson on Real Actions, 169.

The opinion of the Court was by

Shepley J. — The conveyance from Delesdernier, senior, to his sons, accompanied by proof of their actual entry under it and possession of the premises, established their seizin. And it is on the seizin of one of the sons, that the demandant declares in his writ. The title of the sons would be impeached by proof, that the conveyance was made to defraud the creditors of the grantor; but as it respects others, the seizin and the title of the grantees would be good. The instructions to the jury on this point were too broad, and did not communicate the proper limitations. The tenant to enable him to defeat that title by one subsequently acquired from the grantor by one of his creditors must show, that he duly represented the creditor's title, and was therefore entitled to set it up against the title of the grantees. If the deed from Green could be received as evidence of the extent of the tenant's claim, without proof of his authority to convey, it could not pass any title from the United States to the tenant, and he must fail to show, that he represented that title. Nor was the proof sufficient to defeat the title of the demandant to those small portions of the premises, which were not included in the levy made by the United States. The tenant's title to them was derived from conveyances by Delesdernier, senior, after he had conveyed to his sons; and there was no proof, that those subsequent gran-

tees stood in any such relation to their grantor, as would enable them to establish their title against that of his prior grantees.

The verdict is therefore set aside and a new trial granted.

ASA T. ROLFE *versus* THE INHABITANTS OF COOPER.

By St. 1834, c. 129, § 4, the production of the requisite certificates by the master is a condition precedent to his lawful employment by the school agent.

The master is *prima facie* entitled to receive his stipulated compensation upon proof that he had been employed by the agent, and that the agreed services had been rendered.

If the town, notwithstanding the employment of the master by the school agent, would avail themselves of the want of the requisite certificates, they must prove that fact.

THIS was an action of assumpsit, on an account annexed, to recover for his services as a schoolmaster in the town of Cooper.

From the report of SHEPLEY J. who tried the cause, it appeared by the testimony of William McPhetres the school agent, that he employed the plaintiff to teach school in district No. 6; that there were three members of the school committee that year, that the plaintiff exhibited a certificate from two of the committee, likewise a certificate of good moral character from the selectmen of Princeton, and a certificate from a person liberally educated, that he was well qualified to teach a school. It likewise appeared that he rendered the services to recover compensation for which this suit was brought.

Upon this evidence a verdict was rendered for the plaintiff, which the counsel for the defendant moved to set aside as against law.

P. Thacher, for the defendants. The jury had no right to infer that the requisite certificates had been given, from the evidence in the case. St. 1834, c. 129, § 4, 5, requires a certificate from the school committee of the town. The one

produced was signed by but two. When he commenced there was no evidence that he had the requisite certificates. Not producing them the presumption is that they did not exist.

Bridges, for the plaintiff. The plaintiff was employed by the town agent. St. 1834, c. 129, § 4, provides that the master shall produce certain certificates before the agent can legally employ him. It will be presumed the agent did his duty, that he called for the proper certificates, and that they were produced. The Court will not presume a neglect of duty. 1 Phil. Ev. 158.

The opinion of the Court was by

Weston C. J. — The agent for the school district was officially charged with the duty of employing a master. While acting within the scope of his agency, he is the duly authorized organ of the town. By the Statute of 1834, c. 129, to provide for the instruction of youth, § 4, no person can be employed as a schoolmaster, who does not produce the certificates therein prescribed. The production of the certificates, is a condition precedent to his lawful employment. The agent, like other officers clothed with a public trust, must be presumed to have done his duty. He cannot be taken to have violated the law, without affirmative evidence. When therefore he employs a master, and the services are actually performed, upon proof of this, the master is *prima facie* entitled to the stipulated compensation.

The fifth section of the same statute imposes a penalty upon the master, for presuming to keep a school, without having first produced the requisite certificates; and he is in such case further barred from recovering any compensation. If the town, notwithstanding his employment by the agent, would avail themselves of this bar, they must prove the delinquency, upon which it is based. No proof to this effect was adduced by the defendants, and the testimony for the plaintiff, was of a character to strengthen the implication arising from his employment, that he had conformed to the requirements of the statute. *Judgment on the verdict.*

SAMUEL F. BARKER *versus* JOSEPH S. CLARK.

If the indorser of a note has changed his place of residence between the making of the note and the maturity of the same, the holder is bound to ascertain the new residence of the indorser, to which notice of non-payment should be sent, or to use all reasonable efforts to ascertain where it is.

Inquiries in such case are to be made at the former place of residence of the indorser; and those inquiries, and the answers thereto, are facts to be laid before a jury to prove diligence in the holder.

THIS was an action against the defendant as indorser of a promissory note, dated at Calais, May 5, 1835, for $35, signed by P. H. Glover and Billings Blake, and payable to the defendant or order, in one year from date, and interest, and indorsed by the defendant and one Wm. H. Griffith.

From the report of the case by SHEPLEY J. who tried the cause, it appeared by the testimony of Wm. H. Nute, that the plaintiff gave him the note in suit on the day of its maturity, and requested him to demand payment of the makers, and to notify the indorsers; that in pursuance of such request, he called at each of the houses of the makers of the note, and they being absent, informed their wives of his object in calling; that the plaintiff then wrote a letter to Clark, informing him of the demand and non-payment of the note, sealed the same, and delivered it to the witness; that he then went to Milltown, and inquired for the residence of the defendant, among other places at the house of the second indorser, Griffith, and was directed to a certain house where he called and inquired for him (the defendant); that he was informed that he had gone to St. John, to work on the bridge; that the same day he directed the letter to the defendant, at St. John, and put it in the Calais postoffice; that he was directed to Clark's residence by strangers, and except from their information he did not know that he ever lived there; and that when he called at his house, those who gave him the information of the absence of Clark were likewise persons with whom he was unacquainted, and that he did not recollect whether or not he inquired if Clark had left any agent, or had any place of business there.

There was other evidence tending to show that the defendant removed from Calais to New Brunswick, after the signing and before the maturity of the note, and that while residing at Calais he sometimes worked as a millwright there, and sometimes at St. Stephens.

The defendant insisted that due diligence had not been shown to notify him, and that he was discharged. The presiding Judge submitted the question of diligence to the jury, who returned a verdict for the plaintiff.

T. J. D. Fuller, for the defendant. This is a question not of fact but of law; no facts being contested. *Hussey* v. *Freeman*, 10 Mass. R. 84; *Whitwell* v. *Johnson*, 17 Mass. R. 449. The indorsers' liability being conditional, every fact necessary to establish it must be shown by the plaintiff. *Green* v. *Darling*, 15 Maine R. 143. Clark residing in Milltown, notice should have been left at his place of residence in that place. If he had ceased to reside there, diligence should have been used to ascertain his place of residence, and notice should have been sent there. There is no proof where he resided, nor of any diligence used to ascertain the place of his residence. *Green* v. *Darling*, 15 Maine R. 143. Nute was directed to Clark's residence, but he neither inquired for his place of business, nor whether he had left an agent there or not. So far as appears from the evidence, the defendant resided at Milltown, and notice should have been left for him there. Notice should have been given to him in person, or left at his residence or place of business. None was left at Milltown. If he resided at New Brunswick, due diligence should have been used to ascertain his residence there. *Hill* v. *Varrell*, 3 Greenl. 233. Inquiries for that purpose should have been made of the makers and indorsers. No inquiries were made whether he had changed his residence permanently, nor whether he had an agent, nor to what place he had removed; upon which points the plaintiff was bound to seek the necessary information, and for not doing which, he is responsible.

Cooper, for the plaintiff. Due diligence was proved by the evidence; the fact was submitted to the jury, whose province it

was to determine it and they having settled it, the Court will not overrule their verdict. *Chapman* v. *Lipscomb*, 1 Johns. 294; Bailey on Bills, 180; *Bateman* v. *Joseph*, 12 East, 433.

The opinion of the Court was by

WESTON C. J. — If the notice to the defendant was properly directed, the proper mode of transmission was by the mail; and this was seasonably resorted to for this purpose. The question of due diligence, which was properly submitted to the jury involved two considerations; whether there was satisfactory evidence, that the residence of the defendant was at St. John, or if not, whether the plaintiff, through his agent, had made all reasonable efforts, to ascertain where it was.

There was evidence tending to show, that he had resided at Calais. It was the duty of the holder to inquire at that place, whether he was still there, or whether he had removed elsewhere, and if so, to what place. Inquiries are made, to be answered; and upon the answers, further proceedings are to be had, if there is no reason to doubt their correctness. This is the very diligence the law requires. The inquiries and the answers are in themselves facts, to be laid before a jury, to prove such diligence. The agent for the plaintiff inquired at the house of the second indorser for the residence of Clark. A certain house was pointed out to him in answer to his inquiry. He goes there, and inquires for him, and is told that he had gone to St. John, and was there at work. He acts upon this information, and on the same day puts the letter of notice to the defendant into the postoffice at Calais, directed to him at St. John. Having succeeded in the object of his inquiries, and there being nothing to awaken suspicion, that he had not been truly informed, he had no occasion to inquire further. He was satisfied; the jury were satisfied; and the testimony was sufficient to satisfy any reasonable mind.

Judgment on the verdict.

JOHN FELCH *& als.* in Equity, *versus* WILLIAM HOOPER *& al.*

Where one H purchased a tract of land of F, in payment of which he gave his notes and a mortgage of the premises purchased; and then sold the same to one C who procured the notes of B, secured by a mortgage of the same tract, with which he paid H in part for the land by him so purchased, without disclosing the fact that B had no title to the same; and H exchanged those notes and mortgage with F for his own notes and mortgage, without disclosing the above facts; *it seems* that the Court would enjoin C from setting up his title against that conveyed by B.

The widow being entitled to a distributive share of the personal estate of her husband, is not a competent witness in a bill brought to establish the validity of a mortgage by which certain notes belonging to his estate, are secured.

The answer of one co-defendant is not evidence against another.

The executor or administrator is a necessary party to a bill brought to enforce a mortgage securing notes due to the estate.

Where the objection of want of proper parties was not taken at the hearing, the Court may order the case to stand over on terms, with liberty for the party to amend by adding new parties.

BILL in equity, against Wm. Hooper and Henry Cobb.

The plaintiffs in their bill allege that prior to Aug. 1, 1835, one Abijah Felch, the father of these complainants, was seized in fee of certain lots of land in Limerick plantation, containing 1280 acres; that being so seized, William Hooper, one of these respondents, applied to said Abijah to purchase said land, and took a bond for thirty days of said land on certain terms therein specified; that before the bond expired, said Hooper complied with the terms of said bond, and took a deed of the same, giving at the same time to said Abijah three notes of hand, amounting in all to $1440, in three years, secured by a mortgage on the premises conveyed; that said Hooper represented that he had sold the land to Henry Cobb, who was a man of property, and wished the said Abijah to agree that if he should sell to a responsible person, that he would take the notes and mortgage of said purchaser in exchange for those of said Hooper, to which the said Abijah, not suspecting any fraud, agreed; that before this time said Hooper had conceived the design to defraud the said Abijah; that in pursuance of said design, said Hooper went to Boston, and on Aug. 20, 1835, conveyed the whole of said lots to said Cobb, together with

1920 acres which the said Hooper had procured in the same collusive manner of one E. Baxter, for the nominal consideration of $10,000, no part of which, as these complainants believe, was paid or secured by said Cobb; but that said Cobb received the deed in trust, in whole or in part, for said Hooper; that said Cobb well knew the manner of said Hooper's purchase, and that the land had not been paid for, and that the same was subject to a mortgage, and in order to free it from said mortgage, and with intent to defraud said Felch, said Hooper and Cobb applied to one Nath'l Blanchard, who was utterly insolvent, and told him that if he would give his notes, corresponding with those given by Hooper to A. Felch, and sign a mortgage deed of the land described in said Hooper's mortgage, that he should have five or six lots of land for so doing, and that he should have nothing to pay for the same; that said Blanchard signed notes and a mortgage of said lots running to said Abijah; that said Blanchard had no title to the land, that having so signed said notes and mortgage he delivered the same to said Hooper; that said Hooper took the same to said Abijah a short time before his decease, and falsely represented to him that he had sold the land to the said Blanchard, and had conveyed the same to him by deed, and had taken from him these notes, and a mortgage; that said Blanchard was a man of wealth, and worth $40,000; and said Hooper proposed that said A. Felch should accept said Blanchard's notes and mortgage in exchange for his own; that said A. Felch, confiding in the integrity of said Hooper, and not knowing that the title was in said Cobb, delivered up to said Hooper his notes and mortgage, and received in exchange therefor the notes and mortgage of said Blanchard, which were utterly worthless.

The bill further alleges that these complainants are the heirs at law of said Abijah Felch, and that by the fraud of said Hooper they have been deprived of their inheritance.

The bill further prays that said Cobb may be compelled to convey the premises to him conveyed by said Hooper, to secure the amount due from him; or that said Hooper may be compelled to restore the plaintiff the notes or mortgages fraudu-

lently taken by him, and that the respondents may be enjoined from selling said land, or from lumbering on the same, and for such relief, as the plaintiffs are entitled to have.

The respondent, William Hooper, admitted the purchase of said Abijah Felch, of the land described in the bill; that he took a deed in August, 1835, and paid a quarter in cash, and gave his notes on one, two, and three years, secured by mortgage; that he told the said Abijah that he expected to sell the said land to Henry Cobb, and wished to know if he would take his notes and mortgage in exchange for his own, to which he replied that he thought he would; that he immediately went to Boston, having previously given a bond in the penal sum of $500, to procure a warranty deed of the same; that he saw said Cobb before the expiration of the bond, who informed him that he had sold the same to one Blanchard, and requested him to take the notes and mortgage of said Blanchard in part payment, representing said Blanchard to be a man of property, and that he had credited him to the amount of from $3000 to $5000; that induced by these statements he consented to do as requested; that at a time agreed upon, they went to the office of E. G. Loring, Esq.; that he there met Cobb and Blanchard; that he there gave a warranty deed to said Cobb of the land purchased of Abijah Felch, and took the notes and mortgage of said Blanchard; that after the deeds were executed, he compared deeds to see if the description of the lots included in the mortgage of Blanchard corresponded with those he conveyed to Cobb; that Cobb was present, and assisted in comparing deeds; that before the deeds were drawn up, he told Cobb that he wished the notes and mortgage of Blanchard to run to A. Felch, as he expected to exchange them with said Felch for his own paper; and that if he did not effect the arrangement with Felch he must procure Blanchard's notes and mortgage running to him, and take up those running to Felch; that Blanchard and Cobb both assented to these propositions, and that the papers were accordingly drawn up, running to said Felch; that he afterwards met Cobb at his store, and there completed the bargain, and took the notes and mortgage of

Blanchard; and that A. Felch afterwards took Blanchard's notes and mortgage in exchange for his own.

Henry Cobb, in his answer, admitted the conveyance from Felch to Hooper, and the mortgage back, but denied all knowledge of the existence of the mortgage to A. Felch at the time of his purchase. He further asserted, that he purchased believing Hooper had a good title; that on Aug. 20, 1835, said Hooper conveyed to him the lots purchased of Felch and Baxter, but denies he received said deed in trust for said Hooper, or with design to defraud; he asserts the consideration of the deed to be $10,000; that he paid $2800 in money, the sum of $3200 in permits to take timber from said lots, and $3600 in the notes of said Blanchard; that he did not know when said notes of Blanchard were due, but that he believes they were not paid at maturity; that said bargain was in good faith, and with no design to defraud said Felch, and with no knowledge that said Hooper had any such design on his part, or that he intended to transfer them to said Felch; that said Blanchard was a shoe dealer, in good credit; that his (Blanchard's) notes were given without any fraudulent design on his part, but with the expectation that they would be paid at maturity; but denies that he offered said Blanchard four or five lots, or any of said lots, if he would sign said notes and mortgage; denies that he knew of any representations of Hooper to Felch, in relation to the exchange of the notes of Hooper for those of any one else, or that he knew at the time he gave said Hooper said notes of Blanchard, he, Hooper, intended to make any fraudulent use of them; and denies all combination or conspiracy.

The complainants introduced the deposition of Sally Felch, the wife of Abijah Felch, and the mother of the complainants, to prove certain material allegations in the bill, and other proof of the facts contained therein which it is not material to report.

F. Allen, for the plaintiffs, cited *Wendell* v. *Van Rensallaer*, 1 Johns. Ch. 344; *Story* v. *Barker*, 6 Johns. Ch. 166; 1 Story's Eq. 376; Fonb. Eq. 131; *Tilling* v. *Armitage*, 12 Ves. 84; 2 Atk. 83; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 73; *Rogers* v. *Saunders*, 16 Maine R. 106.

Thacher, for the defendants, referred the Court to 2 Mad. Ch. 416; Story's Eq. Pl. 415; Milford's Eq. Pl. 234; and insisted that S. Felch was an incompetent witness, being interested in the personal estate of her husband.

The opinion of the Court was by

SHEPLEY J. — The case is not presented in such a manner as to entitle the plaintiffs to a decree in their favor. If the necessary parties were before the Court, they might perhaps by competent proof show, that the defendant, Cobb, procured the mortgage from Blanchard to Felch to be made, and that he was present and consented that Blanchard should thus convey the title to the land, and made no communication, that he had not conveyed to Blanchard, or that Blanchard's title was not good; and thus lay the foundation of a decree, that Cobb should not set up his title against that conveyed by Blanchard. But no such decree can be made between the present parties, or on the present proofs. The testimony of the widow must be excluded. She is apparently entitled to a distributive share of the personal estate of her late husband composed in part of these notes, and therefore interested to establish the validity of the mortgage, by which they are secured.

Hooper, one of the defendants, was irregularly examined as a witness without any order of the Court therefor; and having failed to answer, the counsel agreed, that his deposition should be regarded as his answer. It cannot be considered under these circumstances as before the Court in any other character than as an answer. And the answer of one defendant is not evidence against another. *Morse* v. *Royal*, 12 Ves. 355; *Leeds* v. *Marine Ins. Co.* 2 Wheat. 380.

There is also a defect of parties. The executor or administrator is by our law entitled to control the notes and the mortgage, by which their payment is secured; and is therefore a necessary party to a bill, that will operate upon the security, which it is his duty to protect and enforce.

But as the objection for want of proper parties was not taken till the hearing; the Court may order the case to stand

over on terms with liberty for plaintiffs to amend by adding new parties. *Jones* v. *Jones*, 3 Atk. 110.

Such an order may be obtained, if desired, and if not, the bill is to be dismissed.

PETER GOODNOW *versus* SIMEON HOWE.

H transmitted a draft to G, his creditor, for collection, with a request that when paid, the proceeds should be passed to his credit. G indorsed the same and procured it to be discounted, and passed the proceeds to the credit of H. The draft was protested for non-payment, though the acceptor was in funds and would have paid the same on presentment, but the notary was unable to find his residence; G took up the same as indorser, at the bank at which it had been discounted, paying costs of protest and damage; *it was held*, that he was entitled to recover the same of H.

A creditor receiving a draft for collection and negotiating the same, and passing the proceeds thereof to the credit of his debtor, is not thereby concluded, unless chargeable with negligence or want of fidelity in endeavoring to collect the same.

THIS was assumpsit on two promissory notes. There was also a count for an account annexed, charging the defendant with L. D. Shaw's draft on Shaw & Dewey, and damages and expenses thereon, amounting in all to $416,90, and the usual money counts. The writ was dated March 15, 1839.

The defendant offered to be defaulted for $27,75, and costs, which was admitted to be the amount, if the plaintiff was not entitled to recover for the draft.

From the report of SHEPLEY J. who presided at the trial of the cause, it appeared, that the defendant on the 5th of Dec. 1836, remitted to the plaintiff the draft in question, dated Nov. 1836, drawn by L. D. Shaw, one of the firm of Shaw & Dewey, at that time doing business in New York, for the sum of $400, and payable to the order of Neal D. Shaw in three months from date — and indorsed by him — requesting the plaintiff to give him credit for the same when paid; that the plaintiff obtained a discount of said draft at the Union

Bank, Boston, indorsing the proceeds, $394,53, on one of the notes in suit; that the draft was forwarded in the usual course of business by the cashier of the Union Bank, to a bank in New York, for collection, and was there protested for non-acceptance, the notary being unable to find the place of business of Shaw & Dewey; that notices were forwarded to the Union Bank; that the Union Bank notified the plaintiff who sent the notices to the defendant by letter; but it did not appear at what time nor in what manner they were sent; that at the maturity of the draft it was protested for the same cause as before, for non-payment, that the plaintiff was duly notified thereof and took up the draft at the Union Bank, and returned the same agreeably to his letter of March 18, 1837, enclosed to Messrs G. & J. Hobbs of Eastport, the defendant living in New Brunswick, requesting them to forward the same to the defendant; that Messrs Hobbs, on April 21st, 1837, returned the draft by letter to the plaintiff advising him that they had endeavored to effect a settlement of the same with the drawer, without success, as he was unwilling to pay the damages, that they at the same time remitted to the plaintiff a new draft of the same parties for the same amount and costs of protest, but not including damages, saying that the plaintiff might retain either draft at his election and return the other; and that the plaintiff retained the protested draft and sent back the other to Messrs Hobbs, and enclosed the old draft with protest to some one at Eastport; that it was not directly sent to him, and it did not appear that he ever received it.

It further appeared, that the defendant was advised of the taking of the new draft, and made no objections to it and said he had written to the plaintiff approving of the course he had taken.

On March 18, 1837, the defendant wrote the plaintiff as follows; —

"Yours of the 8th inst. is at hand. I regret you have had so much trouble with the draft I sent you. You write that you have had to take it up from the bank at an expense of $18. Have you a prospect of collecting it either from the drawer or

of those upon whom it is drawn? If not, forward it to me, duly protested, and I will call on the indorser, who lives at Baring. The other parties are in New York, and from what I can learn, would probably have accepted it on presentment, and paid it when due if called on. I sent the notices you sent me to the parties they were for; the one for the indorser was duly handed him. I hope ere this, you have collected it. I will forward you something as soon as I can, and am sorry I have not used you better."

On 6th Sept. 1837, the defendant made the plaintiff a remittance, and asked for a statement of his account.

It appeared in evidence that the firm of Shaw & Dewey commenced business in New York, 23d of Sept. 1836, and had a counting room and lumber yard at the corner of Rivington and Margin streets, with a large full sign across the front of their office, from the time they commenced till they closed business; that they were solvent and in good credit, meeting all their engagements, from 23d Sept. 1836, to the middle of May, 1838; that they were in funds to meet the draft in controversy, and should have paid the same if it had been presented.

It further appeared, that Neal D. Shaw, the indorser, called on the plaintiff, in Boston, not long after the draft was protested, and offered to pay the same if the plaintiff would release his claim for damages, said Shaw objecting to pay damages because the draft had never been presented, and the drawers were ready to pay the same had it been presented. It likewise appeared that he was solvent till the fall of 1837. It was admitted the risk of collection was not increased by a discount of the draft.

A default is to be entered on the defendant's offer to be defaulted, or for such further sum as the Court shall be of opinion the plaintiff is by law entitled to recover.

Hobbs, for the defendant. The plaintiff had a right to receive the draft in question, either in payment of the debt due him, or for the purposes of collection. If he elects for which purpose he will hold it, he is bound by such election. If it be

considered as payment, it discharges so much of the debt due. If received for the purpose of collection, then the plaintiff held the draft as agent, and is bound faithfully to attend to the duties of his agency. If the plaintiff received the bill as agent, he is entitled only to costs of protest and postage. If by reasonable diligence he might have collected the debt, the defendant is not liable. The defendant is not responsible for damages unless he discounted the bill. The plaintiff then paid them voluntarily and without the request of the defendant, and can have no claim for them as against him.

But the plaintiff indorsed the draft, and having indorsed it, he must account for it *pro tanto*, in payment of the debt due from the defendant. He thereby elected to consider the draft his own and to release the defendant for that amount. His claim then is against the parties to the bill alone. The defendant was not entitled to notice, not being a party to the bill.

The subsequent promise of the defendant does not bind him. It was made without consideration and without a knowledge of all the facts in the case. 1 Saund. Pl. & Ev. 349.

D. T. Granger, for the plaintiff. The risk was not increased by negotiating it and placing the same in a bank for collection. The plaintiff could only make the note available by discount, and the defendant when apprized that he had so done, made no objections. The mere fact of discounting it, did not make it his own. The plaintiff has been guilty of no negligence in his endeavors to collect the draft. The defendant has, with a full knowledge of what was done by the plaintiff, promised to pay, and such promise is binding on him. The defendant, as the party in interest, was entitled to damages and the plaintiff having paid them, may recover them.

The opinion of the Court was by

Weston C. J. — The draft in controversy was remitted by the defendant to the plaintiff, with a request, that when paid, it should be passed to his credit, he being indebted to the plaintiff. This imposed upon the latter reasonable fidelity, in discharge of his trust. He was liable to no other risk or haz-

ard, in relation to the business. He put it in train for collection, by causing it to be discounted at the Union Bank, at Boston. This did not increase the hazard to the defendant, or to the parties to the draft. It enlisted the vigilance of the bank in the collection, they having great facilities, through their officers, and by their extensive correspondence. The defendant, when advised of what was done, made no objection; but in his letter of March 18, 1837, acknowledging the receipt of the notices, requested that the draft might be returned to him, that he might call on the indorser. If he had disapproved of the plaintiff's course, or claimed to hold him responsible for the draft, or any part of the damages or expense, he was required, upon the principles of fair dealing between merchants, so to have apprized him.

The fact, that the plaintiff credited the defendant with the avails, before the draft had been honored, ought not to conclude him, unless chargeable with negligence, or a want of fidelity. And this is not imputable to him, from any evidence presented in the case. The banks and the notary were the usual and approved agents, proper to be employed in the discharge of the duty confided to him. Failing to realize the expectations of the defendant, he advises him of the result and forwards to him notices for the indorser and drawer, which were received and transmitted. It thereupon became the business of the defendant to resort to the parties for payment. Isaac Hobbs, the deponent, remitted a new draft to the plaintiff, which he was to retain or not, at his election; and of this the defendant approved. The plaintiff promptly returned the new draft. Having done his duty, and fully advised the defendant, if Neal D. Shaw, the indorser, was ready and willing to pay the amount of the draft, without the damages, it was for the defendant to decide, whether that proposition would be acceptable. We are not aware, that the plaintiff was bound to adjust the matter upon those terms.

Upon the whole, if any loss has been sustained, it does not appear to us, that it should fall upon the plaintiff. He was acting for the defendant, and faithfully discharged his duty.

The defendant, as is fairly to be implied from his correspondence, was satisfied with what he had done. The plaintiff is justly entitled then to charge back the amount of the draft, and to add thereto the damages and expenses, by him actually paid; and judgment is to be made up accordingly.

JOHN SAWTELL *versus* WILLIAM PIKE.

Where the defendant gave a bond to convey his "right, title and interest in and to the lath machine and the water therefor, which is under saw mills number three and four at Union mills, in Calais, for so long a time as those mills shall stand," the condition of which was, that if the defendant should "make and execute and deliver to the obligee, or to his heirs or assigns, a deed of release and quitclaim of said defendant's said interest in said machine for said term of time, and should in the meantime, suffer and permit the obligee, his executors, administrators and assigns peaceably to occupy and improve said machine;" then the obligation to be void, &c. *It was held*, that the defendant thereby contracted only to convey his own interest, whatever it might be in the subject matter of the contract, and that having given a deed in the terms of the bond, it was no breach that the obligee had been ousted by a higher and better title.

THIS was debt on a bond, dated March 24, 1832, the condition of which was as follows:—"that whereas the said Pike has contracted to convey by deed of release and quitclaim, his right, title and interest in and to the lath machine and the water therefor which is under saw mills number three and four, at Union mills in said Calais, for as long a time as these mills, numbered three and four shall stand; and the said Sawtell in consideration thereof has given to said Pike his, the said Sawtell's, two notes of this date for one hundred dollars, one to be paid in three months, and the other in six months, both with interest, and one other note of this date for $145 with interest, $100 thereof to be paid the first of July, 1833, and the rest the first of Nov. 1833; now if after the payment of said notes at the times and in the manner above named, and at the request of the said Sawtell, his heirs or assigns, the said Pike shall make

and execute and deliver to said Sawtell, or to his heirs or assigns a deed of release and quitclaim of said Pike's said interest in said machine, for said term of time and shall in the meantime suffer and permit the said Sawtell, his executors, &c &c. to peaceably occupy and improve said machine, &c. &c. then this obligation to be void, otherwise to remain in full force and virtue."

The bond in this case was assigned to Neal D. Shaw, for whose benefit this suit was brought.

It appeared that the plaintiff and those under him, entered into the occupation of the lath machine and occupied it till the spring of 1835, when their occupation was terminated by Hartshorn and Ellis, hereafter named.

On the 31st of July, 1832, the defendant by deed of release conveyed all his interest in mills number three and four under which the machine was placed, to Hartshorn and Ellis. It was admitted that the payments required by the bond were duly made.

The defendant read a deed of mortgage dated July 22d, 1826, from himself to said Hartshorn and Ellis; likewise a deed between the same parties dated July 15, 1829, by which it appeared that the condition of the mortgage was broken, and that the grantees had entered by consent for condition broken.

It further appeared, that the lath machine had been placed under the mills after the execution of the mortgage before mentioned; that the defendant executed and tendered to the said Shaw on June 2d, 1838, before the commencement of this suit, a deed bearing date May 30, 1838, in conformity with the terms of the bond, which was accepted by said Shaw not as a performance of all the stipulations in the bond, but of those only requiring the deed to be executed and delivered.

Upon this testimony Shepley J. by consent, ordered a nonsuit, which is to be set aside and a new trial granted if the plaintiff can maintain his suit.

Downes, for the plaintiff, cited Powell on Contracts, 162; 5 Dane's Abr. 105; *Charles* v. *Dana*, 14 Maine R. 383; *Manning* v. *Brown*, 1 Fairf. 49.

B. Bradbury, for the defendant, referred to 2 Saund. on Pl. & Ev. 411; *Barker* v. *Parker*, 1 D. & E. 287; *Pearsall* v. *Summersett*, 4 Taunt. 593; *Dedham Bank* v. *Chickering*, 3 Pick. 335.

The opinion of the Court was by

WESTON C. J. — The assignee of the bond has accepted a deed as provided for in the condition. The breach he now relies upon is, that he has not been permitted quietly to enjoy, as the condition requires. The subject matter of the purchase by Sawtell was, the defendant's "right, title and interest in and to the lath machine and the water therefor, which is under saw mills number thee and four at Union mills in Calais, for so long a time, as these mills shall stand." This, the condition, in which the subject matter is twice described in the same way, requires he should release and convey. It further provides, that before the payments stipulated and the execution of the deed, the defendant "shall, in the mean time, suffer and permit the said Sawtell, his executors, administrators and assigns, peaceably to occupy and improve said machine." This must be understood to mean the defendant's interest therein, which was what the defendant undertook to convey. This part of the condition must be governed and restrained by the previous recitals, which set forth the subject matter of the instrument. *Lord Arlington* v. *Merricke*, 2 Saund. 211, and note 5; *Barker* v. *Parker*, 1 T. R. 287; *Pearsall* v. *Summersett*, 4 Taunt. 593.

Upon this construction, which looking at the whole condition, is according to its legal effect, it appeared at the trial that the assignee was permitted to enjoy all the right, title and interest the defendant had in the subject matter, when the bond was executed.

Nonsuit confirmed.

WILLIAM W. CHAPMAN *versus* ISAAC CRANE.

An indenture in accordance with the provisions of St. 1821, c. 170, concerning apprentices, contains no covenants by which the guardian is personally bound.

The signature of the parent or guardian is affixed to show his consent to the binding.

THIS was an action of covenant broken. The allegations in the writ were, that Wm. M. Crane, who was bound out by the defendant to serve as an apprentice till he should arrive at the age of twenty-one years, with the plaintiff, had disobeyed the orders of his master, absented himself from his service before the expiration of the term thereof, without leave, and against the will of the plaintiff, &c. &c. contrary to the form and effect of his indenture, &c.

The defendant craved oyer of the deed declared on in the plaintiff's writ, and it was read to him in the words following: —

"This indenture witnesseth, that Isaac Crane, of Whitney, in the county of Washington, and State of Maine, gentleman, and guardian of Wm. M. Crane, a minor above the age of fourteen years, doth by these presents bind the said Wm. M., and with the free will and consent of the said William, he is hereby bound an apprentice to William W. Chapman, of Eastport, cabinet maker, and with him the said William W. Chapman, after the manner of an apprentice to serve from the day of the date of these presents until the 24th day of November which will be in the year of our Lord one thousand eight hundred and thirty-seven, when the said apprentice will arrive at the age of twenty-one years, during all which time the said apprentice his said master well and faithfully shall serve, &c. (in the usual form,) and the said William W. Chapman doth hereby covenant and promise to teach and instruct or cause the said apprentice to be instructed, &c. (in the usual form).

"In testimony whereof, the said parties have to this and one

other indenture of same tenor and date, interchangeably set their hands and seals the 4th day of July, A. D. 1832.

"ISAAC CRANE, (seal)
"W. W. CHAPMAN, (seal)
"WM. M. CRANE." (seal)

Thereupon the defendant demurred, and the plaintiff joined in the demurrer.

Thacher, for the defendant, contended that here were no covenants. The first part was merely directory as to the duty of the apprentice. There are covenants on the part of the master, but none on the part of the defendant. This indenture is according to the provision of st. 1821, c. 170. The master signed to entitle him to the provisions of the statute. The remedy of the master is by application to the District Court, but he has no claims upon the parent or guardian for the misconduct of the ward. Abbott on Shipping, 234; *Blunt* v. *Melcher*, 2 Mass. R. 228; *Holbrook* v. *Bullard*, 10 Pick. 68; *Ackley* v. *Hoskins*, 14 Johns. 374.

D. T. Granger, for the plaintiff. The indenture is in the common form, and sets forth that Crane is the father of the apprentice. The nature of the instrument implies a contract. No particular form of words is necessary to constitute a covenant. The defendant binds his son; that imports an agreement on his part. The duties of the apprentice are set forth in language importing a covenant. 3 Dane's Abr. 558; 3 Salk. 108; *Freto* v. *Brown*, 4 Mass. R. 675.

In the case of *Blunt* v. *Melcher*, 2 Mass. R. 228, the guardian did not bind the apprentice, but merely joined to express his assent, and that case is doubted in 3 Dane's Abr. 593. The case, *Holbrook* v. *Bullard*, 10 Pick. 68, is not applicable, the facts in this case being different.

The opinion of the Court was by

WESTON C. J. — The revised statute of 1821, c. 170, concerning apprentices, was like the statute upon the same subject which existed in Massachusetts, at the time of the separation.

It has been there decided, that upon such an indenture as has appeared in this case upon oyer, there are no covenants by which the guardian is personally bound. *Blunt* v. *Melcher*, 2 Mass. R. 228. Dane, in his abridgement, doubts the law of this case. 3 Dane, 593. But it has been sustained and re-affirmed by a subsequent decision. *Holbrook* v. *Bullard et ux.* 10 Pick. 68. The indenture in the last case was executed by the mother; but she has by statute the authority the father had upon his decease; and we are aware of no reason, why the same language should receive a different construction, where she is a party to the instrument, from what it would if executed by the father. There has been a decision to the same effect, under a similar statute in New York. *Ackley* v. *Hoskins*, 14 Johns. 374.

The parent or guardian may bind himself personally, if the instrument contains a clause to that effect. In the above cases it was held, that his signature is affixed to show his consent to the binding. That the recital of what the apprentice is to do, and what he is to abstain from doing, is with a view to set forth his duties. If the apprentice misbehaves, the master may, under the statute, be discharged from the indenture, on application to the District Court. Or he may have process from a justice of the peace, to procure the return of an absconding apprentice to his duty.

The construction in Massachusetts, while we were a part of that State, having been such as has been before stated, we do not feel at liberty to apply a different rule to the indenture under consideration.

Declaration adjudged bad.

NATHANIEL NORTON *versus* BENJAMIN F. WAITE.

Where one having in his hands a draft, void for want of consideration, passes it over in payment of a pre-existing debt, he is a competent witness in a suit between the holder and the parties to the draft, his interest being balanced.

The indorsee of a draft taken before maturity in payment of a pre-existing debt, is to be regarded as a *bona fide* holder, and is not subject to any existing equities between the parties to the bill.

ASSUMPSIT against the defendant as drawer of a draft on Hall & Duren, and by them accepted, dated Calais, July 24, 1837, for $900, and payable to the order of Zimri B. Heywood, at the Suffolk Bank in seventy-five days from date, and by him indorsed.

From the report of SHEPLEY J. before whom the cause was tried, it appeared that the draft was delivered by Heywood to one Heman Norton in part payment of his share of timber cut in township No. 4.

On the part of the defendant, it was proved that the draft was an accommodation draft, drawn and indorsed for the accommodation of Hall & Duren, and had been given for a consideration which had entirely failed.

The plaintiff read the deposition of Heman Norton, which was admitted subject to all legal objections, to prove that he transferred the draft to Nathaniel Norton before its maturity, in consideration of money lent him by the said Nathaniel Norton, five or six years previous to and during the year 1837; and that the draft in question was received in payment of money borrowed of the plaintiff; and that he, Heman, was insolvent at the time of the alleged transfer of the draft, and still continues insolvent.

It appeared that Heman Norton and Nathaniel Norton were residents of New York at the time of the alleged transfer of the note.

The jury returned a verdict for the plaintiff, and the defendants filed a motion for a new trial, because the verdict was against the evidence in the case.

Downes, for the defendant. The defendant is an accommodation indorser. The draft was passed to H. Norton, in payment for the stumpage of timber to which he had no title. H. Norton could not have maintained an action on this draft. The draft being an accommodation draft, and the consideration for its transfer to H. Norton having failed — and the defence of want of consideration being good as against him — the holder is bound not merely to show that it was indorsed before maturity, but that he received it in good faith. *Aldrich* v. *Warren*, 16 Maine R. 468; *Munroe* v. *Cooper*, 5 Pick. 412; *Duncan* v. *Scott*, 1 Camp. 100; *Rees* v. *Headfort*, 2 Camp. 574. The plaintiff is not entitled to recover on Norton's testimony. The transfer being in New York the *lex loci* must govern. The plaintiff must prove that the draft was taken in payment of his debt against H. Norton, and that he risked the insolvency of all the parties to it. No evidence of this fact was given. 1 Dane's Abr. 442; *Tobey* v. *Barber*, 5 Johns. 68; *Rosa* v. *Brotherson*, 10 Wend. 85. H. Norton was an incompetent witness, being interested. 2 Stark. Ev. 728.

T. J. D. Fuller, for the plaintiff, insisted that the jury had found that the draft was indorsed in good faith to the plaintiff, in payment of a pre-existing debt. As between an innocent holder and maker, no inquiry as to the consideration of the draft can be gone into. The case in 10 Wend. 85, is overruled in 16 Wend. 659.

If Norton's testimony were excluded, the result would be the same, the burthen being on the defendant to show how the draft was obtained. The presumption of law is, that the plaintiff came honestly by it.

The opinion of the Court was by

Shepley J. — It is contended, that Heman Norton was not a competent witness for the plaintiff. The bill was drawn, accepted, indorsed, and delivered to him on a consideration, which has failed. He parted with it before its maturity; and it does not appear, that he indorsed it. If his testimony should enable the plaintiff to recover, he would be liable to refund

the amount to the acceptors. Should he be regarded as liable to pay the amount to the plaintiff, if he should fail to recover, his interest would be a balanced one. A person, who sells a note or bill without indorsing it, is a competent witness for the holder, after the execution of the bill or note has been proved or admitted. *Williams* v. *Mathews*, 3 Cow. 252.

The principal question is, whether the plaintiff can be considered as an innocent purchaser of the bill before maturity and for a valuable consideration. The witness states that he transferred it before maturity in consideration of money lent to aid him in the support of his family during five or six years; and that it was received by the plaintiff in payment of money borrowed of him. The plaintiff and the witness both resided in New York, and the transfer was made there. It is contended therefore, that the plaintiff must establish his title to the bill by the law of that State; and that by that law he is not entitled to recover, because he received it for a pre-existing debt. His property in the bill must no doubt be established in conformity to the law of the State where the sale and transfer were made. But whether the indorsee is subject to the equities existing between the original parties does not depend upon his legal title to the bill. That title may be good, as between him and the person from whom he received it, and he be still liable to those equities. Whether the holder be liable to be affected by those equities was, as reported in the daily papers, regarded by the Supreme Court of the United States, during its session of 1842, in the case of *Swift* v. *Tyson*, as a question to be decided by the general mercantile law, and not by the law of the State where the transfer was made. And the decision is said to have been that a pre-existing debt was such a consideration for the regular transfer of a negotiable instrument as enables a *bona fide* holder to enforce it free from the exceptions, to which it might be liable between the original parties.

But if the law of the State of New York were to decide the question, it does not appear, that the plaintiff would not be entitled to recover. The difference between the law of that State and this on the point was noticed in the case of *Homes*

v. *Smyth*, 16 Maine R. 177, where it was attempted to be shown, that the reason why the holder of negotiable paper received before maturity for a pre-existing debt, was subjected to the equities existing between the original parties, was that such paper was not regarded there as received in payment of such debt; and that when there was proof, that it had been received in payment of the pre-existing debt it was not considered as subject to those equities. Nothing has occurred to change the opinion then expressed. In this case, although received for a pre-existing debt, the testimony authorized the jury to find, that it was received in payment of the money borrowed. And in such case the plaintiff must be considered as a *bona fide* holder for value before maturity and entitled to recover. *Judgment on the verdict.*

INHABITANTS OF BAILEYVILLE *versus* SARAH LOWELL, EX'X.

The inhabitants of a town against whom a warrant of distress has issued, are authorized to raise money with which to satisfy the same, either by loan or assessment; and if by assessment either at once, or if less burthensome, by instalments.

An agreement by the owner of an execution against the inhabitants of a town that if they would at once assess the amount required, and collect the same, he would make a certain discount is founded on sufficient consideration, and will be enforced.

THIS was an action of assumpsit. The general issue was pleaded and joined. The plaintiffs offered evidence tending to prove a parol agreement with the defendant's testator, made some time between the 22d day of July and the 5th of August, A. D. 1833, that if the plaintiffs would proceed to assess and collect as soon as convenient, on the resident and non-resident proprietors of said town, and other taxable property in said town, in the common and ordinary mode of assessing taxes, to the amount of a certain warrant of distress which before that time had been duly and legally issued against said town in favor of one Stephen Emerson, then being the property of defendant's testator, on a judgment duly and legally rendered

by the Court of County Commissioners for the county of Washington, at their December Term, A. D. 1831, for the sum of six thousand seven hundred and ninety dollars and twenty-four cents, to be paid to said Emerson, and the sum of twenty-seven dollars and fifty cents costs in that behalf, to be paid to said county; and further, as part pay of said tax or sum aforesaid, the said plaintiffs or their treasurer should draw an order on the State treasurer for the sum of one thousand dollars, which before that time and on the ninth day of March, A. D. 1832, had been granted by a resolve of the Legislature of this State to the settlers of said Baileyville, to be appropriated in part pay for the settlers' tax in building the Houlton road, for which said warrant of distress had issued, the said defendant's testator would discount or allow to the settlers or inhabitants of said town the sum of six hundred dollars.

It further appeared, that seven warrants of distress had been issued. That the first and second warrant had been returned, no part satisfied. The third warrant issued July 6, 1833, upon which appears the following indorsements: — "Feb. 26, 1834. Received of the within warrant, *four thousand seventy-eight dollars and eighty cents*, paid by H. & F. Richards." "Received of the within, nine hundred and twenty-three dollars and fourteen cents, as per receipt of this date." "Received of the within, one thousand dollars, paid by State of Maine," and this third warrant was returned satisfied for the sum of $6001,94. Fourth warrant issued August 26, 1834, upon which is indorsed fifteen dollars; also, on the same warrant, is a further indorsement of *three hundred and thirty-three dollars and ninety-seven cents*, by notes of sundry individuals. Fifth warrant issued September 16th, 1835, and returned no part satisfied. Sixth warrant issued Feb. 1, 1836, and returned no part satisfied. Seventh warrant issued Sept. 30, 1836, which last warrant was proved to have been settled in the fall of 1836, by the selectmen and town treasurer of Baileyville, with one James S. Hall, who had become interested in said warrant by taking town orders duly drawn and accepted.

The plaintiffs further offered in evidence the records of the

assessors of said town of Baileyville, from which it appeared that on the eighth day of October, A. D. 1833, the sum of $6821,14, being the full sum of said warrant of distress, was assessed upon the resident and non-resident proprietors, and other taxable property in said town, to defray the expense of making the Houlton road, and that sum was apportioned, $4936,80 on the non-resident proprietors, (and after deducting the $1000 given by the State *to the settlers in said town,*) the balance for the actual settlers to pay towards building said road would be only the sum of eight hundred and eighty-four dollars and fifty-five cents. It further appeared in evidence from the records of said town, that a legal meeting of the inhabitants was held on the 22d day of July, A. D. 1833, when it was voted not to raise the money to settle said warrant, and that William Anderson and Moses Mosely were chosen a committee to settle with the owner of the warrant of distress; also, that on the fifth day of August following, a second meeting of the inhabitants was held, at which time it was voted to raise the money to settle said warrant, and said Anderson and Mosely were again chosen a committee to settle the warrant of distress with the owners of the same.

The defendant's counsel requested SHEPLEY J. who tried the cause, to instruct the jury, that in law no action could be maintained, as no sufficient consideration was alleged, or appeared in the first count of the writ; the Court did not so instruct the jury, but did instruct the jury that if they found, from the evidence, the defendants did promise to give six hundred dollars, as testified to by the plaintiffs' witnesses, they might return, on that count, a verdict for the plaintiff. The jury returned a verdict for the plaintiff. If these instructions were erroneous, the verdict is to be set aside and a new trial granted.

Chase for the defendant. No consideration is alleged in the declaration. The plaintiffs have done no more than they were bound by law to do. The declaration is bad on demurrer. 1 Saund. on Pl. & Ev. 114; *Jones* v. *Ashburnham*, 4 East, 464. The plaintiffs owed a debt, and the assessors of the

town were by law required to make an assessment to meet that debt. The inhabitants of the town could not have prevented that assessment, had they so wished. The assessment of taxes is to be made by the laws of the State; and in making it, the assessors are not under the control of the town. The agreement to levy and collect a tax was merely a promise to do what the law requires. If the assessors refused to do their duty, it would be a violation of law; and the omission to violate the law is no consideration for a promise. The plaintiffs are not to be permitted to say that they voted that the assessors should not assess, and that afterwards they directed that to be done, which the law requires, and that such was the consideration of the promise made by the defendant. If the contract was founded on the mere discharge of a duty, it is without sufficient consideration.

The promise to procure the order was of no benefit to the defendant. The town was bound to pay; and by procuring the order for $1000, a debt was paid by means of a gift. The town was relieved to the extent of the order. The only loss or injury thereby to the town was the loss arising from the payment of the debt due.

B. Bradbury, for the plaintiff. An express contract is proved in this case. Any consideration however slight is sufficient to support a promise. 1 Com. on Con. 1; 21 Am. Jurist, 260; *Train* v. *Gold*, 5 Pick. 380; Chitty on Con. 7. The consideration alleged is sufficient. A mere change of the time, mode or place of payment is sufficient consideration.

The opinion of the Court was by

Weston C. J. — A warrant of distress, which is a judicial writ, in the nature of an execution, the final process of the law had issued from competent authority, in favor of Stephen Emerson against the present plaintiffs. To that process, they were bound to submit. It acted coercively upon them; and if the amount, for which it issued, was not otherwise paid, the officer, to whom it was confided, was authorized and required to distrain the property of the inhabitants, to be made available

in satisfaction. If they thought proper to remain passive and await the consequences, no legal mandate necessarily required their action.

It was at their option to raise the money by loan, or by assessment; and if by assessment, either at once, or if more convenient, or less burthensome, by instalments. The defendant's testator, to whom the money belonged, to induce the town, as the declaration avers, to raise the amount required at once by assessment, promised upon that consideration, to make a certain discount. They did so; and now claim damages for the non-performance of his promise. The question raised is, whether a sufficient consideration is alleged in the declaration. Prior to this promise, the town had refused to take the course he desired. In consequence of the promise, they did take that course, in consideration of the discount stipulated. The service to be performed by them, he voluntarily procured for that price. He deemed the measure an advantage to him, equivalent to the sacrifice; and he best knew what his interest required. The course thus purchased, was a trouble to them, which amounts to a legal consideration. And it is not the less so, because their interest was also promoted by that mode of extinguishing their debt. If both parties were benefitted, so much the better.

The counsel for the defendant has not taken the ground, that there is a variance of proof, or that the whole consideration had not been set forth. If he had, the objection might have been removed by an amendment. The consideration alleged, was proved and somewhat more. That the town made the money, granted to them by the State, available for his benefit, was a good legal consideration; even if the assessment and subseqent collection was insufficient. Both the promise and the consideration were proved to the satisfaction of the jury; and in our opinion the instructions requested were properly withheld, and those which were given were warranted by law.

Judgment on the verdict.

STEPHEN JENNEY *& al. versus* WILLIAM DELESDERNIER.

A deputy sheriff who has been released by the sheriff is a competent witness in a suit against the sheriff for his default, notwithstanding his sureties may have given a new bond conditioned to indemnify the sheriff against the alleged default, to which his testimony applies.

The attorney of the plaintiff without any special authority therefor may approve of the receipt taken by the officer for personal property attached by him, and thereby relieve him from his obligation to retain and produce the property, that it may be taken in execution.

He may elect and control the remedy, and all the proceedings arising out of and connected with it, but he cannot release or discharge the cause of action, without receiving payment.

Though the attorney may conduct so indiscreetly, negligently or ignorantly, or may so abuse his trust as to be answerable to his client in damages, such conduct is not to prejudice the officer, who is entitled to regard him as the agent of his client in all the contingencies which may arise in the prosecution, and all the processes adopted to secure or collect the debt entrusted to his care.

A new trial will not be granted to enable a party to recover nominal damages.

THIS was an action against the defendant, sheriff of the county of Washington, for the default of Thomas Skolfield, a deputy sheriff under him, in not safely keeping property attached and in releasing the same.

From the report of SHEPLEY J. before whom the cause was tried, it appeared in evidence that the plaintiff, on the 14th of Jan. 1836, sued out a writ of attachment against George I. Galvin, and delivered the same to said Skolfield for service, who, on the 15th of February following, returned thereon an attachment of a quantity of pork and flour of the value of $4000; that the action was duly entered, and that at June Term, 1838, judgment was obtained, and an execution issued thereon; that within thirty days from the rendition of judgment the execution was placed in the hands of an officer, who seasonably made a demand on Skolfield, (who had ceased to be a deputy) but that the property was not delivered.

It appeared in evidence on the part of the defendant, that said Galvin proposed to the attorneys of the plaintiff that he would give a receipt for $4000, for property attached, and that

they should not attach any property of his to which the attorneys assented; that they informed the officer that they had agreed with Galvin, who should sign the receipt with him and the amount for which it should be given, and that they wrote the receipt and delivered the same to the officer, who procured it to be signed by the individual named by the attorneys. These facts were proved by the testimony of said Galvin and Skolfield, and there was opposing testimony thereto on the part of the plaintiffs.

The plaintiffs objected to the admission of said Skofield as a witness, but he having been released, was admitted to testify. After he had testified, the plaintiffs proved that the sureties on his official bond to the sheriff had made an arrangement with the sheriff, more than a year before the trial, and had given him a new bond with other sureties, to indemnify him against this suit. Skolfield was again called as a witness, and after proof of the above facts, he was again objected to as interested, and the objection was again overruled.

It appeared that all who signed the receipt were insolvent when judgment was rendered and still continue so. It also appeared that Skolfield retained the receipt until after a demand was made upon him for the property attached, and soon after sent it enclosed with a copy of his return to the plaintiffs attorneys.

On this testimony the jury were instructed that the testimony conclusively proved, that an attachment had been made to the amount of four thousand dollars; that if the plaintiffs by their attorneys agreed that no actual attachment of personal property should be made, provided a receipt for $4000 worth of property should be given, and so instructed the officer, and assented to and approved of the officer's taking the persons as receiptors who were taken, they being then in good credit, although they did not expressly agree to assume any responsibility as to the ability of the receiptors ultimately to pay the amount, the officer is excused from warranting their responsibility at the time judgment was recovered, and if he has acted faithfully and offered the receipt for the use of the plaintiffs,

they would be justified under such circumstances in finding only nominal damages: — and if the plaintiffs, by their attorneys, did not assent to, and approve of the persons being taken as receiptors, who were taken, the deputy was bound to keep the property safely, or to take such persons as receiptors, as would at all events, be responsible, and the plaintiff would be entitled to recover four thousand dollars named as attached on the writ, and interest from the time of making a demand of the property.

The jury found a verdict for the defendant, which is to be set aside and a new trial granted, if these instructions were incorrect.

Downes, for the plaintiffs. The deputy sheriff, Skolfield, returned an attachment of property. He was improperly admitted, because he was interested, and because his testimony falsified his return, and proved that no attachment had ever been made. *Gardner* v. *Hosmer*, 6 Mass. R. 327; *Purington* v. *Loring*, 7 Mass. R. 388; *Davis* v. *Maynard*, 9 Mass. R. 242; *Simmons* v. *Bradford*, 15 Mass. R. 84; *Wyer* v. *Andrews*, 1 Shep. 168. The officer might have protected himself by returning the facts. If the deputy was admissible, and his testimony was true, no defence was established. The attorneys of the plaintiffs had no authority to give the directions which the deputy, Skolfield, testified to have been given. It was not within the scope of their authority, as attorneys. *Bank of Georgetown* v. *Geary*, 5 Pet. 113; *Jackson* v. *Bartlett*, 8 Johns. 366; *Langdon* v. *Potter*, 13 Mass. R. 319; *Buckland* v. *Conway*, 16 Mass. R. 396. The verdict should be set aside. The plaintiffs, at all events, were entitled to nominal damages. *Weld* v. *Bartlett*, 10 Mass. R. 475; *Nye* v. *Smith*, 11 Mass. R. 188.

T. J. D. Fuller and *J. Granger*, for the defendant. The deputy is only answerable for the non-performance of the duties enjoined by law. The law did not require him to make a nominal attachment and take receiptors. Whatever was done, was done at the request and by the procurement of the plain-

tiffs. He acted solely on the condition that the responsibility of what might be done should rest on them. The plaintiffs being parties to this arrangement, are bound thereby. *Knowlton* v. *Bartlett*, 1 Pick. 271; *DeMoranda* v. *Duncan*, 4 T. R. 120; *Gorham* v. *Gale*, 7 Cow. 739.

The sheriff may show the property in another than the debtors, as whose it was attached. *Learned* v. *Bryant*, 13 Mass. R. 224; *Fuller* v. *Holden*, 4 Mass. R. 498. The plaintiffs are bound by the acts of their attorneys. The Court will presume every thing done in pursuance of authority given, till the contrary appear. *Gaillard* v. *Smart*, 6 Cow. 385. The agreement made by the attorneys with the sheriff, is within the scope of their authority. It commences with the suit, and terminates with the satisfaction of the judgment obtained. The power of the attorney is more extensive over the debt than over the remedy. The attorney in relation to the remedy cannot be controlled by the client. Anon. 1 Wend. 108; *Holker* v. *Parker*, 7 Cranch, 436. He may become a party to an assignment. *Gordon* v. *Coolidge*, 1 Sum. 537. He may consent to a default, or to discontinuance, or he may enter a remittitur as to damages. *Earl of Yarmouth* v. *Russell*, 2 Ld. Raym. 1142. He may direct as to the mode of enforcing an execution. *Gorham* v. *Gale*, 7 Cow. 739. He may compromise a debt. *Holker* v. *Parker*, 7 Cranch, 436; *Georgetown Bank* v. *Geary*, 5 Pet. 99. He may direct an attachment without directions from his client. *Betts* v. *Norris*, 15 Maine R. 469. He may direct what property, real or personal, shall be attached. *Lynch* v. *Commonwealth*, 16 S. & R. 369. If the attorney can direct an attachment, he can modify it, as in his judgment shall seem most for the interest of his clients, and they are bound thereby. The plaintiffs have no property in the goods attached. They have only an inchoate right, which may or may not become perfected. If an attorney can dissolve an attachment, as he may by entering a nonsuit, if he can discharge a party, much more should he be considered as having the powers exercised in this case.

The deputy was properly admitted as a witness. *Jewett* v. *Adams*, 8 Greenl. 30.

Preble, in reply. The officer in this case returned a certain attachment as made by him, but he does not return that a receipt was taken. His return leaves it in his own keeping. That return he cannot deny. If it cannot be denied directly, neither can it be denied indirectly. The return, with all its legal consequences, is binding on him. It may be contradicted by third persons, but not by the deputy or the sheriff. But the evidence received in effect contradicted the return, by shifting the legal responsibility from the sheriff to the receiptors, and by releasing the officer from the legal consequences arising from his return.

The attorneys had no authority to make the agreement testified to by Skolfield. The plaintiffs fully established their case. It was incumbent on the defendant then to establish his defence. He was bound not merely to prove the agreement but the authority to make it. None is shown, but that resulting from the relation of attorney and client, and that does not confer it. An attorney, though he may discontinue a suit, cannot discharge it. In the case of a discontinuance, the dissolution of the attachment is the act of the law, not of the attorney. The existence of the right contended for, cannot be inferred from the power of an attorney to refer a suit. A reference is one of the modes recognized by law for the prosecution of the suit, and necessarily falls within the province of an attorney. But still the attorney can only refer *the* demand in suit. The attorney cannot release the debt. If not, can he release the officer from the responsibility the law throws upon him, and assume it himself in behalf of his client? The officer is not bound to take a receipt, and in taking one the risk is entirely his own. If he follows the directions of the attorney in taking one, he should see that the attorney can legally give such directions.

The opinion of the Court was by

Shepley J. — The deputy of the defendant having been released by him was a competent witness. *Turner* v. *Austin*,

16 Mass. R. 185; *Jewett* v. *Adams*, 8 Greenl. 30. The arrangements made between the sureties of the deputy and the defendant would not effect the rights of the deputy. If the sureties in consequence of that arrangement, should pay to the defendant the amount, which he may be obliged to pay, if the plaintiffs should recover; they would have no legal claim upon the witness; for they must fail to prove, that it was paid on account of any liability incurred by him. His release would protect him against any such claim; whether presented by them, or by the defendants. It is said, that to permit him to testify is in effect to allow him to contradict his return. That states the fact, that an attachment was made; and it is not contradicted, by stating the manner of making it, and that the property was at the same time left in the custody of the debtor, and his receipt, with sureties, taken for its safe keeping and delivery. It would seem to come more nearly in conflict with the return to receive testimony, that the property attached was not the property of the debtor, but it has been decided that such testimony is admissible. *Canada v. Southwick*, 16 Pick. 556. This objection cannot prevail.

The principal question in the case is, whether the attorneys of the plaintiffs, without any special authority therefor, might approve of the receipt taken by the officer, and thereby relieve him, from his obligation to retain and produce the property, that it might be taken in execution. The practice of law in this country, and especially in this part of it, is in several respects peculiar to our institutions and laws, and differs essentially from the English practice. With us no warrant of attorney is required. *Osborne* v. *The Bank of the United States*, 9 Wheat. 738. The duties of barrister and attorney are united. The extent of the authority cannot therefore be determined by any written evidence of it, but must be sought in the nature of the business to be performed. Our laws authorizing an attachment and seizure of the debtor's property before judgment have given an additional remedy for the security and recovery of debts. In making use of it the attorney of the creditor must exercise such authority as will enable him

to apply it with effect, and to control it so as to guard against its being made the occasion of injury instead of benefit to his client. When a creditor places a demand in the hands of an attorney for collection, the inference of law is, that he authorizes him to make use of such legal remedy and mode of proceeding, as may prove most effectual in accomplishing the object. The client is not supposed to be informed fully, what may be the best remedy or the safest mode of proceeding on it, and therefore to entrust these matters to his legal adviser. Hence it was to have been expected, that attorneys would feel authorized in such cases to issue a writ of attachment, if in their own judgment the most efficient remedy, and to order an attachment of the debtor's property to be made. By ordering an attachment he would be but making use of a remedy, which the law afforded to accomplish the object required of him. Accordingly it will be perceived in the reports of decided cases, that attorneys have been accustomed to order officers to make attachments of the debtor's property; and that the Courts have never questioned their power to do this; but have acted upon it as being effectual to control and bind the officer. The order for the particular property to be attached on the writ, *Goddard* v. *Turner*, which occasioned the suit of *Turner* v. *Augustine*, 16 Mass. R. 181, appears to have been made by an attorney; and it was contended, that the attachment was not effectual, but the authority of the attorney was not questioned. It directed certain property to be attached, not including the vessel in controversy, and the Court say, "a special direction may justify the officer in not going beyond it, but it does not deprive him of the authority to obey the command in the precept." Another instance of an attachment made by the order of an attorney is afforded in the case of *Gordon* v. *Jenney*, 16 Mass. R. 465. The several attachments named in the case of *Haven* v. *Snow*, 14 Pick. 28, are stated to have been made by the direction of an attorney, and the Court recognized his authority to determine, which should be first made and the order of sequence; and held, that notice of them to him was notice to his clients. Speaking of the

attorney the Court say, "he directed the order of attachment, and he could have no reason to doubt, that the plaintiff's attachment had been made as directed." The case of *Gordon* v. *Coolidge*, 1 Sum. 537, presents another instance of attachments made by order of plaintiffs' attorneys without any special authority, and the exercise of that power appears to have come to the knowledge of the Court without its being questioned. The St. of 1821, c. 105, and of 1829, c. 445, for the regulation of fees, recognize the authority of the plaintiff's attorney to make a written order to the officer to attach property or to arrest the body. And this Court decided, in the case of *Betts* v. *Norris*, 15 Maine R. 468, that these statutes relieved the officer from the obligation to make any thing more than a nominal attachment without a written order. The right of an attorney to order an attachment without any special authority from his client, may then be regarded as arising out of his authority to make use of any process and of any proceeding upon it, which the law affords for the collection of debts; as recognized in the practice of the law by the judicial courts; and as sanctioned in this State by the enactments of the legislature. If the authority to order an attachment be established, it will be found to include the authority to modify, restrict, and revoke it. For he cannot properly and safely exercise the authority without such a discretion. He must, in using this, as well as other remedies, be governed by the circumstances in which he is placed, and judge to what extent, as well as when it ought to be used for the benefit of his client. Can it be contended that the attorney has authority to order an attachment and no authority the next moment to restrict, or to recall it? Or does the fact that the order has been executed, deprive him of such power over it? If the property in the goods had thereby been changed, it would be so; but it only creates a lien on them, which is only inchoate and connected with the remedy and not with the cause of action. It would be most mischievous in practice to regard it as irrevocable, for the attorney might order a shop of goods in the possession of the debtor to be attached, the order might

be obeyed, and before the goods were removed the debtor might fully satisfy the attorney, that the goods were not liable to attachment for his debts, and if the attorney could not revoke the order and withdraw the officer, his client might be subjected to heavy losses in disposing of them, and to damages for breaking up the business. Such cases and others of like character would not be of unfrequent occurrence.

It has been decided, that an attorney has authority to receive payment and to discharge the debt. *Fowler* v. *Shearer*, 7 Mass. R. 23; *Jackson* v. *Bartlett*, 8 Johns. 367. And if he should state to the officer, who had made an attachment, that he had received payment of the debt, or that the plaintiff had settled the suit, and that he might return the goods to the debtor, if the officer should obey and the statement should prove to be incorrect, the officer must be accountable for the whole property, unless the right to control the attachment be admitted. And under such a practice denying the attorney's authority to discharge the attachment, the officer must detain the property until an order could be obtained from the plaintiff, however distant, subjecting himself or the plaintiff to damages for a detention of the property after the debt had been paid.

The attorney may discharge an attachment by filing a new count, apparently not for the same cause of action. *Fairfield* v. *Baldwin*, 12 Pick. 388. And by entering a discontinuance or nonsuit. *Gaillard* v. *Smart*, 6 Cow. 385. And it is not perceived what security it can afford the client, or what principle of law it can preserve, to deny the power to do that directly, which it is admitted may be done indirectly. In the last case, it is said, "his general power does not extend to a retraxit, or release, because they relate to the cause of action itself; not merely to the remedy, which he is retained to conduct." And here is disclosed the true principle relative to the extent and limitation of the power of an attorney. He may elect and control the remedy, and all the arrangements arising out of and connected with it, but cannot release or discharge the cause of action without receiving payment, or do any thing

which will have that effect. The attorney may in these matters conduct so indiscreetly, negligently, or ignorantly, or may so abuse his trust, as to be answerable to his client in damages. But such conduct should not prejudice the officer, who is entitled to regard him as the legal adviser of the client in all the various contingencies which may arise in the prosecution and use of the processes adopted to secure and collect the debt, or enforce the claim; and as clothed with full powers for these purposes. The extent of an agency is properly determined, when the intentions of the principal and agent are ascertained. What are the intentions of the client and attorney, when the one entrusts to the other a demand to be collected, or a claim to be enforced? If the client were asked, if he intended, that his attorney should release or discharge the cause of action without payment or satisfaction, the answer would be, that he did not. Again, if asked if he intended that his attorney should select, control, and manage the processes and remedies to be resorted to for the purpose of collecting or enforcing his claims, the answer would be, that he did — that he did not know the law, and could not judge of these matters, and that he expected that his attorney was informed and could properly decide upon them. The responses of the attorney to these questions would be similar to those of his employer. And it is believed that the decided cases lead to this conclusion. *Beecher's* case, 8 Co. 58, decides, that the plaintiff's attorney cannot enter a retraxit, "because it shall be a perpetual bar, and in a manner a release." In *Lamb* v. *Williams*, 1 Salk. 89, and 6 Mod. 82, as reported in Salkeld, "it was held, that the attorney has authority, by his being constituted attorney, to remit damages; and that a remittitur need not be by the plaintiff *in propria personæ*, as a retraxit must." Kent C. J. in *Kellogg* v. *Gilbert*, 10 Johns. 221, speaks of this case, and says, "it did not appear, that the act was without or against the consent of the client. It was the opposite party, that made the objection on a writ of error." But the decision was, if the report be correct, that the attorney had the authority by being constituted attorney. The action was trespass against several,

and the report, in the Modern Reports states, that the jury found several damages. The case appears to have been an action against several for a joint trespass, and the finding of the several damages to have been erroneous. *Hill* v. *Goodchild*, 5 Burr. 2791. The plaintiff's attorney, instead of entering a *nolle prosequi* as to all but one measure of damages, as he might have done, 1 Saund. 207, a, note (2), released those assessed against, all but one. He did not release, therefore, any damages to which his client was legally entitled. And the case only shows such a control of the remedy as would secure all his client's legal rights. The case of the *Earl of Yarmouth* v. *Russell*, 2 Ld. Raym. 1142, affords an instance of a like proceeding by an attorney, where several damages were assessed in an action of assumpsit. It has been decided, that the attorney may refer the suit. *Buckland* v. *Conway*, 16 Mass. R. 396; *Holker* v. *Parker*, 7 Cranch, 436. And that, when it was referred to an arbitrator, the attorneys were guilty of negligence in omitting to attend before him. *Swannel* v. *Ellis*, 1 Bing. 347.

The principle involved in the decision of the case of *Reece* v. *Righy*, 4 B. & A. 202, would require the most vigilant attention to all the circumstances connected with the remedy. It was there held, that an attorney was guilty of negligence by suffering the cause to be called on for trial without having previously ascertained, that all the plaintiff's witnesses were present. It was decided, in the case of the *Union Bank of Georgetown* v. *Geary*, 5 Pet. 99, to be within the scope of an attorney's authority conducting the suit, to agree to postpone execution on a judgment against the indorser, and to issue it immediately against the maker. It has been stated in the cases of *Tipping* v. *Johnson*, 2 B. & P. 357, and of *Jackson* v. *Bartlett*, 8 Johns. 367, that the authority of an attorney determines with the judgment." And in 1 Rol. Abr. 291; *Morton's* case, 2 Show. 139, and 2 Inst. 378, have been relied on as authority for this assertion. In *Russell* v. *Palmer*, 2 Wilson, 325, it was however decided, that an attorney was guilty of negligence in omitting to charge in execution, within

two terms of the judgment, a debtor, who was in prison. In *Burr* v. *Atwood*, 1 Salk. 89, it was decided, that the attorney in the original suit might sue out a *scire facias* against bail. And in *Dearborn* v. *Dearborn*, 15 Mass. R. 316, that he was guilty of negligence in omitting to do it. In the case of *Cheever* v. *Mirrick*, 2 N. H. R. 376, that he might consent, that an alias execution should issue for the benefit of an officer, who had given security for the debt. In *Doty* v. *Turner*, 8 Johns. 21, the Court recognise the authority of the attorney, when he delivered an execution to an officer, to instruct him, "that he need not remove the property to be levied on out of the possession of Pierce [the debtor] nor need he take a receipt for it."

And a somewhat similar exercise of authority over the execution was admitted in *Kellogg* v. *Griffin*, 17 Johns. 274. In *Brackett* v. *Norton*, 4 Conn. R. 517, it was decided, that the attorney may give directions concerning the levy of the execution. And in that case it is said, "when a note is sent for collection from a creditor in one State to an attorney in another, by the reception to collect, the latter assumes the duty of performing the measures requisite for the purpose with integrity, diligence and skill." In the case of *Lynch* v. *The Commonwealth*, 16 S. & R. 368, it is said, "the attorney is in some degree the agent as well as the lawyer of the plaintiff; when execution has issued, he often gives time to the defendant, and directs the sheriff to postpone a sale advertised, and so far as I know, this has always been taken as a justification to the sheriff for not selling. Such discretionary powers are necessesary for the plaintiff's interest; without the exercise of them many times and under many circumstances property sufficient to pay the debt would not sell for enough to pay the costs." "If a plaintiff wishes his attorney to have less power, than is usually exercised, it would seem more consonant to right to give him in writing a special and limited authority, than to bring the law of another country and say in opposition to constant and general understanding that the power of his attorney is to be judged of by that law." "In the present case, if the attorney had told the

sheriff to abstain from selling he would have obeyed, must have obeyed." The case of *Gorham* v. *Gale*, 7 Cow. 739, decides that it is within the authority vested in the attorney to direct the sheriff as to the time and manner of enforcing the execution. And after judgment it has been decided to be the duty of an attorney in the suit to bring a writ of error to reverse it, if it be erroneous. *Grosvenor* v. *Danforth*, 17 Mass. R. 74. And that he has authority to make the demand on an administrator required by statute, before another suit is commenced on his administration bond. *Heard* v. *Lodge*, 20 Pick. 53. And that he may, while the suit is pending, bind his clients to waive a notice required by statute. *Alton* v. *Gilmanton*, 2 N. H. R. 520. And that it was his duty, even contrary to the express instructions of his client, to consent to open a default, when according to the settled rules of practice the Court would do it. 1 Wend. 108.

In *Jackson* v. *Bartlett*, 8 Johns. 361, it was denied, that the plaintiff's attorney had authority to discharge the defendant from an arrest on the execution, before the money was paid. The ground of the decision was, that it discharged the debt, which he could not do without satisfaction. To the same effect is the case of *Kellogg* v. *Gilbert*, 10 Johns. 228, where however it is said, that "in the progress and until the consummation of the judgment the attorney has, no doubt, and ought to have, a large and liberal discretion." In the case of *Iveson* v. *Conington*, 1 B. & C. 160, the attorneys of the parties agreed, that the record in the suit should be withdrawn, that the defendant should take back the horse named in the suit and pay an agreed sum to the plaintiff who should pay costs to the defendant; and the Court said, that the plaintiff was not bound by that agreement. It will be perceived, that the attorney not only undertook to discharge the plaintiff's claim by a compromise, but to make him part with his property in the horse. In *Beardsley* v. *Root*, 11 Johns. 465, it was decided, that the attorney of the plaintiff had no authority to purchase for his client property sold on the execution. And in *Lewis* v. *Gamage*, 1 Pick. 346, that he could not discharge

a debtor upon receiving a sum less than the amount due. And in *Millanden* v. *McMicken*, 19 Martin, 35, that he could not release the debt, though he might grant a stay of execution. And in *Waldon* v. *Grant*, 20 Martin, 565, that he could not alienate a judgment obtained by his client. In the case of the *York Bank* v. *Appleton*, 17 Maine R. 55, it was decided, that an attorney could not release an indorser upon the note in suit. And in the case of *Springer* v. *Whipple*, 17 Maine R. 351, that he could not release one interested in the event of the suit to enable him to testify. To the same effect is *Murray* v. *House*, 11 Johns. 464, and *Marshall* v. *Nagel*, 1 Bailey, 206. In these cases there was an attempt to release collateral interests, or a part of the claim in suit. The case of *Fling* v. *Trafton*, 13 Maine R. 295, admits an attorney to have power to receive satisfaction of an award, discharge the rule of reference, strike out the name of one defendant, and prosecute the suit to judgment against another defendant.

There has been no decided case claiming perhaps a more extensive authority and a larger discretion for attorneys in matters relating to the remedy, than the case of *Gordon* v. *Cooldige*, 1 Sum. 537. And while it may justly claim more deference from the consideration, that Mr. Justice Story, who in his treatise on Agency has so thoroughly examined the principles and decided cases, delivered the opinion; it may be doubted whether in some respects it does not, if it be correctly understood, give a more enlarged authority to the attorney, than will be found authorized by any decided case. The facts bearing on this point, as there stated, are in substance; that Messrs McGaw & Hatch, attorneys at law in Bangor, previous to the month of October, 1831, received from Loring and Kupfer, and from Bradley and Sigourney, all of Boston, demands against the defendant for collection. On the fourth day of that month writs were made upon these two demands and delivered to an officer to be served when necessary. On the following day these attorneys were requested to obtain security for a demand of Gilman, Pritchard & Co., against the defendant. To accomplish this, an assignment of his stock of goods was made

by the defendant on the same day to these attorneys to be sold by them and the proceeds applied to pay, 1st, Grant & Stone; 2d, Loring & Kupfer; 3d, Bradley & Sigourney; 4th, Gilman, Pritchard & Co., and then others. This assignment having been made without the knowledge or consent of Mr. McGaw, on the following day he required attachments of the goods to be made on the writs in favor of Loring & Kupfer, and Bradley & Sigourney, these suits were prosecuted to judgment and a part of the goods assigned were sold on the executions obtained on them, and the remainder were sold under the assignment. Hatch signed the assignment "McGaw & Hatch, for the creditors herein named." Gilman, Pritchard, & Co. affirmed these acts. The plaintiff summoned McGaw & Hatch as trustees of Coolidge in a suit in their favor against him. In the opinion delivered it is said, "McGaw & Hatch insist, that they had full authority to bind all their clients by the assignment, if in their discretion, they chose to exercise it. Nor do I perceive how upon the facts this power can well be denied them. The debts were confided to them for collection according to their discretion. And if they chose to take security instead of enforcing an immediate collection by suits, it seems to me clear, that they were at liberty so to do. And they might elect the security of a general assignment, if in the exercise of a sound discretion, that appeared to them to be the best for their clients. There is no pretence to say, that any limitation was intended by the creditors upon their discretion. They were left with an implied general liberty to act in the premises, as they might deem best for the interests of their clients." When speaking of the signature of Hatch in the name of McGaw & Hatch, as attorneys of the creditors, the Judge says, "It was an act binding on the creditors who were their clients. It has never been repudiated by them. And I exceedingly doubt, if in point of law, it was capable of being repudiated. If then the creditors were bound by it, the subsequent acts of McGaw & Hatch in proceeding on the attachments were unjustifiable and irregular." This case is understood as directly or by implication admitting, that the attorneys without any

special authority therefor might direct attachments to be made; that on obtaining, what in their own judgment was more satisfactory security, they might forbear to proceed on them; that they might delay an immediate collection by suits, and take security; and that they might elect as such security a general assignment and one giving a preference over their clients to one whom they did not represent before the taking of the assignment. As the greater includes the less, if an attorney may forbear to prosecute, or withdraw, or relinquish an attachment absolutely, he may do so conditionally upon security given to the officer or to himself for the goods attached. Or according to the last case he may take other collateral security not subject to the dangers and difficulties of an attachment. And it may often happen, that the interest of his client would be greatly promoted by his relinquishing an attachment of property occasioning a heavy expense to preserve it, or to which the debtor's title was doubtful, and taking other security in the place of it. In this way the debt might be eventually collected, when without the exercise of such authority it would be lost. The usual course of permitting goods attached to remain in the possession of the debtor, or of his friends upon his giving security to the officer to produce them or their value, is but a mode of releasing the attachment upon new security taken. And it would often happen without resorting to such a course, that an attachment would not only be useless but expensive to the plaintiff by subjecting him to heavy expenses. The attachment of live animals requiring to be kept, of vessels, and of logs floating upon the water, may be named as examples. If, as has been suggested, the only property of much value, which the defendant in this case had, consisted of logs floating on the waters of the St. Croix river, well might the plaintiffs' attorneys not only have been justified, but deserving of commendation instead of censure for making the arrangement stated in the case. For it may readily be perceived, that such logs could be floated into the Province of New Brunswick as easily as to the place of manufacture in Maine. And that any attempt by the officer or his agents to seize, secure and preserve

them would be unsuccessful, as it would have been expensive. And if they might take a general assignment as security, they might through the instrumentality of the sheriff, well prefer taking what were then considered two good names as security, in preference to attempting to make such an attachment. The instructions on this point are considered as authorized by our practice and by the law, as exhibited in the decided cases. Courts do not grant new trials to enable parties to recover nominal damages only. *Harris* v. *Jones*, 1 M. & Rob. 173. As none of the objections can prevail, there must be judgment on the verdict.

JOHN KELLAR, Treasurer, *versus* DANIEL SAVAGE *& als.*

It is no defence to a suit on a collector's bond, that the assessment preparatory to issuing the tax list and the warrant accompanying the same, were not signed by the assessors.

The collector is bound to obey a warrant in due form, and issuing from the assessors, though they may not have complied with every requisition of law anterior to issuing it.

In the absence of proof, the Court will presume that the tax list and the warrant for collection were duly signed by the assessors.

Where writings are proper matter of defence, and the adverse party must have understood that they would necessarily come in question, notice to produce them will be dispensed with.

The right of a plaintiff, as treasurer, to sue, can only be contested by plea in abatement.

Town treasurers, though annually elected, being authorized to sue for debts due the town, continue in office *quoad* any suit by them commenced till its termination.

A collector of taxes, having acted in that capacity and given a bond, is estopped to contest the legality of his election.

THIS was debt on a bond given by the defendants to John Dickinson, treasurer of the town of East Machias, the said Savage being the principal therein, and the other defendants sureties for him as collector of taxes in that town, for the year 1834. The condition of the bond appears in the opinion of the Court.

The plaintiff read in evidence from a book termed the Assessors' Book, an assessment of taxes for the year 1834. It did not appear to have been signed by the assessors. He also read from said records a warrant purporting to be signed by the assessors, under date of May 29, 1834, directed to the defendant, Savage, for the collection of said assessment. It also appeared that a warrant, signed by the assessors, and a list of the assessed taxes were entered upon a small book and delivered to the said Savage, about June 1, 1834. It did not appear that the list of assessments thus delivered was signed by the assessors, nor that the warrant referred to the list as being their assessment, nor was there any proof that said list was not signed by the assessors, or that said warrant did not refer to the accompanying list as being the assessment. It was admitted that all the taxes collected had been paid to the county treasurer, except the sum of $213,23.

It appeared that John Dickinson was chosen treasurer for the year 1834.

To prove that the plaintiff was chosen treasurer in 1837, a warrant for a town meeting to be holden the 3d of April, 1837, and the constable's return thereon, was read. The record of this warrant and return was not signed. From an unbound volume the plaintiff read the records of the meeting at which he was chosen treasurer. But in this volume the warrant for the town meeting and the constable's return were not found. The existence of two books of records was explained by the testimony of J. C. Talbot, town clerk, who testified that he usually carried an unbound volume to the town meetings, in which he entered at the time the proceedings of the meeting, and that subsequently he entered at length in the bound volume of records the proceedings of the meetings, together with the warrant and return thereon.

The defendant's counsel objected to evidence to prove the warrant in the hands of Savage to have been signed by the assessors, no notice to produce the warrant having been given.

If, in the opinion of the whole Court, this evidence is sufficient to maintain this action, the defendants are to be defaulted; otherwise, a nonsuit is to be entered.

The case was very elaborately argued in writing.

Lowell & Dunn, for the plaintiff, cited *Briggs* v. *Murdock*, 13 Pick. 305; *Welles* v. *Battelle*, 11 Mass. R. 477; *Cotterill* v. *Myrick*, 3 Fairf. 224; *Bucksport* v. *Spofford*, 3 Fairf. 491; *Ford* v. *Clough & al.* 8 Greenl. 334; *Hartwell* v. *Littleton*, 13 Pick. 229; 3 Stark. on Ev. 1250; *Kellar* v. *Savage*, 17 Maine R. 444.

R. K. Porter, for the defendant, insisted that there was no evidence that the plaintiff was treasurer at the time of the trial of the cause, which was in 1840; and that the office being annual the suit could not be prosecuted in his name, after the expiration of his term of office. 1 Chit. Pl. 636; *Holton* v. *Cook*, 12 Mass. R. 575; Bul. N. P. 309. There was no sufficient proof that Kellar was ever duly elected treasurer. *Saxton* v. *Nimms*, 14 Mass. R. 320; *Thayer* v. *Stearns*, 1 Pick. 108; *Hartwell* v. *Littleton*, 13 Pick. 229. No sufficient warrant for collecting taxes, duly signed by the assessors, is shown to have been committed to Savage, without proof of which the sureties are not liable. *Foxcroft* v. *Nevins*, 4 Greenl. 72. No book of assessment, duly signed by the assessors, was offered. No evidence was shown that any assessment and valuation was recorded, or a copy deposited in the office of the town clerk. *Blossom* v. *Cannon*, 14 Mass. R. 177; *Thayer* v. *Stearns*, 1 Pick. 482; *Thurston* v. *Little*, 3 Mass. R. 429.

If the tax had been proved to have been legally assessed, and the assessment and valuation recorded, no legal evidence was produced to show a warrant under the hands of the assessors, committed to Savage, as no notice was given to him to produce the original. Rule 35.

The opinion of the Court was by

WHITMAN C. J. — This is an action of debt, on a bond given by the defendants to a former treasurer of East Machias, the said Savage being the principal therein, and the other defendants his sureties, as collector of taxes for the year 1834,

in said town. The condition in the bond is, that said Savage should, well and truly, collect all the *taxes assessed according to his warrant therefor, and pay over all the moneys and sums, which, as such collector, should be collected or received, &c.*; and should faithfully and seasonably, perform all duties to his said office appertaining, as by law provided. The facts are detailed in the report of the Judge who presided at the trial: And the parties agree that, upon consideration thereof, judgment shall be entered, either upon nonsuit or default, as the Court shall consider to be in conformity to the legal rights of the parties.

No question is made but that Savage was duly chosen collector; and if there was, his giving the bond in suit, and his proceeding to act in that capacity might be well deemed sufficient to estop him and his bondsmen from denying the fact.

A great variety of objections are made, by the counsel for the defendants, to the right of the plaintiff to recover. One is, that the assessments, preparatory to the issuing of the tax list, and warrant accompanying the same, were not signed by the assessors. This savors somewhat of technicality, to say the least of it. And if the action were against the assessors for a misfeasance, as the law formerly stood, if not at present, might be available against them. But, in an action against the collector and his bondsmen, the case may be different. The collector might be bound to obey a warrant, in due form, and issuing from a competent tribunal, as the assessors may be deemed to have been, although they might not have complied with every *punctilio* required by law anterior to issuing it. Executions are often issued from judicial tribunals, and before the record of the judgments, under and by virtue of which they might be issued, has been fully extended and signed; but it never was considered or apprehended, that the executive officers, or their bondsmen, could make use of such an omission to excuse themselves from liability for neglecting to execute such precepts. We are therefore satisfied that this exception is not well taken.

It was denied, at the trial, that the warrant for the collection of the taxes, referred to the tax list, and that the list was signed by the assessors. It seems, however, that no evidence was adduced at the trial to prove or disprove those facts. For the Judge says, "it did not appear, that the list of assessments delivered to the collector, was signed by the assessors, nor that the warrant referred to the list, as being their assessment; nor was there any proof, that the list was not signed by the assessors, or that said warrant did not refer to the accompanying list." In this the Judge must be understood to mean that there was no direct evidence of those facts. There were circumstances, which might tend to render it presumable, that the warrant and list were regularly made. They were in the hands of the collector, Savage. It was in his power to have produced them. From an inspection of them it would have appeared how the fact was. From his not producing them it may be inferred that they were in all respects unobjectionable. His counsel urge that he was not bound to produce them, no notice having been previously given him by the plaintiff for the purpose; but when writings are proper matters in defence, or when the adverse party must have understood that they must necessarily have come in question, notice to produce them may well be dispensed with. The rule of law, relied upon, was adopted to prevent surprise upon a party possessed of documentary evidence, by requiring him to produce it, when he could not reasonably be expected to come prepared with it, if not previously notified, that it would become material. But, in this case, it must be presumed, in the absence of contrary proof, that the assessors had done their duty. This is a presumption which the law makes in favor of all officers charged with the performance of a public trust. It was for the defendants, therefore, if they would counteract such presumption, to have exhibited the warrant and list, confessedly in their possession. Not having done so, there was presumptive evidence that the list and warrant were regularly made out, and duly delivered to the collector.

It is next objected, that the plaintiff does not appear by the record, to have been duly elected treasurer. This being an objection to his capacity to sue, if the defendants would have availed themselves of it, they should have pleaded it in abatement, and could not be allowed to take the exception on the trial of the merits. And, besides, town treasurers, being elected annually, when the Legislature passed an act, authorizing them to sue as such, for debts due to the inhabitants of their towns, it may well be doubted whether it must not be considered, as within the purview of the enactment, that they should be continued in office *quoad* any such suit, until its termination. They are in the condition of trustees, who are answerable for the funds in their hands, to their sucessors. If such were not the intention of the Legislature a suit could scarcely be commenced, by any such treasurer, with a reasonable expectation, that the year, for which he might be elected, would not expire before the termination of the suit, and almost certainly, before the satisfaction of any execution, which might be issuable on any judgment, which might be rendered in his favor, could be obtained. A default therefore, according to the agreement of the parties, must be entered.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK, JULY TERM, 1841.

Mem. — WESTON C. J. was not present at the hearing of any causes during this Term, being employed in jury trials in the County of Washington.

JOSEPH OTIS *versus* MOODY P. MOULTON.

When in a deed two monuments are described, and the length of the line between them is given, but one of the monuments cannot be found, the location of the lost monument is to be ascertained by measuring the given length of line from the known monument, and not by a reference to and conformity with the length of other corresponding lines on the same tract on which the monuments have been preserved.

Where a grant is made and bounded by monuments named as existing upon the earth and by distances between them, and not by monuments and distances named as on the plan only, the admeasurement should be made upon the earth, and not by the scale upon the plan.

The proprietors of a township surveyed through mistake a portion of land without the limits of their grant, and conveyed the same, describing it as within their limits.—The grantee entering and occupying such premises with a claim of ownership and adversely to all others, will acquire a title by disseizin by lapse of time.

The rule that occupation by mistake does not give right, may in such a case be applied to the grantors, but is not applicable as against the grantees, who are not expected to be familiar with rights of the grantors, and who must be considered as intending to claim what they have purchased.

THIS was a writ of entry, for a tract of land in Bucksport, on the demandant's count on his own seizin and a disseizin by the tenant. Plea, nul disseizin. The defendant likewise set up a claim for betterments.

The plaintiff, at the trial before EMERY J. to prove title, read a deed from the Commonwealth of Massachusetts to Leonard Jarvis, dated Feb. 16, 1794, conveying "all the unappropriated land lying between the Penobscot river and the Lottery townships in the county of Hancock, Nos. 7 and 8, surveyed by John Peters in 1786; also the gore of land lying north of said township No. 8;" also a deed from said Jarvis to the Union Bank, dated Dec. 26, 1800, of seven eighths of the land in No. 8; also a deed from the Union Bank to Sarah Russell, dated Nov. 10, 1816, of the same premises, and from Sarah Russell to Joseph Otis, dated Nov. 21, 1816, all which deeds were duly acknowledged and recorded.

To show what lands had been appropriated before the grant to Jarvis, he introduced the grant from the Province of Massachusetts Bay to James Duncan and others of six townships, each township being conveyed by a separate description, and being numbered from one to six inclusive, and being townships afterwards known as follows:— (No. 1) Bucksport; (No. 2) Orland; (No. 3) Penobscot; (No. 4) Sedgwick; (No. 5) Bluehill; (No. 6) Surry. The description of Bucksport will be found in the opinion of the Court.

The plaintiff also introduced the deed of the Commonwealth of Massachusetts to Moses Knapp and his associates, dated June 29, 1785, duly acknowledged and recorded, conveying a tract, which is now Orrington and Brewer.

The defendants introduced a deed from Jonathan H. Brown, who was admitted to be the proprietor of Bucksport, conveying the premises to Samuel Bartlett, from whom, through divers mesne conveyances, the land passed to the tenant.

The facts in the case sufficiently appear in the opinion of the Court.

F. Allen and *W. Abbott*, for the tenants, cited *Kennebec Purchase* v. *Laboree*, 2 Greenl. 275; *Little* v. *Libbey*, 2 Greenl. 242; *Ken. Pur.* v. *Springer*, 4 Mass. R. 416; *Prescott* v. *Nevers*, 4 Mason, 326; *Jackson* v. *Elston*, 12 Johns. 454; *Small* v. *Procter*, 15 Mass. R. 495; *Poignard* v. *Smith*, 6 Pick. 172; *Pidge* v. *Tyler*, 4 Mass. R. 541; *Higbee* v.

Rice, 5 Mass. R. 344; *Ibid.* 353; *Bryant* v. *Com. Ins. Co.* 13 Pick. 543; *Coffin* v. *Phœnix Ins. Co.* 15 Pick. 295; *Owen* v. *Bartholomew*, 9 Pick. 520.

J. A. Poor, for the demandant, referred to *Heaton* v. *Hodges*, 14 Maine R. 66; *Loring* v. *Norton*, 8 Greenl. 61; *Thomas* v. *Patten*, 13 Maine R. 329; *Call* v. *Barker*, 3 Fairf. 326; *Cutts* v. *King*, 5 Greenl. 482; *Ricard* v. *Williams*, 7 Wheat. 59; *Brown* v. *Gay*, 3 Greenl. 126; *Ross* v. *Gould*, 5 Greenl. 211; *Small* v. *Procter*, 15 Mass. R. 499; *Doe* v. *Thompson*, 5 Cow. 371; *Doe* v. *Hull*, 16 E. C. L. R. 71.

The opinion of the Court was by

SHEPLEY J. — On the report and motion for a new trial two questions are presented for consideration. One arises out of the testimony relating to the boundaries of the town of Bucksport; and the other out of that relating to the occupation and title of the tenant. The bounds of the first of the six townships now Bucksport are described as beginning on the east side of the Penobscot river, "at a hemlock tree marked and running into the land in a course N. 70 deg. E. 5 miles and 184 rods to a stone monument, and from thence along a line (which forms the boundary of the first and second of the said townships to the north east and runs on a course S. 26 deg. E. nine miles and forty poles in the whole) unto a stone monument set up thereon, which marks the east corner of the said first township; and from thence by a line S. 53 deg. W. 5 miles 232 poles to a monument on the northwest side of the east branch of Penobscot river, and down the said branch one mile and fifty-six poles unto another monument on said branch, and from thence S. 56 deg. W. one mile and one hundred and thirty-two poles to a monument on the east side of the river Penobscot," and from thence along the river to the first bound. The place of starting from the Penobscot river at the first bound is not disputed. And the course of the line, making allowance for the variation, is found to be correct, and it is not disputed. The stone monument named as the second bound

is not found; and there is no proof of the original survey of the line upon the earth between these two monuments, by which its length can be ascertained. The length therefore should be ascertained by admeasurement upon the earth. It is contended, however, that in measuring it, the proprietors should not be limited to the exact measure named, but should be allowed a larger measure, corresponding to the measure found on other parts of the lands, compared with that stated on the plan. When the grant is made and bounded by monuments named as existing upon the earth, and by distances between them, and not by monuments and distances named as on the plan only, the rule has been too well established to be now disturbed, that the admeasurement should be made upon the earth, and not by the scale upon the plan. And this case illustrates the propriety and necessity of the rule; for although it has been stated by a witness, that in ten different admeasurements there was a larger measure in each case upon the earth, than that stated on the plan, yet there was no uniformity in the excess. And this very line, if measured by the scale upon the plan, would fall short of the distance stated in the grant and now allowed as measured on the earth.

In the case of *Loring* v. *Norton*, 8 Greenl. 61 the conveyance was of certain lots according to a plan. No monuments were named in it. And the decision was on such a state of facts, that the length of the lines was to be ascertained by applying the scale, by which the plan was protracted. The instruction in this case, that in the absence of proof of an original survey, and of the monuments named in the grant, the length of the lines "is to be settled by the length of line given on the plan, according to its scale exactly measured," was not correct, when applied to the state of facts in the case. It becomes however, unimportant, for on other instructions, the jury found the length of the line, according to the statement of it in the grant, as admeasured on the earth. There is strong corroborrative proof, that the birch stump stands at the true northeast corner of the first township. It is found standing in the southerly line of the grant to Knapp and associates, made in

the year 1785. And in the year 1833, that line was found to be forty-seven years old, which leaves little, if any doubt, that it was made at the time of the original survey. And if the line of the first township, were extended on its course one hundred and eighty-four rods further to the beech tree, the whole of that distance must be run upon the land granted to Knapp and associates. Another proof of it, is derived from an examination of the testimony relating to the south-easterly line of the township. The whole length of that line, as stated in the grant, is eight miles and one hundred rods. And beginning on the Penobscot river and measuring it back to the line running from the birch stump to the Surry corner, it is found to be on the earth eight miles and one hundred and twenty-three rods; and it must be extended nearly two hundred rods further to strike the line asserted by the proprietors to be the easterly line of the township. Another proof will appear from an examination of the testimony relating to the great divisional line, which is stated in the grant to run from Cape Rosiere seventeen miles and sixteen poles on a course S. 37 deg. W. The point of commencement at the Cape is not disputed; the course and location of it are found to correspond to the plan of the six townships; and measuring from the Cape to the Surry corner, being also the corner of the townships numbered two and seven, the length was ascertained by the survey of 1832, to be seventeen miles and two hundred and eighty-six rods. And this line must be extended more than two hundred rods further to meet the nearest line extending from the beech tree southeasterly in a direction to meet it; while the testimony shows, that the Surry corner has never been disputed, and that the lands have been surveyed into lots in the townships to the lines running to that corner; and it cannot therefore, upon this testimony, be considered as liable to be moved easterly a distance of two hundred rods. Moreover, the line from the northeast corner of the first to the southeast corner of the second township, is a straight line; and if those two corners were extended farther easterly, one must be extended the whole distance into Orrington and the other into Ellsworth.

And the lines of those townships appear to have been too long and too well established to admit of it. It is not however to be denied, that there are difficulties to be encountered in coming to the conclusions which have been stated. One is, that so early as the year 1801, the easterly line of the first township appears to have been surveyed and marked from the beech tree on a course S. 20½ deg. E. and the land adjoining it to have been surveyed into lots. It was not however extended by the easterly end of the second township; and there were two lines, and each was asserted to be the easterly line of that township, and neither would coincide with the line so run at the easterly end of the first township. And this line, although existing for so long a time, cannot be and is not pretended to be a line of the original survey, or to have had any other foundation than the one before stated. Another difficulty is, that the line in the grant, which makes the easterly line of the first and second townships, is stated to be nine miles and forty poles in length, and to be on a course S. 26 deg. E., and both of these statements must be disregarded. That line, as measured on the earth, where the demandant asserts that it should be, is found to be but about thirty rods short of twelve miles in length. It would be somewhat shorter if run as the proprietors assert that it should be, but it would not then conform at all to the length stated in the grant. And the grant requires, that it should extend to the great divisional line, which it could not do, if the length as stated in the grant were not disregarded. And it cannot be run on the course stated in the grant, commencing at the beech tree to meet the Surry corner, where there is a possibility of locating it, for it would have to be found in Branch pond. There can be therefore no conformity to that line, either as to course or distance, whether it be run from the birch stump or the beech tree. There must have been a mistake in stating the course and distance of that line in the grant. Another difficulty arises from finding that the great divisional line appears to have been run easterly two hundred and forty-two rods beyond the Surry corner, and towards Branch pond. It does not however terminate there at

any monument marked as a corner; and there do not appear to be any lines extending either northerly or southerly from it, as there should be if the corner was originally designed to have been placed there. And this running may be accounted for in the manner stated by a witness, that surveyors sometimes run their lines beyond the points, where they are intended to be intersected by lines from other places running on a different course. But these and some other difficulties not noticed, are not sufficient to counterbalance the greater and more insuperable difficulties, which must be encountered by attempting to establish the easterly line of the first township, where the proprietors assert that it should be run. There is therefore no cause for disturbing the verdict on account of the finding of the jury in relation to this line. Upon the same testimony, a jury ought not to be expected to find differently.

In relation to the occupation and title under which the tenant claims, it appears, that Rufus Moulton entered upon the premises under a deed recorded, and built a house thereon in the year, 1810; and continued to live upon and occupy the premises, until he died in the year 1833. He had built a framed house and two barns, and so had improved the farm by clearing and cultivation, that it had become much more valuable. It is true that he had conveyed it to another person in 1812, but one of his family re-purchased it in 1815. And during all the time he was not disturbed in his occupation of it. And there is proof, that he claimed to do so by right, and the legal presumption is, that he occupied under the title, which by conveyances had been derived from him; and his occupation and possession would become theirs. The farm had been thus occupied more than twenty years under a recorded title before an entry was made by the demandant. And the character of that occupation was such as to leave no doubt that it was under an assertion of title. The deeds of conveyance, it is true, described the land as situated in the town of Bucksport and the proprietors of the township, and their representatives might be supposed to intend to keep within their own limits, and if they did not, the rule might justly be applied to them, while pro-

fessing to do so, that mistake does not give right. But the grantee should not be expected to be familiar with the rights of the proprietors and the bounds of their township; and cannot be supposed not to intend to claim the lands which he had purchased. Nor to intend to notice or keep within any other bounds, than those named in his deed. Much less can he be supposed to intend to admit the title to his farm to be bad, because upon a more accurate settlement of town lines it should be found to be within the bounds of another township. And more especially should no such intention be inferred in this case, when it is considered that the easterly line of the town of Bucksport had been run and marked before he purchased so as to include his land. That being the only marked line may well be supposed to have been regarded by him as the true line. And his right under such circumstances cannot be affected by a correction of this error and a settlement of the line upon more correct principles. The case presents all the elements necessary to constitute a disseizin. The occupation was open, notorious, exclusive, adverse, and under a recorded title with a claim of ownership according to that title. And this was continued for more than twenty years before the entry, and the title of the tenant must therefore upon this testimony be regarded as having become perfect under the statute. The demandant will find another apparently insuperable difficulty. These premises, while thus occupied, could not be conveyed by the deeds from the Union Bank to Sarah Russel and from her to him. They were at that time disseized. It is not perceived that this action upon the present testimony can be maintained.

The verdict is set aside and a new tial granted.

EBENEZER F. CUTLER *& al. versus* DAVID THURLO.

The mortgagee of a ship, though the register or enrolment of the vessel stand in his name, if he has not taken the actual possession and control of the vessel mortgaged, is not answerable for supplies furnished by order of the mortgagor or by the master acting under his order.

So in case of a contract of sale, where the general owner agrees upon certain contingencies to convey the vessel to one, who takes the whole control of the same with a right to appropriate its earnings to his own use, such owner is not responsible for supplies furnished under the direction of the expected purchaser.

The hirer of a chattel cannot without special authority for the purpose, create a liability of the owner for the costs of repairs or supplies furnished by direction of the hirer and to aid him in deriving advantage from the thing hired; — and this principle applies equally to a vessel as to any other chattel.

Nor is this rule of law varied by the fact that the supplies were furnished with the expectation, that the owner was liable, and on his credit. He is not responsible except for supplies furnished by his consent personally, or that of his lawfully authorized agent.

THIS was assumpsit for articles furnished the schooner Caleb and owners in 1832, at the request of Jeremiah Thurlo, master. It was proved at the trial before WESTON C. J. that these goods were furnished upon the credit of the defendant, after inquiry into his circumstances, and were charged on the plaintiffs' books to the Caleb and owners and were such as the owners would be liable for, if Thurlo, as master, had authority to purchase them on their credit.

It appeared in evidence that Jeremiah Thurlo commenced building the schooner Caleb, that he hired and paid for men employed in building the vessel, that finding he was unable to finish it, the defendant, his father, advanced $400 on the hull of the vessel and paid $700, for sails, rigging, &c.; and that the vessel cost $1700. When finished the master builder gave a certificate that he built the vessel for the defendant, and the vessel was enrolled in his name at the custom house, on the 30th of May, 1832, when he made oath that he was the sole owner.

Jeremiah Thurlo, testified, that he built the Caleb on his own account, and sailed in her several years; that after she

was built he put her in his father's hands for security for the advances he had made; that she was to be conveyed to him when he should pay for her; that he kept an account of those advances, but that they never had a settlement; that he never gave any note for those advances nor was there any agreement for their payment by him; that while the vessel was in his possession he paid his father about $200, that about four years ago the vessel was seized at Liverpool, N. S. and his father took the vessel after procuring her release, and appointed another captain, and that his father had the right at any time to take the vessel from his possession; that he never gave his father any bill of sale or other writing respecting the vessel, that his father gave no agreement to convey the vessel on payment of what was due; and that while he, the witness, had possession, his father had no control of the vessel and received none of her earnings.

A verdict was returned for the plaintiffs, it being agreed, that if the jury found from the evidence that the defendant, at the time the supplies were furnished, was mortgagee of the vessel and out of possession (which upon being inquired of, they stated they did find) and the Court should be of opinion that such finding sustained the defence, the verdict is to be set aside and the plaintiffs to become nonsuit, otherwise, judgment is to be rendered on the verdict.

The case was argued in writing.

H. Williams, for the defendant, argued that the defendant, not having the management and control of the vessel at the time the supplies, to recover which this action was brought, were furnished, and being a mortgagee out of possession, was not liable to the plaintiffs. It has been repeatedly settled, that the mortgagee of a vessel, out of possession, is not liable for repairs and necessaries furnished the ship, the master not being his agent, as was the case here. *Colson* v. *Bonzey*, 6 Greenl. 474; *Thompson* v. *Snow & al.* 4 Greenl. 24; *Winsor* v. *Cutts & al.* 7 Greenl. 261; *Brooks* v. *Bonzey*, 17 Pick. 441; *Bixby & al.* v. *Franklin Ins. Co.* 8 Pick. 86; *Hacker & al.* v. *Young & al.* 6 N. H. R. 96.

W. & C. J. Abbott, for the plaintiffs, contended that *prima facie* the registered owner of a vessel was liable for supplies. *Westerdell* v. *Dale*, 7 T. R. 306; *Cox* v. *Reed*, 1 C. & P. 601. When the mortgagee holds himself out to the world as the owner, he is liable. *Tucker* v. *Buffington*, 11 Mass. R. 34; *Champlin* v. *Butler*, 18 Johns. 169; *Leonard* v. *Huntington*, 15 Johns. 298; *Marion* v. *Huntington*, 2 Conn. R. 215. This doctrine was recognized in *Brooks* v. *Bonzey*, 17 Pick. 441, and *Harrington* v. *Fry*, 2 Bing. 179. The defendant held himself out to the world as owner; he built two thirds of the vessel; procured the certificate of the master carpenter that he was the owner; caused the vessel to be enrolled in his own name, and made oath that he was the sole owner. No agreement existed at any time between father and son in relation to the vessel, to indicate that the latter had any interest in the vessel. The goods here were expressly furnished on the credit of the defendant, who thus held himself out as the owner, and for them he is liable. Abbot on Shipping, 16. No case can be found where the enrolled owner, to whom credit was given, has not been held answerable for supplies, though a mortgagee and out of possession, unless the person furnishing those supplies knew that he was a mortgagee and not in possession. The following cases show that when the plaintiffs had this knowledge, or when the credit was given to some other person, no action can be maintained against the mortgagee out of possession, and are therefore indirect authorities for the plaintiffs. *Ring* v. *Franklin*, 2 Hall, 1; *Thom* v. *Hicks*, 7 Cow. 697; *Baker* v. *Buckle*, 7 Moore, 349; *Twentyman* v. *Hart*, 2 E. C. L. R. 429; *Dowson* v. *Longster*, 16 E. C. L. R. 432.

The opinion of the Court was by

Whitman C. J. — The question presented for the consideration of the Court in this case is, who was the owner, *pro hac vice*, of the schooner Caleb, at the time the supplies were furnished, as charged in the account of the plaintiffs. It is believed to be a well settled principle, that one may be the general

owner of a chattel, and another the special owner for a particular purpose. And it is believed to be equally well settled, that, he who has the special property, cannot, without the knowledge and consent of the general owner, and without a special agency for the purpose, incur charges by way of repairs, or for the purpose of rendering the chattel more useful, and create a liability upon the general owner therefor. It was nevertheless, for sometime doubted, whether ships and vessels, under the mercantile law, did not present an exception to this principle. But a series of decisions, in the course of thirty or forty years, have dissipated all doubt upon the subject. Ships and vessels, in this respect, are now placed upon the footing of other chattels.

In a late case, *Reeve* v. *Davis & al.* 1 Adol. & Eu. 312, the Lord Chief Justice of the King's Bench remarked, "If the ship is let out to hire, I do not see how the owners are liable for the work done upon it, by order of the party hiring, more than the landlord, who lets a house." Hence it is, that the mortgagee of a ship, although the register or enrolment may stand in his name, if he has not taken the actual possession and control of the vessel mortgaged, is not held to be answerable for supplies furnished by order of the master, acting under the orders and authority of the mortgagor. *Fraser* v. *March*, 13 East, 239; Adol. & Eu. above cited; *Brooks* v. *Bonsey*, 17 Pick. 441; *McCartee* v. *Huntinton*, 15 Johns. 298; *Colson* v. *Bonzey*, 6 Greenl. 474, and cases there cited.

In the case at bar, the defence proceeded upon the ground, that the defendant was a mortgagee, who had not, at the time the supplies were furnished, taken possession under his mortgage. And the jury found, that such were the facts; and yet returned their verdict for the plaintiff. Under what instruction from the Court this was done does not appear. But the Judge has certified, "if the Court should be of opinion, that such finding, upon the evidence, sustained the defence, the verdict is to be set aside, and the plaintiffs are to become nonsuit; otherwise judgment is to be entered upon the verdict."

The facts detailed in the report of the Judge do not seem to exhibit the defendant and his son precisely in the predicament of mortgagor and mortgagee. The transaction may rather be viewed in the light of a contract of sale, by an absolute and original owner, in which he had agreed, upon the happening of certain contingencies, to wit, the payment of certain sums of money, to convey the vessel to his son; and, at the same time, had given up to his son the sole control of it, together with the right to appropriate its earnings to his own use. This was done doubtless, with a view to enable him to realize funds, with which to make payments in pursuance of the contract of sale.

This however does not vary the case, upon principle, from that of a mortgagee out of possession, while the mortgagor retains the sole control. This position is fully sustained by the case before cited in 15 Johnson, 298. Indeed it is but carrying out the principle, that the hirer of a chattel cannot, without special authority for the purpose, create a liability of the owner for the costs of repairs or supplies furnished by direction of the hirer, to aid him in deriving advantage from the thing hired. As well might the landlord at a public inn claim to charge the owner of a horse, hired by a traveller, and there, by him put up to be fed, for his keeping.

It no where appears in the report of the evidence, that the defendant was conusant of the furnishing of the supplies, or ever assented to it, or promised to pay for them. Whatever may have been the expectations of the plaintiffs, the defendant cannot be rendered liable without consent on his part, either by himself personally, or by his lawfully authorized agent. No such consent appearing in the case it is the opinion of the Court, that the verdict must be set aside, and a nonsuit entered.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO, JULY TERM, 1841.

Mem. — WESTON C. J. was not present at the hearing of any causes during this Term, being employed in jury trials in the county of Washington.

WILLIAM QUIMBY *versus* SAMUEL M. CARTER.

The plaintiff, to entitle him to recover in a special action of the case, brought upon St. c. 195, § 13, must prove that he has a just debt; that his debtor has fraudulently concealed or transferred property liable to be taken by attachment or seized on execution; and that the person sued has knowingly aided or assisted the debtor to defeat his rights as creditor. His claim is limited to double the amount of the property concealed or transferred, if less than his debt, or to double the amount of his debt, if less than the value of the property concealed.

This provision is not penal.

Recovery of judgment and payment are to be regarded as an extinguishment *pro tanto* of the original debt.

When the statute gives double damages, they may be assessed either by the Court or the jury, and it is immaterial by which.

The fraudulent concealment of property transferred before the passage of St. c. 195, renders the receiver equally liable under § 13 of that act, as if the conveyance had been after its passage.

THIS was a special action of the case upon the 13th section of the statute, c. 195, passed in 1835, for the relief of poor debtors. The cause was tried before EMERY J.

The writ was dated Sept. 23, 1839. The general issue was pleaded and joined. The plaintiff, to maintain the issue on

his part, introduced a copy of a judgment in his favor, against one Edward T. Hobbs, recovered at the October Term, 1835, of the S. J. Court for the county of Penobscot, for the sum of $288,25, debt, and costs taxed at $6,40; also an alias execution issued on said judgment, dated June 20, 1836, upon which said Hobbs was arrested and gave the usual bond Aug. 6, 1836. Hobbs was surrendered to the jail in Penobscot county on Jan. 23, 1837, and was discharged by taking the poor debtor's oath, March 6, 1837. The plaintiff also read office copies of a warranty deed from said Hobbs to the defendant, of seventy-five acres of land in Milo, in the county of Penobscot, bearing date Sept. 23, 1834, and acknowledged Sept. 23, 1836, and recorded May 22, 1838; and of a mortgage deed from one Wilkinson to the defendant, of said land in Milo, dated Feb. 14, 1839, duly acknowledged and recorded, to secure to him the payment of five hundred and forty dollars.

It was also proved that Hobbs lived on the land conveyed by said deed to the defendant, enjoying the proceeds thereof, but that the defendant had a right to control all the surplus produce; that the defendant had stated that Hobbs had put the land in Milo into his hands to cheat the plaintiff out of his debt; and that it was worth as much as the debt against Hobbs, over and above the mortgage to the defendant.

Upon this evidence, the counsel for the defendant moved the Court to nonsuit the plaintiff, because he alleged the action was local, and could not be maintained in this county; and because the action was barred by the statute of limitations; but the presiding Judge declined so doing.

He further requested the Judge to instruct the jury that the plaintiff must prove some legal or equitable title to the land in Milo, in Hobbs. This instruction was given.

The Judge further instructed the jury, that the plaintiff was not bound to show any paper title in Hobbs; that they might consider his interest as shown by the fact that Hobbs had possession of the land; that defendant took a deed of it from him; by his declaration that Hobbs owned the land and sold

it to him; together with the mortgage of Wilkinson, and the notes to the defendant, and such other evidence as was in the case, as to his controlling it.

The counsel for the defendant further contended that the offence, if any, was committed when the deed was dated, which was before the statute; but the Judge instructed the jury that if the transfer was previous to the statute, if they found that the concealment continued till after the statute went into effect, that the defendant would still be guilty; and that if they found for the plaintiff, they might give such damages as they should find, not exceeding double the amount of the debt against Hobbs, nor at any event double the amount of the property transferred or concealed.

The jury were directed to find when the deed dated Sept. 23, 1834, was executed and took effect — what property was fraudulently concealed, and at what time.

The jury found a verdict for the plaintiff, that the land in Milo was fraudulently concealed, and that the deed of it took effect and was executed on Sept. 23, 1836.

W. Kelly, for the defendant. The deed to the defendant was before the passage of the act, which it is contended, it violates.

This is a penal action, the statute giving double damages; and the action should have been brought within a year from the time, when the offence was committed. It is local, and should have been brought in the county, where it was committed. *Mansfield* v. *Ward*, 16 Maine R. 433. The jury should have been instructed to find single damages. *Lobdell* v. *New Bedford*, 1 Mass. R. 153; *Warren* v. *Doolittle*, 5 Cow. 678.

A. T. Palmer, for the plaintiff.

This is not for an injury to land, and is not local. It is analogous to a suit against the sheriff for neglect, which may be brought in any county. *Foster* v. *Baldwin*, 2 Mass. R. 569; *Marshall* v. *Hosmer*, 3 Mass. R. 23; *Jefferies* v. *Duncombe*, 11 East, 225; *Titus* v. *Frankfort*, 15 Maine R. 98; St. c. 59, § 45.

It is not barred by the provisions of St. c. 62, § 14. *Woodgate* v. *Knatchball*, 2 T. R. 155, n. This is not a penal, but a remedial action. It is for the benefit of the party injured, and gives a new remedy. *Twynne's* case, 2 Coke, 82. The mere giving of double damages does not necessarily make the provision penal. *Goodridge* v. *Rogers*, 22 Pick. 495; *Myddelton* v. *Wynn*, Willes, 597. A penalty must be created by express words. *Jones* v. *Estis*, 2 Johns. 379.

The opinion of the Court was by

SHEPLEY J. — The right of the plaintiff to maintain this suit depends upon the construction of the thirteenth section of the statute c. 195. By that provision the fraudulent concealment or transfer must be designed to secure or conceal the property from creditors, "to prevent the same from attachment or execution." And the person, other than the debtor, who is made liable, must knowingly aid or assist in effecting it. The statute contemplates, that the creditors will be actually defeated in the recovery of their debts wholly or partially, for one cannot recover more than double the amount of his just debt remaining uncollected. And the plaintiff, to entitle him to recover, must not only prove such concealment or transfer, but that he has a just debt or demand remaining unpaid. It is said that this does not prove any special injury to himself, for he may yet have the means of obtaining payment. He must however prove facts before he can recover, which the law determines to be essentially detrimental to his interest, viz. that he has a just debt or demand, that his debtor has fraudulently concealed or transferred property liable to be taken by attachment or seized on execution to satisfy it, and that the person sued has knowingly aided or assisted the debtor to defeat his rights as a creditor. His right of recovery is limited to double the amount of the property concealed or transferred, if it be less than the amount of the debt; or to double the amount of his debt, if that be less than the value of the property concealed or transferred. The mere fact that he may recover double the amount does not of itself determine

the statute to be penal. It is supposed, that the creditor may, notwithstanding a recovery and satisfaction, still proceed and collect his demand of his debtor, and that the statute must therefore be highly penal. When however he has so recovered and the judgment has been satisfied, the debt is regarded as extinguished in law *pro tanto*, although the payment may not have been made by the debtor himself. The recovery was had on account of the debt, and he has received money because he was a creditor. Examples of this kind are found when a creditor recovers damages against a sheriff for misconduct equal to the whole amount of his debt, and receives satisfaction. The provision in the revised statutes, c. 148, § 34, that the payment of the judgment shall be also a satisfaction of the original debt, was probably regarded as a declaration of the legal effect of such a recovery and satisfaction. If this be a just exposition of the statute, it bears little resemblance to that provision on which the case of *Mansfield* v. *Ward*, 16 Maine R. 433, was decided. The principle of that decision was, that the statute must be regarded as penal, because the plaintiff was not obliged to prove any injury to entitle him to recover. Nor was he obliged to prove such facts as the law would regard as injurious.

The jury have found the concealment since the enactment of the statute; concluding, it would seem, that the deed was executed on the day of acknowledgement; although it bears date long before. It may have been the more general practice for the Court to instruct the jury to find single damages to be doubled by the Court, when the statute requires it. In *Cross* v. *United States*, 1 Gall. 26, it is said, that when damages are demanded, and the statute gives double damages, they may be assessed either by the Court or jury. And in *Warren* v. *Doolittle*, 5 Cow. 678, the Chancellor says, "in principle it is wholly immaterial whether it be done by the Court or jury." The assessment of the double damages by the jury, can afford no just ground for a new trial.

Exceptions overruled.

SALATHIEL NICKERSON *versus* DAVID WHITTIER.

Where an agreement was made between the plaintiff and one of the debtors in a suit, who was surety for the principal debtor, that the plaintiff should proceed to judgment and then levy on the land of the principal debtor and that after such levy, the surety was to purchase the land thus obtained of the creditor in the execution, and security was given for the performance of this agreement; *it was held*, that this did not amount to a payment of the execution by the surety and that consequently the levy was good.

The appraisers, chosen to appraise the value of real estate, should be residents of the county where the appraisal is to be made.

The officer is required by law to notify the debtor, if he live in the county in which such appraisal is to be made, and if not, the officer should return such fact, which will justify his appointment of an appraiser for the debtor, without notice to him.

When an execution is legally levied, and recorded, on land liable to be taken, and the proceedings are duly returned, the creditor is considered as having the actual seizin and possession.

THIS was a writ of entry to recover a parcel of land situate in Belfast. Trial before EMERY J.

The demandant proved that on Jan. 25, 1837, one Alfred Johnson commenced a suit against P. & E. T. Morrill, and Joseph Williamson, as their surety, and on the same day caused "all of defendants' right, title, and interest to their real estate in the county of Waldo," to be attached; that at the July Term of the S. J. Court, 1838, said Johnson recovered judgment in said suit, on which execution was issued on July 9, 1838 — and a levy made of the premises in dispute on the 19th day of the same July, by which said execution was fully satisfied. In the levy of the execution, *Johnson* v. *Morrill & als.* it appears, by the officer's return, that the appraisers were freeholders of the county of Waldo. It does not appear by the officer's return, that E. T. Morrill, as whose, said real estate was taken in execution, neglected or refused to choose an appraiser. The only expression in the return relating to the appraisers being as follows: — "Nath'l M. Lowney chosen by the within named Alfred Johnson, the creditor; the said James White chosen by myself, and Timothy Chase chosen also by myself, for the within named debtor, E. T. Morrill, who having

no residence or place of abode in this county, (Waldo,) and after the most diligent search not being able to find him within my precinct, I could not notify him to choose an appraiser."

It further appeared, that on July 19, the day of the levy, Johnson by deed released the premises levied upon to J. Williamson, who on the 3d of August, 1838, conveyed by deed of warranty the same to the demandant.

The tenant proved that he held a mortgage for $600, given by Philip Morrill the 6th of Sept. 1829, of his dwellinghouse, and that on the 16th of June, 1837, this mortgage was discharged, and that in the same month said Morrill, being then in failing circumstances, conveyed the same to Joseph Williamson, a creditor of his, by whom the same was sold, and the proceeds thereof received. It further appeared, that on the 13th of June, 1837, E. T. Morrill conveyed the demanded premises to Philip Morrill, who on the 16th of the same June conveyed them in mortgage to secure the sum of $600 — thus exchanging the security on the house for that on these premises.

Alfred Johnson testified, that about the 11th of July, 1838, it was agreed between him and Joseph Williamson, that he, Johnson, should levy the execution in his favor against Morrill & als. on such real estate of said Morrills, as he, Williamson, might designate; and that for that purpose he (Williamson) was to have the control of the execution, and that he or his assigns should have a deed of quitclaim from said Johnson of the land that might be taken on said execution, provided he, Williamson, should pay said Johnson his judgment, and all costs and fees thereon; that this agreement was reduced to writing and signed by the parties, at which time a note for an amount exceeding the execution and all costs, was deposited by Williamson with said Johnson, as security that he, Williamson, would make said purchase, which note was subsequently paid; that Johnson applied enough of it to pay his execution, and the residue he paid to Williamson; that at the time no land was indicated upon which the levy was to be made; that Williamson took the execution, and controlled the officer in

making the levy; and that subsequently he released the premises levied upon to Williamson.

The presiding Judge, on this testimony, instructed the jury to find a verdict for the demandant, reserving to the tenant all exceptions to the plaintiff's title.

Allyn, for the tenant.

1. The levy is bad, the attachment being of land owned by the defendants jointly, and not of land owned by either of them in severalty.

2. The appraisers, it appears by the officer's return, were freeholders *of* the county of Waldo, whereas in the statute, the expression is, that the appraisers shall be freeholders *in* the county where the land taken lies; freeholders *in*, denotes the place where the freehold is situate; and freeholders *of*, denotes the place of such freeholders' residence; and so the return is bad.

3. It does not appear that E. T. Morrill neglected or refused to choose an appraiser; without which, the proceedings are defective. St. c. 60, § 27; *Means* v. *Osgood*, 7 Greenl. 146; *Whitman* v. *Tyler*, 8 Mass. R. 284; *Eddy* v. *Knapp*, 2 Mass. R. 154.

4. The execution was paid by Williamson before the extent, and the levy is void. *Allen* v. *Holden*, 9 Mass. R. 138; *Stevens* v. *Morse*, 7 Greenl. 36; *Brackett* v. *Winslow*, 17 Mass. R. 153.

F. Allen and *J. Williamson*, *contra*. The case shows a substantial compliance with the statute. It is not necessary to use the exact words of the statute. *Munroe* v. *Reding*, 15 Maine R. 153. The officer's return shows that due diligence was used to find the debtor; the officer could not notify out of his county, nor was the creditor bound to let his attachment run out. *Howe* v. *Reed*, 3 Fairf. 515; *Buck* v. *Hardy*, 6 Greenl. 164; *Bugnon* v. *Howes*, 13 Maine R. 154.

The execution was not discharged at the time of the levy. Johnson had received nothing, nor had Williamson paid any thing. The whole matter was conditional, and whether Wil-

liamson was ever to have the property levied upon, depended upon his compliance with those conditions.

The opinion of the Court was by

SHEPLEY J. — The title of the tenant is derived from Ephraim T. Morrill, who on the thirteenth of June, 1837, conveyed the premises to Philip Morrill, who on the sixteenth of the same month conveyed in mortgage to the tenant. The consideration of the latter conveyance was the discharge of a former mortgage held by the tenant on the dwellinghouse of the mortgagor, which was afterward conveyed to Joseph Williamson. Before the tenant released his mortgage on the dwellinghouse and received one on the premises instead of it, an attachment had been made on the twenty-fifth of January, preceding, on a writ in favor of Alfred Johnson against Ephraim T. Morrill, Philip Morrill and Joseph Williamson, of all their real estate in the county of Waldo. That suit was prosecuted to judgment and the execution issued thereon in consequence of an agreement between Messrs. Johnson and Williamson was levied on the demanded premises for the benefit of Williamson, who was surety for the Morrills. Johnson released his title acquired by the levy, to Williamson, who conveyed with covenants of warranty to the demandant. The attachment having been made before the grantor of the tenant acquired any title, the demandant must prevail, if the levy was legally made and the title under it passed to him. The effect may be, that the tenant will lose a debt, which was secured, and that Williamson will be saved from a loss as surety, where he had no security. And this after he had been benefited by a discharge of the mortgage on the dwellinghouse. The agreed statement does not impute any fraud, and such results cannot change the law or the legal rights of the parties.

It is contended, that the execution was satisfied before the levy was made. The written agreement between Messrs. Johnson and Williamson was produced at the argument and received by consent. The operation of it was the same as an assignment of the judgment and execution to Williamson, he

giving security to Johnson, that his debt should be paid. The note of Carlton was pledged as collateral security, that Williamson would pay, not delivered to Johnson in payment. In the cases cited by the counsel for the tenant, there was a receipt of money for the purpose of paying the debt. Here the debt was not in fact paid to the creditor until the note deposited as security was paid.

The return of the officer, who made the levy, is alleged to be defective in stating, that the appraisers were freeholders *of* instead of *in* the county. The argument is, that it was intended, that the appraisers should not only be freeholders, but that their estates should be situate in the county. Such a construction would allow the creditor and officer to select appraisers from a distant part of the State or even out of it, and ignorant of the value of land so far, as they would not be informed of it by being owners of land in the county. And they might have become owners by taking it in payment of debts in a manner that would afford little information. Such a selection might be expensive and oppressive to the debtor, who also might select an appraiser resident without the officer's precinct, and where he could not notify him. The design of the statute appears to have been, that they should be freeholders, and that they should be residents within the county. Neither party could then act oppressively toward the other, the officer could notify, and the appraisers might be supposed to have a better knowledge of the value of lands in the county where they resided.

Another alleged defect in the levy is, that the officer does not in his return state, that the debtor neglected or refused to appoint an appraiser, although he appointed two himself. When the officer is required to notify the debtor to appoint an appraiser he must return, that he has neglected or refused to appoint to prove his authority to appoint one for him. But there are cases, in which our statute does not require the debtor should have notice to appoint. And in those cases it is necessary, that the officer should return such facts as would prove his authority to appoint without notice to the debtor. The

officer is required to notify "if the debtor be living in the county, in which such land lies." In this case the officer does return such facts as prove his authority to appoint for the debtor; and that is all that the statute requires. The officer not being required to notify the debtor, because he did not live within the county, and not having done so, could not truly state in his return, that he had neglected or refused to choose.

Another objection insisted upon at the argument is, that the title acquired by the levy, was not conveyed to the demandant, because Williamson and Johnson were disseized at the time they conveyed. When an execution is legally levied on lands liable to be taken, and the proceedings are duly returned and recorded the creditor is considered as having the actual seizin and possession. *Gore* v. *Brazier*, 3 Mass. R. 537. There is no proof in this case to rebut the legal presumption of its continuance in the creditor and his grantee until after the conveyances were made.

Judgment on the verdict.

JONATHAN DURHAM *versus* HIRAM O. ALDEN *& al.*

One co-tenant, holding a mortgage on the part of the other, united with him in a deed of the land of which they are co-tenants, by which the several portions of each are conveyed, and in which the premises conveyed are said to be "free from incumbrances," and "that the grantors have good right to sell and convey," without causing any exception to be made of his own title as mortgagee, and without disclosing its existence to the purchaser. He is estopped by the declarations of his mortgagor in their deed to claim under his mortgage.

To permit him to disturb a title thus acquired, would be a fraud upon the purchaser.

THIS was a writ of entry, in which the plaintiff sought to obtain judgment as on a mortgage upon the following agreed statement of facts: —

On June 1, 1835, the demandant being the owner of a certain tract of land in Belfast, conveyed seven eighths of the same by deed of warranty to one Philip Morrill, for the con-

sideration of $1400, and the same day the said Morrill mortgaged his interest in said premises to the demandant to secure the sum of $1150, the balance of the consideration unpaid at the time of the deed.

On the 6th of March, 1837, said Morrill and the demandant united in conveying a portion of said tract, being the premises in dispute, to one Daniel Merrill, under whom the tenants derive their title. This deed was as follows: —

"Know all men, &c. that we, Philip Morrill and Jonathan Durham, &c. in consideration of, &c. paid by Daniel Merrill, (the receipt of which we hereby acknowledge,) do hereby give, grant, sell, and convey unto the said Daniel Merrill, that is to say, the said Philip Morrill does hereby give, grant, and convey seven eighth parts, and the said Jonathan Durham one eighth part of the following piece or parcel of land, &c. (describing the same,) to have and to hold the aforegranted premises to the said Daniel Merrill, his heirs and assigns, to their use and behoof forever.

"And we do covenant with the said Merrill, his heirs and assigns, that we are lawfully seized in fee of the aforegranted premises, that they are free of incumbrances, and that we have good right to sell and convey the same to the said Merrill in the aforesaid proportions, and we will warrant and defend the same to the said Merrill, against the lawful claims and demands of all persons, &c. &c. In witness whereof, &c."

On the 26th of June, 1837, the demandant, by consent of said Morrill, in writing, entered upon the mortgaged premises for condition broken, and for the purpose of foreclosing said Morrill's right in equity to redeem the same.

The tenant's claim, by deed of warranty from said Merrill was dated Sept. 1, 1838.

This action is brought to recover seizin and possession of said seven eighths, as aforesaid. If upon the foregoing facts the action is maintainable, judgment is to be entered for the demandant; otherwise, for the tenants, and with costs; provided, also, that if the Court should be of opinion that the covenants of warranty on the part of the demandant, contained

in his deed to Merrill, extend to and cover said seven eighths aforesaid, being the demanded premises, and the incumbrances created by the mortgage, then judgment is to be for the tenants, but without costs against the demandant.

W. Kelley, for the demandants. The only question which arises in this case is as to the true construction of the deed from the demandant and Morrill to D. Merrill. Are the covenants joint and several? The intention of the parties should govern as to the construction of a deed or other contract. Here the parties did not intend to covenant for each other. Each covenanted only for his own interest. The parties specify their several interests, and the grantor could only sue each on the covenants for his several interest. The whole instrument is to be taken together. The Court will not make a contract joint when the parties intended it to be several. *Allen* v. *Holton*, 20 Pick. 458; 1 Esp. N. P. 287; *Carleton* v. *Tyler*, 16 Maine R. 392; *Walker* v. *Webber*, 3 Fairf. 65; *Cole* v. *Hawes*, 2 Johns. Cases, 202; 2 Hilliard's Abr. 372; Met. & Perk. Dig. 675.

W. G. Crosby, for the tenants. A recovery might be had on the covenants against incumbrances; and to prevent circuity of action the tenant may set up the same in bar. The language of the deed is joint. The word "we" indicates that the covenants were joint. If it was not the intention of the grantors to covenant against the mortgage, it would have been excepted from the operation of the covenants in the deed. The grantee must have understood that he was having the benefit of a joint warranty. But were it a case of doubt, the language of the deed is to be taken most strongly against the grantor. *Bates* v. *Norcross*, 17 Pick. 14; *Gibson* v. *Gibson*, 15 Mass. R. 110; *Duvale* v. *Craig*, 2 Wheat. 45; *Carleton* v. *Tyler*, 16 Maine R. 392; 1 Esp. N. P. 271. If the owner stand by and see the defendant, under an erroneous impression, make a purchase and erect improvements, he shall be estopped from asserting his claim. *Hatch* v. *Kimball*, 16 Maine R. 146.

The opinion of the Court was delivered by

SHEPLEY J. — It appears from the agreed statement, that the demandant as mortgagee in fee held the title to seven eighths, and had an indefeasible title to the other eighth, of a tract of land, of which the demanded premises were a part. And that he united with his mortgagor in a deed conveying the premises to Daniel Merrill, from whom the tenants derive their title. By this deed the demandant conveyed one eighth and his mortgagor seven eighths with warranty. Admitting the covenants to be several and not joint, the effect of this transaction is, that the demandant knowingly becomes a party to the most solemn assurance made by his mortgagor under his hand and seal, that the seven eighths "are free of all incumbrances" and that "he has good right to sell and convey the same." And he does this, while he held a mortgage covering the premises, on which was then due more than double the amount of the purchase money, without causing any exception of his own title to be introduced; and without giving any information to the purchaser, that he claimed any title, or that the grantor's title was defective. Under such circumstances he is as much bound by the declarations of his mortgagor as if they were his own. It would be a fraud upon the purchaser to permit him now to disturb that title. *Wendell* v. *VanRensellaer*, 1 John. Ch. 344; *Storrs* v. *Barker*, 6 id. 166; 1 Story's Eq. 376; *Hatch* v. *Kimball*, 16 Maine R. 146. It would be no legal excuse, if done through ignorance or inattention, for it is more just, that he should be the loser under such circumstances than that the innocent and faultless purchaser should.

Judgment for the tenants.

ALBERT L. KELLEY *versus* AMOS WESTON.

Where the tenant agrees to cultivate and bag the hop crop for the year, in payment of rent, the property in the hops is in the landlord.

The tenant acquires no more title to the crop, than if he had been paid for his labor in any other way, than by the use of the farm.

No separation or delivery is necessary, when the portion of produce agreed upon as rent is never to be the property of the tenant.

REPLEVIN for four bales of hops. It was agreed in this case that the defendant was a deputy sheriff and that the hops were attached by him as the property of one Amos Damon on a writ, *Isaiah Rich, jr.* v. said *Damon*. The cause was submitted to the decision of the Court on the facts testified to by Damon, which were as follows; that he lived on the farm of the plaintiff; that being indebted to him for rent, the plaintiff in the spring of 1838, notified him that he could have the farm no longer; that he (Damon) told him if he would let him stay one year longer he should have the hops he should raise and that he would cure them fit for market and bag them; he further testified that he sowed the seed for Mr. Kelley, and took care of the hops for him, but had no interest in them himself, and that whatever else he raised was his own. He further testified that he originally went into the occupation of the farm by virtue of a bond from the plaintiff as agent of Messrs. Thorndike, Sears & Prescott, which bond had expired three or four years previous to 1838.

N. H. Hubbard, for the defendant. By the contract, as proved, Damon was tenant at will to the plaintiff. St. c. 53, § 7. The property in the crops was in Damon till a delivery, and the remedy of the plaintiff rested in contract. The plaintiff cannot claim the property as sold, because the thing sold must be definite and capable of delivery. *Lanfear* v. *Sumner*, 17 Mass. R. 110. Nor as mortgagee because a mortgage implies a sale. *Brooks* v. *Powers*, 15 Mass. R. 244. Nor as pledgee, for there was no delivery to the plaintiff. Nor was he in possession. Had Damon sold, the title would have passed to his vendee. *Butterfield* v. *Baker*, 5 Pick. 522; *Waite's case*, 7 Pick. 100; *Bailey* v. *Fillebrown*, 9 Greenl. 12; *Dock-*

ham v. *Parker*, 9 Greenl. 137; *Brown* v. *Smith*, 3 Greenl. 44.

W. Kelly, contra. The plaintiff does not claim as vendee, pledgee, or as holding the property replevied as security for a debt. Damon has no claim to the hops. The rent was to be paid for in labor, and it is immaterial on what the labor was to be done, whether on this or on other land. The contract was not to pay in hops, but in work. The tenant was a mere laborer, cultivating the crop for the plaintiff, by which his rent was to be paid. Had the plaintiff sued Damon for rent, the performance of the work and labor as proved here, would have constituted a good defence. *Lewis* v. *Lyman*, 22 Pick. 437.

The opinion of the Court was by

Shepley J. — The defendant attached the hops as the property of Amos Damon, and is entitled to hold them for the benefit of his creditor, if they belonged to him. The Court must consider, that Damon gives a correct account of the agreement under which the farm was occupied by him for the year 1838, during which the hops were grown. His statement of the contract is, "I told him if he would let me stay one year longer, he should have all the hops I should raise; and that I would cure them fit for market and bag them; and that the crop was Mr. Kelley's when growing, for I raised it for him, and took care of them for him, and had no interest in them myself; and whatever else I raised was my own." According to this account he was to cultivate the hop crop and prepare it for market for the plaintiff in consideration that he would permit him to remain on the farm that year, and take all the rest of the produce for his own use. The property in the hops was not then in the tenant. He would no more acquire a title to them, than he would, if he had been paid for his labor in cultivating them in any other mode than by the use of the rest of the farm.

The cases on which the defendant's counsel relies are not analogous. In *Bailey* v. *Fillebrown*, 9 Greenl. 12, the agree-

ment was, " that all the hay that may be cut on said farm shall be holden by said agent as security till payment of the rent." And in *Dockham* v. *Parker*, 9 Greenl. 137, the agreement was, " that the defendants were to hold all the produce of the farm as security unless the tenant obtained good personal security for the payment." In these cases the provision that it should be security for the rent shows, that the property was in the tenant and not in the landlord. And when the produce is to be holden as security, it has been considered necessary, that the landlord should in proper time manifest his intention so to appropriate it by taking the possession or control of it to prevent its being taken by other creditors. But when by the terms of the agreement a portion of the produce is never to become the property of the tenant there can be no such necessity.

When the tenant states, that he contracted with the plaintiff as the agent of others, he appears to speak of that contract which he had made nine years before to purchase the farm, and which had expired three or four years before the year 1838. He says, " I lived on A. L. Kelley's farm," and the Court cannot infer, that the plaintiff was not the owner then, because he had nine years before acted as the agent of others.

According to the agreement the defendant is to be defaulted.

NATHANIEL M. LOWNEY *versus* DAVID PERHAM.

The possession of a bill of exchange by one who negotiates the same, is presumptive evidence of his ownership of it.

The holder of a bill though others may have an interest in the same, may maintain a suit on it in his own name with the consent of the parties interested.

A witness is not protected from answering, when his answers expose him merely to pecuniary loss.

When a bill in equity and answer are introduced as evidence, the Court have no power, on motion, to order the defendant in equity to answer further, in order that such answer may be used as evidence in the cause.

Where an agreement was entered into between the holder of a draft in suit and the acceptor; that the acceptor was to be defaulted at the then next term of the Court, in which the action was pending, and if a stipulated sum should be paid before such term, the cause was to be continued one term more for judgment, and if the sum was not paid, then judgment was to be rendered on the default; and the action against the indorser was to be continued — *it was held*: —

That the first clause of the agreement, by which the acceptor was to be defaulted, would enable the plaintiff sooner to obtain judgment and could not be considered as giving time.

That the further agreement for a continuance on payments being made as stipulated, was a conditional contract to give time — and: —

That a conditional agreement not performed, to give time to the acceptor on his payment of part, does not discharge the drawer or indorser.

ASSUMPSIT against the defendant as indorser of a bill of exchange, dated Oct. 5th, 1836, drawn by the defendant upon Benjamin Tainter, for $3000, payable to his own order at the Suffolk Bank, in Boston, in nine months from date, and indorsed by him and by one Richard Treat. Evidence was offered that the bill was duly protested for non-payment, and due notice thereof was seasonably forwarded to the defendant.

The defence was, that usurious interest had been taken in the negotiation of the bill to the plaintiff, and that after the non-payment of the bill, the plaintiff had extended the time of payment to the acceptor.

The following agreement was read in evidence by the defendant: — "Nov. 19, 1838. It is agreed that the action pending in the S. J. Court, Waldo county, *N. M. Lowney* v. *Benjamin Tainter*, be defaulted at the next term, and if one

thousand dollars of the debt be paid before the Court sits in December next, the action shall be continued for judgment to the July Term: otherwise judgment is to be rendered at the next December Term. It is further understood that if the foregoing is agreed to and signed by Mr. Tainter, the action, *Lowney* v. *Perham*, in the same Court is to be continued.

"N. M. LOWNEY,
"B. TAINTER."

No portion of the thousand dollars named in said agreement has ever been paid. It appeared in evidence, that suits had been brought on this draft against both the acceptor and indorser, and that the action, *Lowney* v. *Tainter*, was defaulted at December Term, 1838, and not continued for judgment.

Evidence tending to show that the draft had been loaned on usurious interest, was submitted to the jury.

He also read in evidence a bill in equity in his favor against the present plaintiff, in which he was charged with having discounted the bill at the rate of two per cent. a month on the time it had to run; and he was further required to state what he did give for said draft. The plaintiff in this suit, in his answer, declined stating what sum he did give, and insisted that by law he was not bound to answer. This question being presented to the presiding Judge for his decision, he refused to pass any order upon this matter, giving to the defendant in this suit the full benefit of such refusal, if the full Court should be of opinion, that he had a legal right to such answer.

It was proved, that Tainter had placed real and personal security in the hands of the defendant, the sufficiency of which to indemnify the defendant was submitted to the jury.

It further appeared, that the defendant had indorsed other notes and drafts of said Tainter to a larger amount than the value of the security.

The defendant then called Alfred Johnson, Esq. who being inquired of, as to what the plaintiff said he gave for the draft, declined answering the question, on the ground that he was personally interested in the suit; that the plaintiff informed him before he had taken the draft, upon what terms he could

have it, and proposing that he (the witness) should take a part, and that he did, having advanced originally one third, which amount he now owned; but saying that he was willing to answer the inquiry, if the Judge should decide that he was bound by law so to do. The Judge decided that the witness was not bound to answer the inquiry, and he did not.

The counsel for the defendant, requested the presiding Judge, on the evidence adduced, to charge as follows: —

1. That if the jury should find that the instrument signed by said plaintiff and Tainter, dated the 19th of November, 1838, was actually signed, executed and delivered, that said Perham was thereupon actually discharged from all liability to the plaintiff as indorser or drawer of said draft.

2. That the evidence tending to show that said Perham had been indemnified, does not prevent his being discharged as indorser by said agreement; and that if the jury should find that said Perham had no more property conveyed to him by Tainter than enough to indemnify him against loss from the notes and demands he now holds against said Tainter, exclusive of the one in suit; that in that event, such conveyance will not prevent him from being discharged from his liability as indorser by the agreement of November 19, 1838.

3. That if the jury should find that more than legal interest had been taken by the plaintiff in discounting said bill, that the plaintiff would not be entitled to recover three per cent. as damages on the same.

4. That if the jury should believe from the testimony of Johnson, that he was an original joint purchaser of said bill of exchange, and that he now owns one third of the same, that in such case he ought to have been joined as co-plaintiff, and that the action cannot be maintained by said Lowney alone.

The presiding Judge declined giving these instructions, but charged the jury, that by the execution and delivery of the agreement, dated Nov. 19, the defendant was not discharged from liability on the bill of exchange, that agreement being on condition, and there being no evidence that the condition had been fully complied with.

That if the defendant had not property of said Tainter conveyed to him sufficient, calculating its value at the time of indorsing the draft, to indemnify him for the notes and demands he now holds against said Tainter, and the property has since very materially fallen in value, that in such case, said conveyance will not prevent the defendant from objecting that he is discharged from his liability as indorser by the agreement of Nov. 19, unless it was done by his consent; and as to that the jury would judge; but it was otherwise, if he was fully indemnified at the time of indorsing the bill.

That if the jury were satisfied that the bill of exchange in question was an accommodation bill, and that illegal interest was taken thereon at the discounting of it by the plaintiff, they should deduct that illegal interest and give the three per cent. on the residue; that if they did not find it an accommodation bill, and that illegal interest had been taken, they should give three per cent. damages on the whole bill.

That if they believed this suit was prosecuted in the plaintiff's name by the consent and approbation of those interested therein, the plaintiff might maintain this action.

The jury returned a verdict for the plaintiff, and found specially, that the draft in suit was business and not accommodation paper; that no extra interest was taken in discounting it; and that the defendant was fully indemnified for discounting the same.

F. Allen, for the defendant. A witness is not excused from answering when his civil rights are affected. 1 Phil. Ev. 225–6; 1 Hall's Law Journal, 233; *Devoll* v. *Browning*, 5 Pick. 448; *Taney* v. *Kemp*, 4 Har. & Johns. 348; *Stoddard* v. *Main*, 2 Har. & Gill. 147; *Bull* v. *Loveland*, 10 Pick. 9; *Baird* v. *Cochran*, 4 S. & R. 397.

Giving time constitutes a good defence. 3 Kent, 111; Chitty on Bills, (Perkins' ed.) 290; *Hewett* v. *Goodrich*, 2 C. & P. 468; *Franklin* v. *Vanderpoel*, 1 Hall, 78. The agreement of Nov. 19 was valid and mutually binding. The defendant's rights are not dependant on the performance of that agreement. By the mere making of it, the defendant is

discharged. By its terms the plaintiff is precluded for a time from collecting the demand. Between the date of the contract and the next term of the Court, there is a time when the condition was unbroken, and when the plaintiff could not have given up the draft, even if requested. It is the entering into the contract, not the performance, which releases the indorser. *Bank of U. S.* v. *Hatch*, 6 Pet. 250; *M'Lemore* v. *Powell*, 6 Pet. Con. R. 636. Had the defendant taken up the draft and commenced a suit on it, he would have been barred by this agreement.

The question of full indemnification should be determined by the value of the property, when it is needed for that purpose, not by its value when it is conveyed.

W. Kelly, for the plaintiff. The witness, Johnson, was not competent to answer, because he was a party in interest, and because, if there was usury, he is not bound even in a bill in equity to disclose it. 3 Stark. Ev. 174; Story's Eq. Pl. 238, 244, 438, 444, 647. His admissions were admissible.

Any one having possession of the bill may maintain a suit in his own name. *Marr* v. *Plummer*, 3 Greenl. 73; *Fiske* v. *Bradford*, 7 Greenl. 28.

There was no usury here, this being a purchase of business paper. *Knights* v. *Putnam*, 3 Pick. 184; *French* v. *Grindle*, 15 Maine R. 163.

The agreement of Nov. 19, was conditional, and those conditions have not been performed. The agreement to be defaulted did not delay, but rather expedited the collection of the debt. If money had been paid, it might be considered as an agreement binding on the party; but that not being complied with, the contract ceases to exist. Chitty on Bills, 229; 2 St. Ev. 288.

The defendant is fully indemnified; and if not, it is his own neglect, for which he alone must suffer. *Mead* v. *Small*, 2 Greenl. 207; *Bond* v. *Farnham*, 5 Mass. R. 170. Being indemnified, he is not entitled to notice.

The opinion of the Court was by

SHEPLEY J. — This suit is on a bill of exchange drawn on the fifth of October, 1836, by the defendant upon Benjamin Tainter and payable to his own order at the Suffolk Bank, Boston, in nine months from date. It was drawn and indorsed by the defendant for the accommodation of Tainter. Richard Treat, according to the testimony of Hayford, introduced by the defendant, is found in possession of the bill and disposing of it to the plaintiff at a discount greater than six per cent. per annum; and he indorsed it. A question arose on the trial, whether the bill, as between Tainter and Treat, was accommodation or business paper; and the jury found it to be business paper. It is insisted, that this finding was not authorized by the testimony. The only testimony now presented is contained in the report of the case. It may be true, that Treat was an accommodation indorser and an agent for Tainter in selling the bill, but there is no proof of it. On the contrary he is found in possession of, and dealing with it as his own. He sells it and receives the money. An agency could not be presumed. The Court is not authorized therefore to say, that the jury might not justly conclude, that Treat received it of Tainter for value and sold it for his own benefit.

Regarding the bill then as business paper, should the presiding Judge have required Alfred Johnson to have answered the question, "whether the plaintiff did not inform him how much he gave for said draft, and what it was?" The witness declined answering, on the ground that he was interested in the bill, having been a joint purchaser of it with the plaintiff. Whatever doubts may have once existed as to the right of a witness to be protected when his answer would not expose him to punishment or subject him to a penalty, but might to a pecuniary loss, the tendency of modern decisions has been to remove them. And it has now become the settled rule, either by acts of legislation or by judicial decisions, in England and in most of the States, that the witness in such cases is obliged to testify. Yet if the testimony might be properly excluded on another ground, there is no just cause of complaint. It

should be noticed, that the answer could have no tendency to prove the bill to be accommodation paper. It was decided in *French* v. *Grindle*, 15 Maine R. 163, that a negotiable promissory note, free from usury and made for value as between the parties to it, might be indorsed by the holder and sold at a greater discount than legal interest, and the transaction would not be usurious. It has been before stated, that this bill must be regarded as of that description of paper; and the testimony coming from the answer could not have constituted a legal defence. Nor could it have been available in mitigation of damages, although it might have been, if the suit had been against the party from whom it was purchased. *Braman* v. *Hess*, 13 Johns. 52. If it should be admitted therefore, that the witness did not come within the rule, which admits the declarations of the real party in interest and relieves him from giving testimony, the Judge might properly exclude the testimony as irrelative.

There can be no doubt, that the Judge properly determined, that he would not pass any order respecting the defendant's claim to have a further answer of the plaintiff to the bill in equity. It would be a most extraordinary proceeding to call upon a presiding Judge, to order a further answer to be made to a bill in equity, no otherwise before him than as testimony in a suit at law.

The holder of a bill or note may maintain a suit upon it in his own name with the consent of the party interested. *Bragg* v. *Greenleaf*, 14 Maine R. 396.

The effect of giving time to the principal has been fully considered in the cases of *Page* v. *Webster*, 15 Maine R. 249, and *Leavitt* v. *Savage*, 16 Maine R. 72. And the rights of the surety are stated to be impaired and he is therefore discharged, when the creditor has disabled himself to proceed against the principal at law, or has placed himself in such a position, that the principal can in equity obtain an injunction against his proceeding. The first clause in the contract of the 19th of November, 1838, between the plaintiff and the principal debtor provides, that the action pending

between them should be defaulted at the next term of the Court. This was for the benefit of the plaintiff, relieving him from the introduction of testimony, and the effect would be to enable him to obtain judgment sooner, rather than to give time. The next clause provides, that the action shall be continued for judgment at the next term "if one thousand dollars of the debt is paid before the Court sits in December next." This was a conditional contract to give time to the principal, and might have brought the case within the principle deduced in the *Bank of the United States* v. *Hatch*, 6 Peters, 250, if there had been a performance on the part of the debtor. It was decided in *Badnall* v. *Samuel*, 4 Price, 174, that a conditional agreement not performed, to give time to the acceptor on his paying part, did not discharge the indorser. In this case the condition was not performed and the proposed delay was not granted.

Judgment on the verdict.

ELIZABETH DURHAM *versus* LAVINIA ANGIER.

An adverse occupation of the premises in which dower is claimed, for more than twenty years during the life of the husband, will not bar the rights of the widow.

The statute of limitations does not begin to run against her right to claim dower, until after the death of her husband. It is never regarded as operative upon a remainder man or reversioner during the existence of the particular estate.

A release of dower by the wife will not be presumed from long continued occupation of the premises, where such occupation is adverse to the husband.

THIS was an action to recover dower in a part of lot 36, in the first division, in Belfast, and was submitted to the Court on the following facts, by the agreement of parties.

The demandant was the widow of John Durham, and was married to him in Dec. 1780. To prove the seizin of her husband, she produced an office copy of a warranty deed from Benjamin and Edward Stetson, of lot 36, to him, dated April

2, 1796, duly acknowledged and recorded. John Durham resided upon part of lot 36 from the year 1798 to the time of his death, which took place Oct. 25, 1823. At the time said Durham went into possession of the premises, in which dower is claimed, they had been cleared of the original growth, were fenced with a brush fence, and used as a pasture, but had no buildings on them.

The tenant, to prove her title, produced a warranty deed from George Hopkins to Sam'l Jackson, dated Feb. 9, 1801, duly acknowledged and recorded, under which deed Jackson entered and immediately went into the occupation of the premises. At this time the fence had become dilapidated. The tenant has the title of Jackson, and she and those under whom she claims, have been in possession of the premises from Feb. 9, 1801 to the present time.

Dower was duly demanded before the suing out of the plaintiff's writ.

A. T. Palmer, for the demandant.

The seizin and death of the demandant's husband, and that dower was demanded, are admitted.

The estate was one in which the widow was entitled to her dower. *Mosher* v. *Mosher*, 15 Maine R. 371; *Knight* v. *Mains*, 3 Fairf. 41. The statute of limitations does not operate as a bar. *Moore* v. *Frost*, 3 N. H. R. 126; Com. Dig. Temps, G, 9; *Jones* v. *Powell*, 6 Johns. 290; *Barnard* v. *Edwards*, 4 N. H. R. 107.

W. Kelly, for the tenant.

It does not appear, that this was an estate entitling the demandant to her dower. Wild land is not subject to dower, and the case furnishes no evidence, that the premises have ever been cultivated or improved by John Durham.

The widow is barred by the statute of limitation. A manifest distinction exists between claims under and adverse to the husband. The tenant claims adversely to John Durham. He was ousted. That disseizin continued so long, that the tenant acquired a perfect title as against him; and as the wife claims

only through him, she is equally barred by lapse of time. 2 Hill. Abr. 195; *Cullen* v. *Melzer*, 13 S. & R. 356.

The opinion of the Court was by

SHEPLEY J. — It is provided by Statute, c. 41, § 6, "that the estate in which a widow shall have a right to claim dower by this act, is all such lands, tenements and hereditaments of which the husband was seized in fee, either in possession, reversion, or remainder, at any time during the marriage, except where such widow by her own consent may have been provided for by way of jointure prior to the marriage, or where she may have relinquished her right of dower by deed under her hand and seal." In England, by the St. of 3 & 4 Will. 4, c. 105, § 4, the widow is not entitled to dower out of any lands conveyed by her husband during life or devised by his last will. And in several of the States the right has been restricted to lands of which the husband died seized. No such limitation exists here. In this case the husband was seized during the marriage as the statute requires. The seizin must be a rightful one; for if the husband be in under a title, which is defeated by an elder and better one, his widow is not entitled to dower. Litt. § 393, and Butler's note, 170. Although the case states, that the tenant and those under whom she claims have held under a title different from that of the husband, it does not state, that it was a better one, or that it prevailed against that of the husband. The estate had been held by a title apparently adverse to that of the husband for more than twenty years before his death; and the counsel for the tenant contends, although the statute of limitations does not begin to run against the right of the widow until after the death of the husband, when the tenant claims under him, that it does operate as a bar when there has been a possession for so long a period under an adverse title. And he relies upon such a statement of the law in 2 Hill. Abr. c. 21, § 33, where it is said, "where a husband conveys his land without the wife's joining in the deed, the statute of limitations does not run against her till after his death. *Otherwise it seems where an*

entry and possession are adverse to his title, or where his title is not acknowledged." The general statute of limitations did not apply to a writ of dower. It was not within the words of the statute, for the widow did not count on her own seizin, or on that of any ancestor. Com. Dig. Temps. G. 9, Park on dower, 311; *Moore* v. *Frost*, 3 N. H. R. 126; *Wells* v. *Beall*, 2 Gill & Johns. 468. Upon the principle on which statutes of limitation are enacted, that of negligence or laches in the party debarred, no statute of limitation could justly be held to run against her until after that time. The statute is never regarded as operative upon a remainder man or reversioner during the existence of the particular estate. The cases cited in 2 Hill. Abr. do not sustain the text. They only shew, that the widow in England would be barred by the statute of non-claims, if she did not bring her suit within five years after her right accrued, when the husband, his heir, alienee, or devizee, had levied a fine with proclamations. Nor can the neglect of the husband to enter during his life destroy the right of his widow. For it is only, where he has no seizin in law, as where he is entitled to enter upon the determination of a particular freehold estate and permits the tenant to continue his seizin without entering upon him during his life, that his laches can prejudice her claim of dower. Perkins, § 366.

Whether the action would not be barred by the statute of limitations, if it had not been brought within twenty years after the death of the husband, does not arise in this case. That question has been decided upon the statutes of other States. *Barnard* v. *Edwards*, 4 N. H. R. 107; *Jones* v. *Powell*, 6 Johns. Ch. 194.

It is said, that a jury would be at liberty to presume a release of dower, and that the Court should therefore do so on this agreed statement. As the tenant does not profess to hold under but against the title of the husband no conveyance from him can be presumed; and without it she could not during his life release her dower by our laws. And sufficient time had not elapsed before the commencement of the suit to authorise the presumption, that she had released since his death.

The case finds that, "the premises in which dower is claimed had been cleared of the original growth and fenced with a brush fence, and were used as pasture." Such lands are not within the rule, which excludes the right of dower in lands covered with wood and uncultivated. *Mosher* v. *Mosher*, 15 Maine R. 371. It is not material therefore whether the premises were used in connexion with the remainder of the lot. The demandant is entitled on the agreed statement to recover her dower.

GEORGE W. REED *versus* THE INHABITANTS OF BELFAST.

A father cannot by virtue of St. 1821, c. 118, § 17, maintain an action against a town for the loss of services of a minor son in his employ, or for expenses paid for medical attendance, occasioned by an injury sustained by such son in consequence of a defect in a highway for which the town was responsible, over which he was passing.

The right, which a father has to the future earnings of his minor children, does not constitute present property, and is not embraced within the words "other property" in that statute.

EXCEPTIONS from the District Court, CHANDLER J. presiding.

This was a special action of the case, brought to recover the amount of damages sustained by the plaintiff, in consequence of an injury to his minor son, living with and supported by him, through a defect in a public highway.

The plaintiff offered to prove that there was a certain highway in Belfast, which the defendants were bound to keep in repair; that the same for some time previous to July 25th, 1838, had been and then was out of repair; that the defendants had reasonable notice of that fact, but neglected to repair the same; that on the said 25th of July, his minor son, Charles, was moderately riding on horseback over said highway, and without any fault of his, through a defect in a bridge or causeway in said highway, the said Charles was violently thrown to the ground in consequence of said horse stepping

in a hole in said bridge or causeway, and was seriously injured thereby; that the plaintiff had expended large sums of money to procure medical attendance for him, &c. and had wholly lost his services for a long period of time.

But CHANDLER J. considering the action not maintainable upon those facts, ordered a nonsuit; to which order exceptions were filed and allowed.

W. G. Crosby, for the plaintiff, argued that St. 1821, c. 118, § 17, gave a remedy for any injury to person or property. The true construction of the statute is alone to be ascertained. Property embraces every interest a man has. He has a pecuniary interest or property in his child; he may sell or hire out his services. If the child is beaten or injured, he may maintain an action for loss of service. So if he labor for another, he may recover for that labor. The child may recover for mere bodily injury, but he cannot for loss of service, nor for moneys expended in procuring medical aid. The loss of those falls upon the father, who loses the service, and is compelled to pay for the expenses incurred in case of the sickness of his son. The statute was passed for the protection of the community, and should receive a liberal construction. If an individual would be liable to the father for the loss of service of the son, so should the town in a similar case.

W. Kelly, for the defendants, contended that this case was not embraced within the provisions of the statute relied upon. That statute gives compensation only for direct injury to person or property, but none for consequential damages. The right to control the earnings of a wife or son does not constitute property. The master could not recover for the loss of services of his hired servant occasioned by an injury arising like the one in this case. The question is not what ought to be, but what is the law. The remedy is not to be extended by construction. At common law no action can be maintained. All liabilities being created by statute, and that giving an action only in case of a direct injury to person or property, the present, which is for consequential damages, cannot be maintained. *Mower* v. *Leicester*, 9 Mass. R. 247; *Riddle* v. *Proprietors*

of Locks, &c. on Merrimack River, 7 Mass. R. 187; *Hooper* v. *Emery*, 14 Maine R. 375.

The opinion of the Court was by

WHITMAN C. J. — This action is instituted by the plaintiff, to recover of the defendants, damages arising from an injury sustained to the person of his minor son, at the time living with, and laboring for, and being supported by him. The injury was sustained in consequence of a defect in a highway in Belfast, which the inhabitants of that town were bound to keep in repair. The Judge presiding in the District Court, at the trial, being of opinion, that such an action could not be maintained, directed a nonsuit, to which the plaintiff excepted, and has brought the case into this Court in order to a revision of that opinion.

The action is believed to be unprecedented. This however does not form a conclusive objection to its maintenance. Nevertheless, if cases of similar injuries must have occurred before, and no action in any one of them was ever commenced to obtain redress, a strong presumption arises, that hitherto such an action has not been deemed to be maintainable.

Actions of trespass, *per quod servitium amisit*, for the battery of a servant, we all know, are of familiar occurrence. So are, also, special actions on the case for consequential injuries, arising from the enticing from service, or the debauching a female servant or daughter. And it may be, that, if a man were the keeper of a ferocious animal, a dog for instance, apt to bite, and known to him to be such, which should essentially injure a child, living with its parent, that the latter would have a right of action against the owner.

But it has been considered that towns are liable to the party injured, in cases of this kind, by force of the statute alone, for injuries arising from defective ways. *Mower* v. *Leicester*, 9 Mass. R. 247. If so, they are liable only to the extent of the provisions thereof. The language of the statute is, "that if any person shall lose a limb, break a bone, or receive any other injury in his person, or in his horse, team or *other property*,"

&c. If the action be maintainable under this provision it must be upon the ground, that the plaintiff has sustained an injury to his property. Can the injury to his son be considered as an injury to his property? If the legislature had contemplated extending the remedy to a person, for any injury to his servants, would it not have been natural, that they should so have expressed themselves? Not having done so can we fairly infer, that such injuries were embraced in the words "other property"?

Property, according to the definition in Jacob, "is the highest right a man can have to any thing, being used for that right which one hath to *lands* or *tenements*, *goods* or *chattels*, which no way depend on another man's courtesy." If slavery existed here, as it does in some of the States of the Union, and the slave here, as there, had no capacity to sue for any injury to himself, and could not, to any legal intent and purpose, be regarded as the owner of property, he might come under the denomination of other "property." But can this be predicated of a son, who can be the owner of property, independently of his parent, and who can, by the aid of his next friend, vindicate his rights thereto; and have redress even against his parent for personal injuries?

The father has undoubtedly, a right to the custody and services of his minor children. But can this be considered as property? Or as such within the scope and meaning of the language used in the statute? Is it goods or chattels? Is it a thing *in præsenti*? or is it something *in futuro* and in expectancy merely? A right solely to derive advantage from a certain source, or by certain means, is not property, Men have ability, by their labor, to acquire property; but this is neither goods nor chattels; and therefore not, in strictness, to be denominated property. It is a right merely. Our rights are numerous, and various in kind. But so long as they remain unexercised they are but rights; they are not property. The fruits which we may expect to reap from the future earnings of our children can, in nowise be considered as present

property, liable to be damaged or injured; or at any rate not such as could be considered as having been in view by the legislature, when they speak of injuries to the property of any one. We must suppose that the legislature used the word property in its obvious and ordinary sense, and are not at liberty to seek for a hidden, abstruse or far fetched construction of it. When they speak of injuries to property they do not mean to the person; and *vice versa.* If it were otherwise, provision need not have been made for remuneration for the injury to the persons of individuals specifically; the provision that they should be remunerated for an injury to property would have included both.

And when the legislature speak of injuries to one man they do not mean injuries to another. It cannot be believed, that any case like the present was in the actual contemplation of the legislature. It does nevertheless, sometimes happen, that cases embraced in legislative language, were not actually in view at the time; and when the legislature does in fact so make use of language they must be taken and deemed to mean what their language imports. But if it be manifest that they did not, in reality, have any such meaning in view at the time, it would not be reasonable to put a forced construction upon language in order to make them mean so.

Exceptions overruled and judgment on the nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK, APRIL TERM, 1841.

HENRY BOOTHBY *versus* EBENEZER HATHAWAY.

A suit for the breach of the covenant for quiet enjoyment, cannot be maintained without proof of an actual eviction.

A deed of a collector of taxes under which the grantee has entered and continued in possession, claiming and exercising exclusive control of the premises conveyed, is admissible in evidence to show the nature and extent of his claim, without proof that the grantor was a collector of taxes.

An entry under a deed from one having no title, is evidence of a seizin arising by disseizin.

A seizin in fact in the grantor, under color of, though without legal title, is a defence to a suit for a breach of the covenants of seizin.

THIS was an action of covenant broken, and was founded on the breach of the covenants of seizin and good right to sell and convey lots No. 9, and 15, in Conway, N. H.

From the report of EMERY J. who tried the cause, the following testimony was introduced.

The plaintiff produced the deed of the defendant to him of the above named lots dated April 23, 1827.

The plaintiff then offered a copy of the proceedings of a meeting of the Masonian proprietors, holden at Portsmouth, July 24, 1782, by which it appeared that a survey and plan of the town of Conway, had been made, in which fifteen lots of an hundred acres each, had been reserved to the proprietors; and that the proprietors being desirous of making a severance of said reservation, passed the following vote: "Voted, that a

severance be now made of said reservation agreeably to said plan, by a draft of the lots agreeably to the numbers as therein marked or laid down, and that the lots now drawn to each of the fifteen original proprietors' rights or shares shall be a severance of said reservation to each of said proprietors' rights or share therein, as drawn and entered to each of them; to have and hold the same in severalty to each of them and their heirs and assigns as so drawn and entered."

It further appeared, that No. 9, was drawn by Theodore Atkinson, and No. 15, by Thomas Parker. The plaintiff then introduced a quitclaim deed from George K. Sparhawk, who derived title from said Atkinson, to Robert Boothby, a son of the plaintiff, dated April 18, 1838, conveying to him lot No. 9. The consideration of said deed as expressed therein was five dollars.

The plaintiff also introduced a quitclaim deed from Asaph Evans and Almira B. Evans, dated April 14, 1838, for the consideration of ten dollars, conveying to said Robert Boothby an undivided half of lot No. 15; likewise a deed from Joseph Dearborn to Simeon Eaton, dated Jan. 23, 1836, conveying to him, for the consideration of one dollar, an undivided half of said lot No. 15. The plaintiff likewise introduced evidence showing that the said Dearborn and Evans had acquired by deed and by descent, the title of Thomas Parker.

The defendant offered the deed of Thomas F. Odell, collector of taxes for the town of Conway, dated March 12, 1810, conveying to William Foss lot No. 9, and also the deeds of Benjamin Osgood, collector of taxes, dated March 31, 1820, conveying to him lots No. 9 and 15; also the deed of Thomas F. Odell, dated Dec. 1821, conveying to him the same lots — all which deeds were rejected, because the authority of said Foss, Osgood, and Odell, as collectors of taxes, and the preliminaries to establish a tax title, were not proved. The plaintiff likewise produced a deed dated Oct. 5, 1818, from Wm. Foss to him, conveying lot No. 9 to him. All the deeds offered or introduced were executed in New Hampshire, and were duly acknowledged and recorded.

There was evidence tending to show that the defendant, after he acquired his title, entered into possession of and exercised control over these lots; and that the plaintiff, after receiving his deed, entered into possession of said lots, and has continued in possession of the same.

It further appeared that Robert Boothby was a son of the plaintiff, and was about twenty-three or twenty-four years old, and lived with him.

The question of damages is to be settled by additional testimony to the Court or jury, if in the opinion of the Court the action can be maintained; if it cannot be maintained, the plaintiff is to become nonsuit.

J. Howard, for the plaintiff. An action of covenant broken, assigning for breaches that the defendant was not seized, and had not good right to sell and convey, brings the title to real estate in question. *Beckford* v. *Page*, 2 Mass. R. 455. The collectors' deeds were properly rejected. They could not be read to the jury for any purpose whatsoever material to this case, under the laws of New Hampshire, without first showing the authority of the collectors to sell, and the regularity of their proceedings. *Waldron* v. *Tuttle*, 3 N. H. R. 340; *Pro. of Cardigan* v. *Page*, 6 N. H. R. 182. The land being in New Hampshire, and the deeds there made and executed, the construction and effect of these deeds are to be determined by the law of that State. *Powers* v. *Lynch*, 3 Mass. R. 77; *Baker* v. *Wheaton*, 5 Mass. R. 509; *Winthrop* v. *Carleton*, 12 Mass. R. 4; *Pearshall* v. *Dwight*, 2 Mass. R. 84; *Blanchard* v. *Russell*, 13 Mass. R. 4; *Hull* v. *Blake*, 13 Mass. R. 153; Story's Conflict of Laws, 75, 194; *Cutler* v. *Davenport*, 1 Pick. 8; *Goodwin* v. *Jones*, 3 Mass. R. 520. The grantee may voluntarily yield the possession to one having good title, without impairing his claim for damages. *Hamilton* v. *Cates*, 4 Mass. R. 349. The collectors' deeds being rejected, the defendant has shown no title, and is liable in damage.

D. Goodenow, for the defendant. Actual possession is *prima facie* evidence of legal seizin. *Newhall* v. *Wheeler*, 7 Mass. R. 189. A deed of conveyance by one without title,

and an entry under such deed, is a disseizin of the owner. *Warren* v. *Childs*, 11 Mass. R. 222. The covenant of good right to convey is not broken, if the grantor was in fact seized either by wrong or by a defeasible title. *Twombly* v. *Hawley*, 4 Mass. R. 44; *Marston* v. *Hobbs*, 2 Mass. R. 439; *Prescott* v. *Freeman*, 4 Mass. R. 627. The evidence shows the defendant at the time of his conveyance was in possession, claiming to be seized in fee. The plaintiff, by his conveyance, acquired a seizin of the premises granted. The collectors' deeds should have been received for the purpose of showing the extent and limits of the defendant's seizin. *Bearce* v. *Jackson*, 4 Mass. R. 408; *Little* v. *Megquire*, 2 Greenl. 176; *Kennebec Purchase* v. *Laboree*, 2 Greenl. 273. The defendant being seized at the time of his conveyance, whether his title be good or bad, is not liable on his covenants of seizin. There is no proof that the Masonian proprietors had title to the premises, or that the individuals drawing the lots were proprietors.

The opinion of the Court was by

WHITMAN C. J. — This was an action of covenant broken, on a deed of warranty of the title to land. The covenants, the breaches of which are assigned, are that the plaintiff was seized in fee, and had good right to sell and convey the premises described, and that he would warrant and defend the same against the lawful claims and demands of all persons. The lands conveyed were situated in New Hampshire: and the title to them must be considered with reference to the laws of that State. Such laws, when necessary to the maintenance of an action in this State, must be proved to be in force there; and the burthen of such proof is upon the party, who must depend upon it, to sustain his side of a cause. It may, perhaps, be presumed, or be taken for granted, that the laws of that State, aside from statutory regulations, do not, in general, vary essentially from those of Maine and Massachusetts: all three of those states having formerly been under the same jurisdiction; and deriving their common law principles from the same great source: and it is a matter of notoriety, that the

statutory regulations of those states, often times, bear a very great similitude to each other: and the cases decided, as contained in the books of reports, are interchangeably, resorted to for an exposition of legal principles. The very case decided in New Hampshire, and by the counsel for the plaintiff in his argument, cited and relied upon with much emphasis, as maintaining his positions, would seem to have been considered as finding its support in the authorities cited from the Massachusetts reports, in the arguments of the counsel in that case. No others were referred to, either by them or the Court. And we are not aware that the law in this State would be adjudged otherwise, than as decided in that case.

The plaintiff having brought his action, averring breaches of covenant on the part of the defendant, the burthen of proof is upon him to sustain his allegations. Although in the writ there is an averment of the breach of the covenant for quiet enjoyment, it would scarcely seem to be pretended that the proof supports the allegation. In fact there does not seem to have been any evidence of an actual eviction; without which the action, upon that ground, could not be maintained.

The reliance, it may be presumed, is placed upon the other supposed breaches: as to which, it would seem to be undeniable, that the plaintiff, upon receiving his deed from the defendant, in 1827, immediately under and by virtue of it, took actual possession of the lots of land conveyed, and has continued that possession ever since; furthermore that the defendant, for seven or eight years before his conveyance to the plaintiff, had exercised exclusive and uninterrupted control of the same lots. This fact, we think, would have authorized the introduction of the deeds from Foss and Osgood to the defendant, by way of showing the nature and design of his acts of ownership. Under the authority of the cases of *Marston* v. *Hobbs*, 2 Mass. R. 433, and *Bearce* v. *Jackson*, 4 Mass. R. 408, the principles recognized as sound law, in which we see no reason to doubt, would be held to be in force in New Hampshire, we think, would authorize us to consider that an entry under a deed, although from one having no right or title in

himself to convey, might tend to show a seizin, created by a disseizin, whereby the former or rightful owner might be ousted. Considering the lapse of time, before and after the conveyance to the plaintiff, during which every act of ownership and possession of the lots in question, has been done exclusively, so far as appears, by the defendant and the plaintiff, we deem it quite evident, that the defendant must be considered as having had, at the time of his conveyance to the plaintiff, good right to convey; and that he had, at the same time, what in law may be denominated a seizin in fee; and, therefore, that the covenants, in reference thereto, have not been broken.

A further presumption, if any were needed, in favor of the seizin and right to convey, on the part of the defendant, arises from the neglect of those in whom the plaintiff supposes the title to have been, from 1782 till very lately, to assert any title to the premises. The nominal consideration, merely, for which the supposed proprietors parted with whatever title they might seem to have had, would indicate no very serious intention of their having ever intended to make, for themselves, any claim to the premises. Their titles, if any they had, were, in a good measure, dormant. And the case is not without evidence, although of a circumstantial nature, tending to raise a strong presumption, that the raking up of this supposed adverse title, was by the procurement, or at least by the connivance, of the plaintiff, but for which it might never have appeared. It may well be remarked that no grant is produced to Atkinson and others — no law exhibited authorizing any proceedings as a proprietary body by them — no specification of the object of calling any meeting — no evidence of any notification of one — no evidence that the records of the proprietors are lost, and therefore cannot be produced — no evidence of the acceptance and ratification of the division, by taking and continuing possession under and according to it. In the absence of all these particulars, no presumptions can or ought to be made, in favor of the supposed title under the division. A nonsuit, therefore, as agreed by the parties, must be entered.

REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

VOLUME VII.

MAINE REPORTS.

VOLUME XX.

HALLOWELL:
GLAZIER, MASTERS & SMITH.
1843.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

Hon. NATHAN WESTON, LL. D. Chief Justice.
Hon. NICHOLAS EMERY, } Justices.
Hon. ETHER SHEPLEY, }

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT, JUNE TERM, 1841.

MARGARET C. LOGAN *versus* ALLEN MONROE.

If the legal cause for taking a deposition no longer exists at the time of trial, the proof to exclude it is to come from the adverse party.

When the jury *may find* from the evidence, however improbable it may be that they will do so, the state of facts to be such as is contended for; the Court cannot restrain counsel, when arguing upon such a possible result. But in such case, it will be proper for the Court to call the attention of the jury to the amount of evidence upon which such arguments are built.

But where facts have been stated by a witness, which could be legal evidence only by proof of having been brought to the knowledge of the adverse party, and there has been an entire failure of proof on the latter point, the commentaries of counsel thereon as evidence in the case would be improper.

ASSUMPSIT for breach of a promise of marriage.

The plaintiff offered the deposition of Comfort Chase. The defendnat objected to the admission of the following question and answer thereto: "From what you saw of the acts of the defendant in the fall of 1834 and winter of 1835, and the acts and conduct of the plaintiff, have you any doubt that the defendant was engaged to marry Margaret C. Logan?" Answer: "I have not."

The defendant objected to the reading of the deposition of C. R. Logan, on the ground, "that said deponent was now at school in Charleston, which is within thirty miles of the place of trial, which objection was overruled, and the deposition was

read ; — no proof being offered of that fact, and the certificate of the justice showing the reverse." Notice was given to the defendant to produce, at the trial, letters from the plaintiff to him ; but none were produced. It was shown that letters were written by the plaintiff to the defendant, and part of the contents of one, proved to have been received, was stated by a witness. Other letters were written, and part of the contents stated, but there was no evidence that they had been received by the defendant.

At the trial, before EMERY J. the counsel for the plaintiff argued to the jury upon the contents of these letters, and upon their non-production, as affording evidence, that the defence set up by the defendant, that if any contract ever subsisted, it was dissolved by the plaintiff, and that she dismissed him, would be disproved. To this the counsel for the defendant objected. The Judge ruled, that he could not say there was no evidence submitted to the jury, that the letters were received ; that the letters proved to have been received were not the letters proved to have been written by the plaintiff, and seen by a witness ; and permitted the counsel to proceed. The Judge instructed the jury, that if they believed the letters received by the defendant were written by the plaintiff to him, in pursuance of the advice of Betsey Wingate, "that if the plaintiff had done wrong, and been a little too hasty in dismissing the defendant, she had better write Mr. Munroe," they would consider how far a reconciliation had subsequently taken place ; and if, from the whole testimony, the jury should be satisfied that it was mutually understood between the parties that the defendant was not dismissed, they would find their verdict for the plaintiff; and that the plaintiff, if she satisfied them that a contract, express or implied, of the character alleged, had been proved, the burthen of proof was upon the defendant to satisfy them that he had been dismissed.

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

Rogers, for the defendant.

J. Appleton and *M. L. Appleton*, for the plaintiff.

The opinion of the Court was by

SHEPLEY J. — The objection to a part of the deposition of Comfort Chase is not insisted upon, inasmuch as it did not relate to the point of the cause, on which it must have been decided. If the legal cause for taking the deposition of Charles R. Logan no longer existed, the Statute, c. 85, § 5, requires the proof to exclude it to come from the adverse party.

Notice was given to the defendant to produce letters received from the plaintiff, and none were produced. Evidence was introduced to prove, that two or three letters were written by the plaintiff, and that one or more of them was received by the defendant; and a witness stated part of the contents of the one which he delivered. Other letters were afterward written by the plaintiff, and sent to the defendant, and a witness stated part of the contents of them, but it did not appear that they were received. Whether they were received, was necessarily a fact before the jury, taking into consideration all the circumstances. If they believed, that these letters were in fact received, the contents, so far as proved, were a proper subject for commentary in argument, and for consideration by the jury; otherwise, not. When the jury may find from the evidence, however improbable it may be that they will do so, the state of facts to be such as is contended for, the Court cannot restrain counsel, while arguing upon such a possible result. It may be proper for the Court, and it will be in the power of the opposing counsel, to call the attention of the jury to the amount of evidence upon which such arguments are built, that they may not be misled by them.

If the evidence had shown, that the letters were not received, the commentaries of counsel would have been improper.

Exceptions overruled.

ELIHU BAXTER *versus* WILLIAM BRADBURY.

If the covenant of seizin in a deed of warranty is broken, and thereby the title wholly fails, the law restores to the purchaser the consideration paid, with interest; but in this, as in other covenants usual in deeds for the conveyance of real estate, if there exist facts and circumstances which would render the application of the rule inequitable, they are to be taken into consideration by a jury in estimating the damages.

If the covenant of seizin is broken, but in virtue of the covenant of warranty in the same deed, which was also taken to assure to the purchaser the subject matter of the conveyance, he has obtained that seizin, he cannot retain the seizin of the land, and be allowed besides to recover back the consideration paid for it.

If the grantor by deed of warranty had nothing in the estate at the time of the conveyance, but acquires a title afterwards, this title enures to the grantee immediately by way of estoppel; and he cannot elect to reject the title, and recover the consideration money paid in an action for breach of the covenant of seizin, but is entitled to merely nominal damages where no interruption of the possession has taken place, and to the damages actually sustained where there has.

The estoppel, being part of the title, may be given in evidence without being pleaded.

In an action for the *breach* of *this covenant*, which does not assure the paramount title, if there be an actual seizin, it is immaterial whether it be defeasible or indefeasible.

An estate in fee, upon the decease of the ancestor, is presumed to descend in pursuance of the laws of inheritance, unless the descent is shown to have been intercepted by a devise.

COVENANT broken, for breach of the covenant of seizin in a deed of warranty from the defendant to the plaintiff, dated August 3d, 1835. In this deed many lots of land were conveyed, and several in Corinth were described. To prove the breach of the covenant declared on, the plaintiff read a deed of warranty from John Peck to Benjamin Joy, conveying the town of Corinth, with certain reservations, dated July 27th, 1799. The land in controversy was part of the land conveyed to Joy. The plaintiff proved the consideration paid for these lots, and there rested his case.

The defendant then read a deed of mortgage, dated August 3d, 1835, from the plaintiff to him, of the same premises to secure the payment of certain notes; and a deed of quitclaim of the same premises from the plaintiff to Chester Baxter,

dated July 31, 1837. To prove a seizin in the plaintiff, and also for the purpose of reducing the damages, the defendant offered in evidence a deed of quitclaim from Amos Whitney to him of one of the lots, dated August 24, 1835, and the warranty deed of Thomas Whitten, dated the same day, of another lot, and offered evidence to show that the grantors were then in possession. To the introduction of this evidence the plaintiff objected, and EMERY J. presiding at the trial, ruled it to be inadmissible, and rejected it. The defendant also offered the contract of Joy, dated in June, 1835, to convey certain of the lands in controversy to the defendant, and a deed of the same from the heirs of Joy, dated Oct. 20, 1837, after this action was commenced, but the Judge rejected it. The defendant then offered to prove that the lots were of less value than the purchase money. This evidence was rejected.

A default was then entered by consent, and the damages assessed at the amount of the consideration and interest, under an agreement, that if in the opinion of the whole Court, the evidence rejected should have been admitted, the default was to be taken off, and the action stand for trial.

J. Appleton, for the defendant, contended, that the testimony offered was improperly excluded. There is no evidence that the plaintiff was ever interrupted in the possession of the property. The defendant acquired a perfect title to the land afterwards; and this title enured to the benefit of the plaintiff by way of estoppel. The plaintiff is not entitled to any damages. 1 Johns. Cas. 81; *Somes* v. *Skinner*, 3 Pick. 52; *Fairbanks* v. *Williamson*, 7 Greenl. 96; *Jackson* v. *Hoffman*, 9 Cow. 271; *Lawry* v. *Williams*, 1 Shep. 281.

But the damages, if any must be assessed, should be merely nominal. *Bean* v. *Mayo*, 5 Greenl. 94; *Leland* v. *Stone*, 10 Mass. R. 459; 12 Mass. R. 305; 12 Wend. 83; 5 N. H. R. 266; 15 Pick. 434; 5 Johns. 49.

But the defendant is as well entitled to recover of the plaintiff on the covenants of the deed of mortgage, as the plaintiff is in the present action. The money should not be paid to the plaintiff to be immediately returned. 10 Pick. 204; 20 Pick. 474.

Rogers and *Cooley*, for the plaintiff, contended, that the remedy for the breach of the covenant of seizin did not run with the land, and therefore that the plaintiff was not prevented from recovering by his quitclaim deed to Chester Baxter. 5 Greenl. 227; 2 Johns. 1; 4 Johns. 72; 14 Johns. 248; 2 Mass. R. 433, 455. The deeds offered were rightly rejected, because it was not shown that the grantors had any title. They were not admissible to show title by estoppel, because it is necessary to plead an estoppel, and this was not done. 17 Mass. R. 365. The title by estoppel could not enure to the benefit of the plaintiff without his consent. He is not compelled to receive the title. The evidence was not admissible to reduce the damages, because on the breach of this covenant, the plaintiff is entitled to recover the consideration money paid, and not receive land. 2 Mass. R. 433, 455; 8 Mass. R. 162; 10 Mass. R. 460; 5 Greenl. 227.

The opinion of the Court was by

Weston, C. J. — It is assumed in argument, that Amos Whitney and Thomas Whitten were seized of the lands described in their respective deeds to the defendant, dated August 24, 1835. The lands constitute a part of that, which is the subject matter of this suit. These deeds, with the evidence of their seizin, were rejected as inadmissible, by the presiding Judge at the trial. If this evidence could legally have any effect upon the right of the plaintiff to recover, or upon the measure of damages, it ought not to have been rejected.

The rules, which have been established to determine the measure of damages, upon the breach of covenants in deeds for the conveyance of real estate, have been framed with a view to give the party entitled a fair indemnity for damage he has sustained. Thus if the covenant of seizin is broken, as thereby the title wholly fails, the law restores to the purchaser, the consideration paid, which is the agreed value of the land, with interest. But in this, as well as in other covenants, usual in the conveyance of real estate, if there exists facts and circumstances, which would render the application of the rule in-

equitable, they are to be taken into consideration by a jury. *Leland* v. *Stone*, 10 Mass. R. 459. The covenant was intended to secure to the plaintiff a legal seizin in the land conveyed. If it is broken and he fails of that seizin, he has a right to reclaim the purchase money. But if in virtue of another covenant in the same deed, which was also taken to assure to him the subject matter of the conveyance, he has obtained that seizin, it would be altogether inequitable that he should have the seizin, and be allowed besides to recover back the consideration paid for it. The rule as to the measure of damages for the breach of this covenant, which is just in its general application, could never be intended to apply to such a case. In *Whiting* v. *Davey*, 15 Pick. 428, it is strongly intimated by the court, that this rule may have exceptions, as it undoubtedly has.

If Whitney and Whitten were seized, immediately upon the execution of their deeds, which were executed a few days after that, upon which the plaintiff declares, their seizin at once enured and passed to him, in virtue of the covenant of general warranty in his deed. *Somes* v. *Skinner*, 3 Pick. 52. It has been insisted by the counsel for the plaintiff that this effect depends upon the election of the grantee, and that the plaintiff here would reject the title arising by estoppel. But we are aware of no legal principle, which can sustain this position. In the case last cited, the court say, "that the general principle to be deduced from all the authorities is, that an instrument, which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor." The plaintiff by taking a general covenant of warranty, not only assented to, but secured and made available to himself, all the legal consequences, resulting from that covenant. Having therefore under his deed, before the commencement of the action, acquired the seizin, which it was the object of both covenants to secure, he could be entitled only to nominal damages, and in our judg-

ment the evidence rejected was legally admissible. The estoppel, being part of the title, may be given in evidence, without being pleaded. *Adams* v. *Barnes*, 17 Mass. R. 365. Whether the seizin of Whitney and Whitten was defeasible or indefeasible, is not a question which can arise under this covenant, which operates only upon the actual seizin and does not assure the paramount title.

The same course of reasoning, and the same authorities, which justified the admission of the testimony rejected, required that the evidence of title derived by estoppel from Joy's heirs, should have been received.

It has been objected, that these lands may have been devised by Joy, which may have prevented a descent to the heirs. But an estate in fee, upon the decease of the ancestor, is presumed to descend, in pursuance of the laws of inheritance, unless the descent is shown to have been intercepted by a devise. By the conveyance from Joy's heirs to the defendant, the plaintiff acquired not only the seizin, but an indefeasible title. As, however, that was executed, since the commencement of the action, the plaintiff is entitled to nominal damages, and to nothing more, if he has not been disturbed in his possession; and judgment may be rendered for him therefor on the default, which has been entered. But if the actual seizin of Whitney and Whitten is intended to be contested, or the plaintiff would show that he had been dispossessed, before his title by estoppel attached, the default must be taken off, and the action stand for trial.

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

Where the third day of grace falls on the Lord's day, by the Statute of 1824, c. 272, the maker of a promissory note is entitled to a grace of two days only; and in such case, a presentment for payment on the Lord's day, is made too late to charge the indorser.

THE suit was against the defendants as indorsers of a promissory note, given by William Smith to the defendants, or order, and by them indorsed, bearing date May 4, 1835, and

payable in two years with interest annually. The note was left, before it became payable, at a bank in Bangor, where the defendants resided, for collection. On *Sunday*, the seventh day of May, 1837, the third day after the note by its terms fell due, a demand was made upon the maker, and notice given to the defendants; and on the next day a like demand was made, and notice given.

The trial was before WESTON C. J. and a nonsuit was entered, to be confirmed, or set aside, according to the opinion of the Court upon the law of the case.

M. L. Appleton argued for the plaintiffs, and cited St. 1824, c. 272; *Whitwell* v. *Johnson*, 17 Mass. R. 449; *Berkshire Bank* v. *Jones*, 6 Mass. R. 524; *Woodbridge* v. *Brigham*, 13 Mass. R. 556; 3 Cowen, 252; 2 Caines, 343; 1 Johns. Cas. 131; 3 B. & P. 599; Chitty on Bills, 401.

Rogers argued for the defendants, citing 2 Caines, 343; 12 Johns. 423; 15 Johns. 470; *Jones* v. *Fales*, 4 Mass. R. 245; *Farnum* v. *Fowle*, 12 Mass. R. 89; 6 Wheat. 102; Chitty on Bills, (8th ed.) 401.

The opinion of the Court was by

SHEPLEY J. — It is provided by St. 1824, *c.* 272, that the maker of a promissory note payable at a future day, when it is discounted or left in a bank for collection, shall be entitled to a grace of three days, unless the third day happens on the Lord's day, or on a day of public fast or thanksgiving; and in that case to a grace of two days only.

The third day after this note, without grace, became due being the Lord's day, the maker was entitled to a grace of two days only; and a presentment on the Lord's day would be like one in other cases on the day after the three days of grace had elapsed, and it was too late.

Nonsuit confirmed.

JOHN SHAW *versus* SUMNER LAUGHTON *& al.*

Where property has been attached, and a receipt therefor has been given to the attaching officer by the defendant and another, whereby they promise to pay a sum of money, or safely to keep the property free of expense to the officer, and on demand to re-deliver the same to him, or his successor in office, — and if no demand is made, that they will, within thirty days from the rendition of judgment in the suit, re-deliver the property at a place named, and notify the officer of the delivery, — such contract is not illegal.

To maintain an action on the contract after the expiration of the thirty days, it is not necessary for the officer to prove a demand of the property, nor notice to the receipters of the time when judgment was rendered.

But the receipters are not to be held liable for the value of a horse, part of the property, which died before the time limited for the delivery, without fault on their part.

ASSUMPSIT against Sumner Laughton and Dominicus Parker, upon an instrument of which the following is a copy: —

"Orono, July 28, 1836. For value received we promise to pay John Shaw, deputy sheriff, or his order, the sum of one hundred dollars on demand, or to re-deliver the goods and chattels following, viz.—One horse, one gig, and one harness, which property the said John Shaw has taken by virtue of a writ against Sumner Laughton in favor of William H. Baxter. And we agree safely to keep, and on demand to re-deliver, all the goods and chattels above described, to the said Shaw, or his successor in office, at Orono, in said county, in like good order and condition as the same are now in, free from expense to said Shaw, or to the creditor aforesaid. And we further agree, that if no demand is made, we will within thirty days from the rendition of judgment in the action aforesaid, re-deliver all the above described property as aforesaid, at the above named place, and forthwith notify said officer of said delivery.

"Sumner Laughton — Dominicus Parker."

The plaintiff offered no evidence of any demand upon the defendants for the property mentioned in the receipt, nor of any notice to the defendants when judgment was obtained in the action named therein. The horse died before the expiration of thirty days from the recovery of judgment in the original action.

It was agreed, by the parties, to submit the case for the decision of the Court; and that if the action cannot be maintained without evidence of one or both of said points, or if said receipt is illegal, contrary to the policy of the law, or for any other cause appearing upon its face invalid, the plaintiff should become nonsuit; otherwise, the defendants were to be defaulted, and judgment was to be entered for the value of the gig and harness, and also for the value of the horse, if the defendants are liable therefor.

Prentiss, for the plaintiff, contended, that the contract declared on, was a legal one. *Farnham* v. *Cram*, 15 Maine R. 79.

The knowledge of the time when judgment was rendered in the suit wherein the attachment was made, is not in any peculiar manner within the knowledge of the plaintiff. The proceedings of the Courts are open to all. But one of the present defendants was the defendant in that suit, and ought to know, better than the officer, when judgment was rendered. *Hobart* v. *Hilliard*, 11 Pick. 144; 1 Phil. Ev. 319. To say that notice must be given when the judgment was obtained, would be to make a different contract for the parties from that made by themselves.

J. Appleton, for the defendants, said, that they could not be held liable to pay the value of the horse. *Melvin* v. *Winslow*, 1 Fairf. 397; *Carpenter* v. *Stevens*, 12 Wend. 589.

When default is made, the defendant is out of Court, and has no knowledge when the plaintiff will take his judgment. *Herring* v. *Polley*, 8 Mass. R. 113. The defendants are not obliged to watch when judgment is taken, and to seek after the plaintiff, and to find the execution. It is sufficient if he is ready to deliver the property, when demanded. No action can be maintained where the officer has ceased to be liable. St. 1821, c. 60, § 1; *Tibbetts* v. *Towle*, 3 Fairf. 242; *Carr* v. *Farley*, ib. 328; *Howard* v. *Smith*, 12 Pick. 202.

The opinion of the Court was by

WESTON C. J. — By the agreement of the parties, the plaintiff is to become nonsuit, if the contract, upon which he relies, is illegal, or if by law, either a prior demand or notice of the rendition of judgment, in favor of the attaching creditor, was essential to the maintenance of the action. If the Court should determine otherwise upon these points, the defendants are to be defaulted. It must be understood, that no other grounds of defence exist, except as to a part of the damages, which will be subsequently noticed.

We perceive no objection to the legality of the contract. The plaintiff had assumed official responsibility in consequence of the attachment, from which he had a right to be protected, upon delivering the property to the defendant. Authorities have been cited to show, that an action against a receipter of property attached cannot prevail, if the liability of the officer has ceased, by the negligence of the creditor or otherwise. It is a sufficient answer to say, that no such point is presented to our consideration in the agreement of the parties. Nor does it there appear, that when the goods should have been delivered, the plaintiff was no longer an officer, as has been assumed for the defendants in argument.

By the contract the goods were to be delivered on demand; but if no demand was made, the defendants were to re-deliver the property "at the above named place," (Orono,) and to notify "said officer," (the plaintiff) of such delivery, within thirty days, from the rendition of judgment. This part of the contract is not to be disregarded. It is perfectly intelligible; and as it clearly imposes an obligation upon them without demand, and has not been complied with, no previous demand is necessary to render them legally liable. And in our opinion, as one of the defendants was a party to that judgment, they were bound to take notice of its rendition. *Hobart* v. *Hilliard,* 11 Pick. 143.

With regard to the horse, it having died before the expiration of the time, limited for its delivery, and no fault appearing in the defendants, they should not be held to answer for

its value. The officer would be excused in such a case, and so ought the receipters to be, who are keepers for him. *Carpenter* v. *Stevens & al.* 12 Wend. 589; *Melvin* v. *Winslow & als.* 1 Fairf. 397. These cases were on replevin bonds, but they are analogous in principle.

Defendants defaulted.

JAMES PHILLIPS *versus* ENEAS SINCLAIR.

It is a well settled rule in equity that twenty years possession by the mortgagee or his assignees, without an acknowledgement of a subsisting mortgage, operates as a bar to the right of redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations.

After a judgment in his favor establishing the right, one may lawfully enter under that judgment upon a vacant lot, without a writ of possession.

If the party be not without the limits of the United States at the time the right first accrued, no subsequent absence will prevent the operation of the statute of limitations, (St. 1821, c. 62,) or give him ten additional years in which to bring his suit or make his entry, under the proviso contained in the fourth section.

The rule in equity on that subject, is applied upon the same principles as the statute. When that will not allow a party the additional ten years, equity will not relieve him.

The right to redeem a mortgage first accrues, when the money secured by it becomes payable.

To avoid the operation of this rule in equity, it should clearly appear, that the party was without the United States when his right to redeem first accrued.

BILL in equity, seeking for a decree establishing his right to redeem a mortgage, heard on bill, answer, and proof. All the facts necessary for the proper understanding of the points in the case decided by the Court, will be found stated in the opinion, immediately preceding the decision on those points respectively.

J. A. Poor argued for the plaintiff, and among other positions, took the following: —

The deeds put into the case by the defendant admit the existence of the mortgage until within two or three years of the

filing of the bill; and that is sufficient to establish our right to redeem. 1 Hill. Abr. 29; 1 Powell on Mort. (Rand's Ed.) 380 to 392; *Dexter* v. *Arnold*, 1 Sum. 110; S. C. 2 Sum. 109; *Demarest* v. *Wynkoop*, 3 Johns. Ch. R. 129; 4 Ves. 348; 18 Ves. 455; 1 Dana, 279; 1 Sim. & St. 347.

To constitute a foreclosure by an entry other than under a writ of possession, it must not only be made after condition broken and for condition broken, but the actual possession must be taken and retained. *Gordon* v. *Lewis*, 1 Sum. 525; *Taylor* v. *Weld*, 5 Mass. R. 109; *Scott* v. *McFarland*, 13 Mass. R. 309; *Thayer* v. *Smith*, 17 Mass. R. 429; *Gibson* v. *Crehore*, 5 Pick. 146; *Hadley* v. *Houghton*, 7 Pick. 29. Our statute is different from those of Massachusetts, and expressly prohibits all presumptions of foreclosure, where none of the statute modes are shown to have been pursued. *Boyd* v. *Shaw*, 14 Maine R. 58.

The rule in equity is the same as in law respecting the length of time necessary to show a presumption of foreclosure by continued possession, without proof of a regular foreclosure under the statute. Twenty years are the shortest time. Hill. Abr. 290; 1 Johns. Ch. R. 285; 10 Wheat. 152; 9 Wheat. 489; 1 Sum. 110, 525; 2 Sum. 109; 1 Taunt. 307.

The statute of limitations did not begin to run until ten years after the return of the plaintiff from the British Provinces. 9 Johns. 174; 3 Johns. Ch. R. 129.

A. G. Jewett argued for the defendant, and contended, that a purchaser of land for value of the mortgagee, without notice of its being held in mortgage, with a possession of twenty years under his deed, holds the land against any right of the mortgagor to redeem. 1 Story's Eq. 139, 165, 381, 403, 409, 434, 436; 2 Story's Eq. 1502, 1503; 2 Ves. Jr. 458.

If a man, having the right, stands by and sees another purchase, and gives no notice of his claim, he cannot hold against such purchaser. *Wendell* v. *Van Rensselaer*, 1 John. Ch. R. 344; *Storrs* v. *Barker*, 6 Johns. Ch. R. 166; 1 Story's Eq. § 388, 389.

But the defendant has shown a perfect title, both at law and in equity. By twenty years uninterrupted possession, claiming title in himself. When in possession of a portion of the premises, erecting buildings and making improvements, under a recorded deed, for twenty years, he acquires an indefeasible title to all the land described, unless it was in the possession of some other person. *Prop. Ken. Pur.* v. *Larrabee*, 2 Greenl. 275. And by a legal foreclosure of the mortgage. *Boyd* v. *Shaw*, 2 Shepl. 58. The commencement of the foreclosure was under the Statutes of Massachusetts, and they are to govern.

The opinion of the Court was drawn up by

Shepley J. — By this bill the plaintiff seeks to redeem an estate conveyed by him in mortgage, to Samuel Rich, on the third day of July, 1811, to secure the payment of a note for $300, on the first day of May, 1812. A receipt, for $174,93 to be indorsed on the note, purporting to be signed by Rich and bearing date April 21, 1812, is produced. It appears in proof, that the plaintiff in the early part of the year 1812, left the town of Brewer and went to Eastport, and soon after to the Province of New Brunswick, where he resided until about the year 1820, when he returned to this state, and has frequently since that time been in the town of Brewer where the estate lies. It does not appear, that he left the estate in the care of any person, when he went away; nor that he has since that time, by himself or others under him, had any possession of it, paid any taxes on it, or in any manner claimed any rights in it until March, 1837, when he called upon the tenant to render an account and to allow him to redeem. Twenty-five years had then nearly elapsed since it became his duty to have paid the money and redeemed the estate. It is a well settled rule in equity, that twenty years possession by the mortgagee or his assignees, without an acknowledgment of a subsisting mortgage, operates as a bar to the right of redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations. *Jenner* v. *Tracy*, 3 P. Wms. 287; *Demarest* v.

Wynkoop, 3 Johns. Ch. R. 129. Two objections are made to the application of this rule in the present case. In the first place it is denied, that the testimony satisfactorily proves that the estate has been held under the mortgagee for so long a time. And in the second place it is said, that the plaintiff was without the United States in such a manner as to bring him within the proviso in the act of limitations.

It appears that the mortgagee on the 20th of August, 1812, brought a suit on the mortgage to obtain possession. That during that year he left the town of Brewer, where he had resided, and never returned. The suit was prosecuted and judgment obtained, and the conditional judgment entered in the following year; and a writ of possession issued thereon on the 14th of January, 1814. This writ is not found, and there is no proof of its having been executed. While that suit was pending the mortgagee conveyed the estate, on the 9th of July, 1813, to his sister, Polly Rich, referring to the mortgage deed from the plaintiff. It was not recorded until 1816.

Hollis Bond testifies in substance, that Arthur Rich, who resided in Eddington, had the care of the land until he sold it to Howard and Martin, which was in the year 1825. That he hired it of him for the year 1814 or 15, and paid the taxes for the use of it as a pasture. That James Campbell and Joshua Hathaway occupied it after him. That it was occupied as a pasture every year till Howard and Martin purchased, although the fences were often down, and it occasionally laid common. John C. Clewly testifies in substance, that his father occupied it in 1818, under Arthur Rich, and paid the taxes and kept up the fences that were upon it for the use of it, and that he pastured it for several years, and he thinks till Howard and Martin purchased. Franklin Adams testifies, that when a small boy he recollects hearing Arthur Rich inquire about it, and offer to rent it, and to sell it; and that he is now thirty years of age. James S. Rich testifies, that he found among the papers of his father, Arthur Rich, deceased, a power of attorney, which is produced, from Polly Rich to his father, dated October 2, 1822, authorizing him to sell the land. And

that Polly Rich became the wife of Henry Merritt. It appears that Merritt and wife authorized Arthur Rich to sell by a power bearing date October 8, 1825. And in December following they conveyed by deed with warranty to Howard and Martin, under which title, with that of Merritt and wife, it has since been occupied. It appears to have been taxed several years to the plaintiff, as a non-resident. This was while he was out of the country; and there is no evidence that any one paid for him; while there is evidence of occasional payments by the tenants under the Rich title; and as the land does not appear to have been sold to pay them, there is just reason to conclude, that they were usually so paid. There can be little doubt, that from the year 1822, Arthur Rich controlled the possession for Polly Rich, and there is no evidence of any entry or of possession taken at that time, which tends to confirm the other testimony, shewing, that possession was taken under her title soon after the judgment in 1814 or '15, as stated by Bond. She might lawfully enter under that judgment, for one may so enter after judgment upon a vacant lot without a writ of possession. *Withers* v. *Harris*, Ld. Raym. 808. The testimony is therefore almost conclusive to prove, that possession had been held under the title of the mortgagee for more than twenty years, not only without any admission of the title of the mortgagor, but with a practical denial of it, by offering to sell, and by actually making sale of the estate.

It remains to consider whether the testimony shows, that the plaintiff is entitled to the benefit of the proviso in the statute of limitations, relating to those out of the United States. By that statute, one who is "without the limits of the United States," "at the time the said right or title first descended, accrued, or fell," is allowed ten additional years to make his entry or bring his suit. If not so absent at the time the right first accrued, no subsequent absence will prevent the operation of the statute. The rule in equity is applied upon the same principles as the statute. When that would not allow a party the additional ten years, equity will not relieve him. The right

to redeem in this case, first accrued when the debt became payable, which was on the first day of May, 1812. From that time, the statute would operate upon the remedy of the mortgagee. There is nothing in the case to show that the debt could have been collected of the mortgagor at the time he first claimed to redeem. His absence would not have rebutted the presumption arising from the lapse of time, for the right of action accrued before he left the country. It does not appear, that he left the town of Brewer before the first of May, 1812, nor how soon he went from Eastport to New Brunswick. To avoid the operation of the rule, it should clearly appear that he was without the United States when his right to redeem first accrued. This right having been destroyed by the lapse of time, it becomes unnecessary to consider the effect of the testimony to prove a foreclosure of the mortgage.

Bill dismissed, with costs for defendant.

Mem. — EMERY J. was holding the Court for the trial of issues to the jury, in Piscataquis, when this case was argued, and took no part in the decision.

AMOS M. ROBERTS *versus* GEORGE F. MARSTON.

If a party accepts of an agreement from which he is to derive a benefit, when he shall have performed an act on or before a certain day; such acceptance is equivalent to an affirmative agreement on his part to perform the act by the time stated.

Where an estate was conveyed, and the grantee agreed in writing to allow the grantor a certain sum, less than the consideration money, when he should have removed certain incumbrances upon the estate, such removal to take place on or before a certain day; and where the incumbrances were removed by the grantor, but not within the time stipulated, no notice having been given, in the meantime, by the grantee that he elected to repudiate the contract; *it was held:* —

That performance at the time, the incumbrances not being to the amount of the consideration, was not to be regarded as a condition precedent.

That the grantee should be placed, by compensation, in the same condition, as if the other party had removed the incumbrances at the time fixed.

And that if the grantee had suffered damage from the delay of the grantor, it should be deducted from the price agreed to be allowed.

ASSUMPSIT on several notes of hand, amounting in the whole to $5500, all given in 1835, the action having been commenced Jan. 27, 1837. The defendant introduced in evidence a receipt from the plaintiff to him in these terms, "Bangor, Dec. 20, 1836. Received of George F. Marston this day a warranty deed of two parcels of land situated on Union Street, for which I do agree and promise to pay or allow him the sum of four thousand dollars, with interest from this date, on the demands I now hold against him, when he shall have cleared the incumbrances now on said deeded property abovementioned, which incumbrances are to be cleared by him, on or before the first day of July next." The incumbrances referred to in the receipt were removed on Nov. 3, 1838, of which the plaintiff had notice within two days. On Oct. 13, 1838, the plaintiff executed to the defendant a deed of release of the land referred to in the receipt, and on the trial offered the same to the defendant, who refused to receive it.

At the trial before WESTON C. J. the counsel for the plain-

tiff insisted, that as the incumbrances were not removed by the time limited in the receipt, it afforded no matter of set-off whatever. The Chief Justice ruled that the defendant, by his acceptance of the receipt, had stipulated to remove the incumbrances by the time stated; that if on July 2, 1837, when that time had passed, the plaintiff had notified the defendant that he considered that he was no longer bound by his agreement expressed in the receipt, and had then tendered to the defendant a release of the land conveyed to him, the defendant would in that case not have been entitled to be allowed any thing in offset on that account. But that this not having been done at the time, the jury would allow in offset such sum as the defendant was equitably entitled to, making such deduction from the $4000, expressed in the receipt, as a change in the value of the property might render just and proper. The jury did not agree; and by agreement of the parties, it was submitted to the decision of the Court, whether the defendant is, or is not, to be allowed any thing on account of the receipt, connected with the discharge of the incumbrances by the defendant after the time appointed.

Rogers argued for the plaintiff; and

M'Crillis, for the defendants, citing 1 Saund. 320, note; 3 Wend. 360; 5 Wend. 496; 1 H. Bl. 275; 10 East, 295; 3 Bing. N. C. 257; 5 Serg. & R. 323; 7 Greenl. 394; 6 Vt. R. 448; 6 Hammond, 171; 17 Johns. 437.

The opinion of the Court was by

Weston C. J. — The plaintiff has received of the defendant a deed of warranty of certain real estate, for which it appears, by his receipt of December 20, 1836, he was to allow him four thousand dollars, when he shall have cleared the incumbrances on the property. The defendant has removed the incumbrances; and his right to be allowed the stipulated sum would be perfect, but for a clause added to the receipt, which is in these words, "which incumbrances are to be removed by him, on or before the first day of July next.

The incumbrances were not removed on that day, nor until more than a year afterwards. And the argument is, on the part of the plaintiff, that by reason of the failure of the defendant to cause this to be done at the time appointed, he has now no claim to any allowance whatever, by way of offset. This construction would give to the clause, under consideration, the force of a condition precedent. No direct language is used, expressive of such a condition, nor is it deducible by necessary implication. The incumbrance was less than the stipulated price; and it would be unreasonable to subject the defendant to the hazard of a forfeiture of the estate, if he did not remove it at the time, unless such is the plain meaning of the terms used.

Although the plaintiff was secured by the covenant in the deed, yet without the latter clause in the receipt, no definite time was fixed, within which the business was to be closed. The defendant, by accepting the receipt, must be deemed to have assented to the stipulation. It is equivalent to an affirmative agreement on his part to that effect. It does not go to the whole consideration, and for that reason, should not be regarded as a condition precedent. *Duke of St. Albans* v. *Shore*, Douglas, 690, note; *Boone* v. *Eyre*, 1 H. Blackstone, 275, note; *Bennet* v. *Executors of Pixley*, 7 Johns. 249.

So far as the plaintiff has suffered damage from the delinquency of the defendant, he has a right to have it deducted from the price he agreed to give. He should be placed, by compensation, in the same condition, as if the defendant had fulfilled the stipulation. The jury were not able to agree before; and the matter is not so easily liquidated in a trial at law. Unless however the parties can arrange it between themselves, or by a submission to a reference, the action must stand for trial.

THE MAINE CHARITY SCHOOL *versus* JAMES DINSMORE.

In the commencement of real actions, the form of process may be a writ of attachment, or an original summons, at the election of the demandant.

THIS was a writ of entry brought upon a mortgage made by the defendant to the plaintiffs, and was in form *a writ of attachment*. The service on the defendant was made by attaching a *chip*, the property of the defendant, and giving him a *summons* for his appearance. On the second day of the first term, the defendant made a written motion to quash the writ, and dismiss the action, for the causes aforesaid, which appeared on the face of the writ and return of the officer.

The motion was overruled by EMERY J., holding the Court, and the defendant was ordered to answer over. The defendant filed exceptions.

A. W. Paine, for the defendant, contended, that the writ should have been quashed: —

1. Because it was wrong in form. It was a real action, and should have been by original summons, and not by writ of attachment. St. 1821, c. 63, § 1; c. 59, § 2, 4; Jackson on Real Actions, 50.

2. Because there was no legal service. It should have been made by leaving a copy, instead of a nominal attachment of property, and leaving a summons. St. 1821, c. 59; *Holmes* v. *Fernald*, 7 Greenl. 232.

J. McGaw, for the plaintiffs, said that if the suit could be dismissed on motion, instead of plea in abatement, the motion should be as formal as to facts as the plea. It is therefore double and bad, assigning two distinct causes.

If the decision in *Holmes* v. *Fernald*, is not founded on a misconception, it is not decisive of the point now raised. It does not follow, that there must be an attachment of property, because the remedy is by writ of attachment. Property can be attached only by the written order of the creditor, or his attorney. *Betts* v. *Norris*, 3 Shepl. 232. The legislation and decisions on this subject were examined, and the conclu-

sion drawn, that the demandant might proceed by original summons or by writ of attachment, at his election. The service would be made, in either case, in the mode provided by statute for the process adopted. Ancient Charters, c. 9; same, c. 163; Const. Mass. c. 6, § 6; Mass. St. March 11, 1784, respecting writs of dower; Mass. St. Feb. 27, 1796; *Ellis* v. *Paige*, 1 Pick. 48; Anthon's Prec. Dec. in Real Actions; St. 1835, c. 195; St. 1821, c. 52, § 19; same, c. 40; same, c. 59, § 2, 15; Stearns on Real Actions, 91, 92; Howe's Prac. 56.

The opinion of the Court was drawn up by

SHEPLEY J.—It was decided in *Holmes* v. *Fernald*, 7 Greenl. 232, that no special attachment of goods or estate was proper in a real action. The court came to this conclusion, because the Massachusetts statute of 1784, and the re-enactment of it in our statute, *c.* 60, provided only, that goods and estate attached should be held for security of the debt or damages; and in real actions no debt or damages are, as it is said, recovered. And by the common law no debt or damages could be recovered in real actions. It was however provided so early as the statute of Merton, 20 H. 3, *c.* 1, that the widow by her writ of dower might in certain cases recover damages. And such has been the law in Massachusetts and Maine from a very early period. In our Statute, *c.* 59, § 2, dower is one of the actions named as commenced by original summons. Whether the decision in *Holmes* v. *Fernald*, or this provision of the statute is to be regarded as prohibiting an attachment in such cases, is not now before the Court for consideration or decision.

The colonial ordinance of 1641, Anc. Char. 49, authorized the party to make use of a writ of capias and attachment in real as well as in personal actions. On the revision of 1784, in Massachusetts, the party was allowed to use any of the prescribed forms of writs suitable to his case, "in all civil actions." There is no restriction unless it be found in the language respecting the property attached being held as security for the debt or damages. The mere fact, that a party cannot legally

and beneficially enforce every command in the writ, does not deprive him of the right of using that form. If such were the law, no writ of capias and attachment could issue against officers, or other persons entitled to a temporary exemption. And such exemption might arise after the issuing of the writ, or cease to exist before a service. It was admitted, in *Holmes* v. *Fernald*, that the practice had been to use an attachment or summons, at the election of the party; and it was supposed to have arisen "because the change of language in the act of 1784, was not particularly regarded." The act of 27th of February, 1796, provided, "that when any person shall be arrested on trespass and ejectment, or other real action, the defendant's own bond, and no other, shall be required for his appearance to answer the same." This provision shows, that the legislature did not then understand, that the act of 1784, had deprived a party of the right to use the writ of capias and attachment in a real action. And even if such were to be the judicial construction, the act of 1796 would itself be sufficient to authorize the use of it in such cases. Our own statute provisions, are but re-enactments of those contained in the statute of 1784, and their construction there should be received.

The provision in the first section of our Statute, c. 59, relating to the service of writs, applies alike to cases where a nominal or a real attachment of property is made. And the enumeration of actions in the second section, may be regarded as exhibiting examples where the process is by summons, rather than as an enactment requiring that such should be the process. For the design of the statute evidently was not to determine in what cases one form of writ or another should be used, but only to prescribe the mode of service, when a particular form of writ was used. There does not appear to be any practical mischief, requiring a construction which would limit a party to the use of one particular form of writ in real actions.

Exceptions overruled.

Benjamin Bussey *versus* Polly Grant.

The demandant in a writ of entry must recover upon the strength of his own title, and is bound to prove the seizin upon which he counts. And upon this point, it is competent for the tenant to adduce rebutting proof, whether he shows any title of his own or not.

Where in the deed under which the demandant claims, certain tracts of land, the exact location and limits of which are not there defined, are excepted from the operation of that conveyance, such deed is not *sufficient evidence* of seizin of any particular portion of the township in the grantee.

Unless it appears, in such case, that the tract of land demanded is not within the exceptions, the demandant cannot recover.

A deed from the same grantor, made at the same time, to another grantee, and referred to in the deed to the demandant, of a part of the land excepted, is competent evidence for the tenant, to show the location of the excepted portions.

The lots of actual settlers prior to 1797, upon the townships back of Bangor and Hampden, numbered two in the first range, and two in the second range of townships, did not pass to Henry Knox and wife by the conveyance to them of those townships from the Commonwealth of Massachusetts, whether the settlers' lands have been confirmed to them by the Commonwealth or not.

Where exceptions or reservations, in a deed conveying lands, depend upon a plan, the actual survey and location upon the face of the earth are to determine their bound.

The demandant brought his writ of entry, and at the trial before Emery J., to support his action, read in evidence a deed from Henry Knox and wife to himself, dated Oct. 16, 1804, of townships numbered two in the first range, and two in the second range, north of the Waldo patent, excepting 3900 acres, situated in the northwest corner of No. 2, in the second range, previously conveyed to R. G. Amory, by deed of the same date, as surveyed by Nathan Withington, "and excepting also out of this conveyance one hundred acres to each settler within the two townships, meaning to except from this conveyance the lots of the settlers within the aforegranted two townships, as confirmed to the said settlers by the Honorable the General Court." The premises demanded were within the limits of the last described township. Also, three resolves of the legislature of Massachusetts, of June 25, 1789, March 10,

1797, and June 18, 1797; and a deed from Patten to the tenant; the demandant introduced evidence tending to show, that Delano, who had made and returned a plan of the land under the resolves of 1797, on which the lot demanded was marked as settler's lot, No. 2, had made no actual survey, at the time the plan was made, of the lots designated thereon, and that the lines run upon the face of the earth were run by him after he made the plan; and there was evidence introduced by the tenant tending to prove the contrary. The lot demanded was marked on Delano's plan as a settler's lot, of one hundred acres, but in fact contained, by exact measurement, more than one hundred acres. The tenant, in addition to other evidence not appearing in the exceptions, to show that the lines of this lot were run upon the earth, and extended to the Amory tract, read the deed from Knox to Amory, mentioned in the excepting part of the deed from Knox to the demandant; and a deed of the same land from Amory to the demandant, dated May 20, 1831. The demandant objected to the introduction of these deeds, but they were *admitted*. The tenant introduced evidence tending to show, that this lot No. 2, called the Perkins lot, had been in the occupation and improvement of Perkins, Garland, Pomroy, Patten, E. Grant the late husband of the tenant, or of the tenant, as a farm, from 1797 to the present time; and that Pomroy, in 1821, deeded this lot to E. Grant, having, previously to giving the deed, occupied the land seven years or more.

The counsel for the demandant requested the Judge to instruct the jury, that the demanded premises were not embraced in the exceptions in the deed from Knox to the demandant; that to bring the Perkins lot within the exceptions, it must appear that he was a settler within the terms of the resolves of Massachusetts; and that his title had been confirmed to him by the Commonwealth.

Also, that if he was a settler, and entitled, as such, to a deed from the Commonwealth, if his title was not confirmed to him, his lot was not within the exceptions.

Also, if he was a settler, and his title had been confirmed,

there was no evidence of the extent of his lot; and that it could not be extended to the Amory line, unless it was so extended on the plan of Delano.

Also, that the tenant had not connected herself with the plan and survey of Delano.

And also, that his survey and plan were not evidence that the title of the tenant was co-extensive with the lot on the plan and survey.

The Judge declined to give these instructions, or any of them, and did instruct the jury, that if Perkins was in the occupation of said lot at the time Delano made his plan, and that Delano made a survey upon the face of the earth, corresponding to the limits claimed by the tenant, in 1797, they would return their verdict for her.

The jury returned a verdict for the tenant, and found specially, that Perkins was a settler on this lot prior to 1797, and that a survey was made by Delano in 1797, on the face of the earth, prior to the return of his plan and survey, said survey being in accordance with the limits claimed by the tenant.

To the rulings of the Judge, to his refusal to give the instructions requested, and to the instructions given, the demandant excepted.

Rogers and *A. W. Paine* argued for the demandant, in support of the several grounds taken for him at the trial, and contended that the instructions given to the jury were erroneous. They cited 1 Phil. Ev. 411; Com. Dig. Estates, C; 4 Binney, 231; 3 Dane, 284; 1 Stark. Ev. 376; 1 Phil. Ev. 156; 1 East, 653; 1 T. R. 144; 3 Burr. 1475; 1 McCord, 573; 2 Gallison, 485; 9 Petersd. Ab. 155; 4 T. R. 37; 1 B. & P. 468; *Lambert* v. *Carr*, 9 Mass. R. 185; *Harlow* v. *French*, ib. 192; *Allen* v. *Littlefield*, 7 Greenl. 220.

J. Appleton argued for the tenant, and cited *Knight* v. *Mains*, 3 Fairf. 41; *Hains* v. *Gardner*, 1 Fairf. 383; 6 Peters, 598; 4 Peters, 83; 9 Wend. 209; 17 Johns. 335; 3 Johns. Cas. 174; 8 Serg. & R. 92; 4 Binney, 327; *Knox* v. *Pickering*, 7 Greenl. 106; 7 Wheat. 59; *Esmond* v. *Tarbox*,

7 Greenl. 61; *Ripley* v. *Berry*, 5 Greenl. 24; *Brown* v. *Gay*, 3 Greenl. 126; *Bussey* v. *Luce*, 2 Greenl. 367.

The opinion of the Court was by

WESTON C. J. — The demandant must recover upon the strength of his own title. He is bound to prove the seizin upon which he counts. And upon this point, it is competent for the tenant to adduce rebutting proof, whether she shows any title of her own or not. The deed from Knox to the demandant was not sufficient evidence of seizin in him; for although that deed may have conveyed the greater part of township number two, in the second range, in which the land in controversy lies, certain tracts of land in that township are excepted from the operation of that conveyance, the exact location and limits of which, are not there defined. Whether therefore the land demanded was a part of that conveyed or excepted, cannot be ascertained from the deed. Indeed, from an inspection of its terms, it does not appear, whether the greater part of the land in the township was excepted or conveyed.

But as other testimony, bearing upon the question of title, was received at the trial, we are called upon to determine, whether the verdict returned for the tenant, can be legally sustained. Unless it has appeared, that the land demanded is not within the exception, it ought not to be disturbed. The deed from Knox and wife to Amory, which conveyed one of the excepted tracts, was admissible with a view to determine its location. For the location of the excepted parts is necessary, in order to show what lands within the township the deed, upon which the demandant relies, embraced. But that, as well as the deed of the same tract from Amory to the demandant, was received as tending to show that Delano, the surveyor, ran the lines of the Perkins lot, of which it is insisted by the tenant, the land demanded is part, and that it extended to the Amory tract. The lines and monuments by which that tract is defined in the deed to him, may be proved and located, whenever that deed is legally admissible in evi-

dence. Three sides of the Perkins lot, there called number two, are given as part of the bounds of the Amory tract. The number, two, is derived from Delano's survey. The Amory tract being bounded upon it shows that its lines, upon the earth, were then well known. Nor was this assumed, as a matter of mere description of bounds, not ascertained. The Amory tract is further described, as actually surveyed and marked out by Nathan Withington. Number two, then, or the Perkins lot, is upon three of its sides, made part of the bounds, actually marked, of the Amory tract; and this had a tendency to show, that number two had been previously surveyed and located. This fact derived no additional corroboration, from the same description in the more recent deed from Amory to the demandant. If therefore, he is not bound by the recitals in that deed, it was immaterial in its bearing upon the point, for which it was adduced, namely, to show that Delano made an actual survey; and therefore if inadmissible should not affect the verdict.

It is contended for the demandant, that it has not appeared, that number two was a settler's lot, and so within the exception. The resolve of June twenty-fifth, 1789, specifies who shall be regarded as settlers upon the unappropriated lands, and as such entitled to be quieted, upon the terms therein set forth. It was not a general law, to be applied prospectively, but was limited to settlers, who had become such prior to 1784. The resolve of February twenty-third, 1798, which authorized the conveyance, under which the demandant claims, provides, "that the lots, not exceeding one hundred acres to each settler, which shall be occupied by any settler on the additional lands, to be assigned by force of this resolve, shall not be considered as taken to make up said deficiency, but the said settlers, who are not already quieted by law, shall hereafter be quieted in their settlements in such manner as the General Court shall direct." This manifestly contemplated settlers, then upon those lots, to quiet whom provision had not been made by law, as it had been for those, who had become settlers prior to 1784. The resolve required that the lots of the actual settlers in 1797,

should be excepted from this grant, the legislature choosing to retain the power of quieting them at its pleasure. If the conveyance from the Commonwealth to Knox is not in the case, as the demandant invokes this resolve, in aid of his title, the exception as to settlers' lots, which appears in the deed to him, must be construed with reference to the terms of the resolve. These settlers' lots then, being excepted, did not pass to the demandant's grantors or to him. The jury having found, upon competent evidence, that Perkins was a settler prior to 1797, his lot was not conveyed to the demandant. If the demanded premises are a part of it, the demandant has failed in his title.

Delano's plan was made to designate and determine the lots of such settlers, and returned to the land office in Massachusetts, under the authority of the resolves of March 10, and of June 13, 1797. It was a public, well known document, accessible to Knox and his grantee, Bussey, as evidence of the location of the settlers' lots. It purports to delineate one hundred acres to each settler, which was the quantity intended to be reserved and excepted. But like other grants, exceptions or reservations, which depend on a plan, the actual survey and location on the face of the earth are to determine their boundary and extent. This has become an established principle in regard to grants and conveyances depending on a plan, which cannot be departed from without unsettling the bounds of lands in a great part of the State. It has in most instances given an excess of quantity, in consequence of a liberal mode of admeasurement. The acre of that day, as is and was well known, in the locations made in this State, was larger than the exact acre. Knox must have understood, that where settlers' lots had been surveyed and returned, they fell within the exception as actually located. The land in controversy, falling within a settler's lot, as surveyed and returned, the demandant cannot prevail, whether the lot has ever been confirmed to the settler, and to those claiming under him, or not. And the seizin of the demandant not having been proved, the tenant is under no necessity of showing any title in defence, or of con-

necting herself in any manner whatever with the title or interest of the settler.

In our opinion, the instructions requested were properly withheld, and those which were given, in conformity with law.

Judgment on the verdict.

BENJAMIN WINGATE *& al. versus* JOSEPH SMITH.

The mere taking by one man of the mill logs of another and mixing them with his own, will not constitute confusion of goods; but if he fraudulently takes the logs and manufactures them into boards and intermixes those boards with a pile of his own, so that they cannot be distinguished, with the fraudulent intent of thereby depriving the plaintiff of his property, the *owner of the logs* thus taken may maintain replevin for the *whole pile of boards.*

Although the owner may claim his property after it has undergone a material change, yet if he would replevy it, he should describe it as it existed at the time of the commencement of his suit. If mill logs be fraudulently converted into boards before the writ of replevin is sued out, the owner should describe the property as boards in his writ. He cannot describe it as mill logs, and recover boards.

It is a good defence, in an action of replevin, *under the general issue*, that the writ was sued out before the cause of action accrued.

ON the trial of this action of replevin, before EMERY J., the counsel for the defendant requested the Judge to instruct the jury on certain points of law. The requests made, pertinent to the grounds of decision, are stated in the opinion of this Court; as are also the facts, appearing in the report of the case. On the subject of confusion of goods, the Judge instructed the jury, that merely taking the mill logs and fraudulently mixing them with the defendant's logs, would not constitute confusion of goods. But that if from the evidence, they believed that the defendant had fraudulently taken the plaintiffs' logs of the marks in proof, and had fraudulently manufactured them into boards, and fraudulently intermixed those boards in a pile of his own, so that they could not be distinguished, with the fraudulent intent of depriving the

plaintiffs of their property, the jury might find a verdict for the plaintiffs for the boards in the raft in question; provided they were satisfied, that any of the boards in the raft were by the defendant so fraudulently manufactured from the plaintiffs' logs, and by the defendant fraudulently intermixed with the defendant's boards, with the intent of depriving the plaintiffs of their property. The verdict for the plaintiffs was to be set aside, if the instructions requested ought to have been given; or if those given were erroneous.

This case was argued June 29, 1840, and the opinion of the Court, WHITMAN C. J. and SHEPLEY and TENNEY, Justices, was delivered July 2, 1842.

Rogers argued for the defendant. In his remarks as to what constituted a confusion of goods, he cited 2 Kent's Com. 360 to 365; and *Betts* v. *Lee*, 5 Johns. 349. To show that it was necessary to describe the property in a writ of replevin as it then was, he cited 2 Saund. 74, note; Oliver's Precedents, Replevin.

J. Appleton argued for the plaintiffs, and cited 2 Rawle, 423; 6 Johns. 168; 7 Cowen, 95; *Ryder* v. *Hathaway*, 21 Pick. 298; 13 Wend. 296; 2 Johns. Ch. R. 62; 15 Serg. & R. 9.

The opinion of the Court was by

SHEPLEY J.—The suit is replevin for several rafts of boards designated by certain marks. One raft only was replevied. The defendant pleaded the general issue, and by a brief statement alleged the property to be in himself and two other persons named. It appears from the report of the case, that the plaintiffs were the owners of logs distinguished by certain marks; and that the defendants caused another additional mark to be placed upon them by which they would become marked like his own and partner's logs. The boards composing this raft were sawed from logs bearing this mark, but how many of them from logs before marked for the plaintiffs did not appear. They were sawed and piled together, so that those sawed from

logs of the plaintiffs could not be distinguished from those sawed from logs of the defendant and partners. And a question was made whether the plaintiffs were entitled to recover the whole lot of boards or only so many as could be proved to have been sawed from their own logs. It has been decided, that the owner of logs may reclaim his property although it has undergone an alteration, and assumed a different shape, as by being converted into shingles or boards. *Betts* v. *Lee*, 5 Johns. 349; *Brown* v. *Sax*, 7 Cowen, 95. In the case of *Ryder* v. *Hathaway*, 21 Pick. 298, the doctrine of confusion of goods was considered when applied to wood, which had been cut from the land of one of the parties; and the principles there stated would authorize the instructions which were given on that point in this case.

Upon another point made in the case, the presiding Judge was requested to instruct the jury "that if they believed, that the raft in suit at the time of suing out the plaintiff's writ was not manufactured, that after said suit they were sawed into boards, that the boards in the spring of 1836 were rafted at the mills and had no existence as a raft prior to the spring of 1836, that the same were not repleviable in the present suit; and that their verdict should be for the defendant." If it appeared from the report, that the logs had been sawed into boards before the commencement of the suit, the argument for the plaintiffs might be correct, that the description of the property in the writ should be regarded as applying to the boards, whether placed in a raft or in a pile at the mill. And that whether defectively or properly described should not be the subject of inquiry under these pleadings. The property claimed would in such case be ascertained, though a part of the description should appear to be false. But the report states that "these boards were rafted from the mills at Lower Old Town, in the spring of 1836, and came from a pile which were manufactured from the logs in the fall or winter preceding." The writ was sued out on the fifteenth day of October, 1835, and from such a statement it cannot be inferred, that any of the logs were sawed into boards before the commencement of the

suit. Although the owner may claim his property after it has undergone a material change, yet if he would replevy it, he should describe it as it existed at the time of the commencement of the suit. He cannot describe logs in his writ and claim to recover boards or shingles made from them; or describe boards and shingles, and claim to recover mill logs. When the property has been so materially changed, a new right of action arises to reclaim it by replevin in that shape, which it has assumed. It is a good defence, under the general issue, that the writ was sued out before the right of action had accrued, and it cannot be made by plea in abatement. *Facquire* v. *Kynaston*, 2 Ld. Raym. 1249. The Judge instructed the jury on this point "that it was an incorrect mode of proceeding to claim in the process of replevin a raft of boards marked in a certain way, which raft at the time of the issuing of the writ had no existence." This did not meet fully the point of the defence, as it applied only to the existence of the boards in a raft; not to the allegation, that the boards had not then been sawed from the logs. And the instruction did not state the effect, which a failure to prove, that some of the boards had been sawed before the commencement of the suit, would have upon it. And for this cause the verdict is set aside and a new trial granted.

NEWELL WARE & *al. versus* JAMES HUNNEWELL & *al.*

The commissioners appointed to make partition of lands held by tenants in common, should make return of the manner in which they gave notice, to the persons interested, of the time and place of their meeting to proceed in making the partition, that the *Court* may determine whether *due notice was given.*

And unless it appears, from the return of the commissioners, that reasonable notice had been given to the persons interested, the report will not be accepted.

If notice may be legally given (in any case) by merely putting written notices into the mail, reasonable notice is not given, when the persons interested live at the distance of two hundred miles from the land to be partitioned, by placing notices to them in the mail, seven days before the time appointed to proceed in making the partition.

WARE and seven others petitioned to this Court, and represented that they were owners in common and undivided, with persons unknown to them, of seven twenty-fourths of one township, and of forty-nine one hundred and ninety-second parts of another; and prayed that the portions claimed by them in those townships might be severed from the other owners, and be set off to them, that they might hold those portions "in common and undivided with themselves."

After the publication of a notice in the newspaper published by the printer for the State, and no persons appearing to object, partition was ordered, and commissioners were appointed to make it. They returned a report of their proceedings at the October Term of this Court, 1839, when Hunnewell and three others, being part owners of the same townships, appeared and objected to the acceptance of the report, assigning fifteen causes for its rejection.

The eleventh was, that the commissioners did not give due notice to all concerned, that were known and within the State, before partition was made, that they might be present at the time of making the same.

These objections were overruled by EMERY J. then holding the Court, and the report was accepted. To this the respondents filed exceptions.

The portions of the commission and return of the commissioners, material to this objection, are extracted in the opinion of the Court. As no opinion was given touching the other objections, it becomes unnecessary to notice them.

Cutting, for the respondents, objected, that the provisions of the Statute of 1821, c. 37, § 7, had not been complied with, requiring that "due notice shall be given by the committee to all concerned, that are known and within the State, before such partition be made, that they may be present, if they see meet, at the time of making the same." He contended, that if the mode of giving notice was proper, that sufficient time had not been given. Much less time was allowed to make preparation and go into the wilderness, than the law requires to be given to attend to the taking of a deposition. But seven days were given for the letters to go two hundred miles, and for the persons interested to prepare themselves and travel that distance.

But the mode of giving notice was, in itself, wrong. The notice should have been served by an officer. There is far less reason for sending by mail, in this case, than for sending a notice to overseers of the poor. And nothing but the special act of the legislature could make that legal. *Groton* v. *Lancaster*, 16 Mass. R. 110.

The neglect to give due notice is fatal to the proceedings. *Ashley* v. *Brightman*, 21 Pick. 285.

Ingersoll, for the petitioners, contended that here was sufficient notice, both as to mode and time. The statute does not prescribe any mode of giving notice, and it is left entirely to the discretion of the commissioners. They are made, by statute, the judges of the reasonableness of the notice, and their decision is conclusive.

J. Appleton replied for the respondents.

The opinion of the Court was by

Emery J. — Four individuals, professing to be interested in the tract of which partition is intended, appear and resist the acceptance of the report of the commissioners. These owners

have presented fifteen objections. Of this number, the thirteenth is not pressed. The eleventh objection, that the commissioners did not give due notice to all concerned that were known and within the State, before the partition was made, that they might be present at the time, is of a very serious character.

We may safely premise, that partition of a new township, intended to be accomplished upon the petition of a portion only of the owners coalescing, not for the purpose of obtaining a severance of each one's individual interest, but to keep up a union of common ownership on the part of the petitioners, in perhaps large masses, in the tract, which may be severed and set off to them, calls for great watchfulness on the part of the Courts, before whom the proceeding is to go on.

It is true we have no requisition of law, nor as yet even a rule of Court, that in cases of petitions for partition against owners alleged to be unknown, it should be made apparent on the record by affidavit of the petitioners, that they are ignorant of the names, rights or titles of such owners.

It is therefore highly probable that in many instances partitions are obtained, when in truth there is no actual notice to the other tenants in common.

If it be of importance that notice should be published in the newspaper, published by the printer of the State, to give notice of the pendency of the petition, previous to any interlocutory judgment that partition be made, as prayed for, it cannot be of less importance that those, whose interests are to be so very much affected, should, if practicable, have actual notice of the time when the partition is to be accomplished, that they may be heard before the commissioners.

It is not unlikely that too much looseness has prevailed in the mode, in which notice has been attempted to be given by commissioners.

In this case, the direction to the commissioners is "to make partition, being previously sworn to the faithful discharge of the trust, and giving due notice to the parties interested, that

are known and live within the State, that so they may be present, if they see fit at the time."

The commissioners return how they gave due notice, as they say, "to wit, notices written May 28, mailed May 30, 1839, directed to John and Thomas Perley, South Bridgeton; John Bradley, Portland; Moses Isaacs, Bangor, agent for the North American Company; Robert M. N. Smyth, Bangor; Ebenezer Barker, Charlestown, Mass.; Benjamin Fish, Boston; also gave James Hunnewell a notice in hand; Nathan Ware, the petitioners' agent, being present, did not give or send the petitioners any notice; and they living out of the State, they being the only persons interested known to the subscribers, did meet agreeable to said notice at the dwellinghouse of Isaac Stevens in South Lincoln, on Friday the seventh of June, 1839, at six o'clock in the afternoon, being near said township, Nathan Ware, agent of said petitioners, being the only person interested, present."

And the commissioners set off $\frac{7}{24}$ of one tract and $\frac{49}{192}$ of the other.

Have we from this return evidence that due notice was given to the parties interested that are admitted to be known, and living within the State, so that they might be present if they saw fit at the time?

It is a matter which ought to appear clearly of record in the return. We can judicially perceive that South Bridgeton must be nearly 200 miles from the place to be divided.

There is no provision by law, that notice shall be given by mail, nor indeed does there appear to be any prescribed form in which notice shall be communicated. And hence, it is argued, that it is left to the discretion of the commissioners. We are not satisfied of the soundness of this reasoning. It is not like the case of notice to an indorser of a note or bill of exchange, which may be established by proof of the seasonable deposit of a letter in the post office, giving the necessary information to the indorser. That is based upon the expectation that dealers in negotiable paper will be attentive to the course of mail, which has so long been settled as the proper channel

for the communication of intelligence as to the failure of acceptors of bills or makers of notes to perform their engagements. It appears to be a convenient commercial regulation. But when the question arose, whether notice to overseers of the poor of towns, that a pauper had become chargeable, was attempted to be given by mail, the experiment was held by the Court, previous to the separation, not to be a legal mode of giving the requisite information. *Inhabitants of Groton* v. *Inhab. of Lancaster*, 16 Mass. R. 110. And so the law remained in this State, till a statute was passed sanctioning that course. By St. c. 671, passed Feb. 18, 1835, it was deemed equivalent to actual delivery of such notice, if it arrive at the post office in the town where the maker resides. And there would appear much more propriety in adopting the post office as the channel of communication between the public municipal officers, in relation to such subjects, than in regard to individuals about intended partitions of remote wild lands.

In these cases of attempted partitions of townships, which may have exceedingly important bearing on the rights of others, it appears to us that if petitioners will bring themselves within the pale of the law, though no particular form of notice to be given is prescribed in the statute, they should take the precaution of showing such direct evidence to the commissioners of the service of the notice, that they can set it out in their return, and that no reasonable doubt can remain that notice was given. And it should also appear that the notice was reasonable, considering the distance of the party to be affected from the place to be divided. It cannot be supposed that one should be instantly prepared to go into an exploration of a forest at a great distance. Some allowance must be made for preparation. The commissioners here have acted wisely to return the manner in which they proceeded. The whole proof of notice should come from their return, in order that the Court may determine whether *due notice was given*. The law contemplates it. The commission directs it. It is not to be left to conjecture.

We regret that the return, in this case, has left the matter in such uncertainty, whether the notice intended to be given was actually received by all the persons living in this State and known to be interested. There were but seven days intervening between the time of mailing the written notices, and the time appointed for the division. Under these circumstances, we are constrained to pronounce, that, judicially, upon these proceedings, we cannot decide that due notice was given by the commissioners.

The exceptions must therefore be sustained, and the subject re-committed for further proceedings.

SILAS BARNARD *versus* INHABITANTS OF ARGYLE.

The money of non-residents, paid instead of labor and materials on account of the highway tax, is subject to the order of the selectmen of the town, or assessors of the plantation, on account of highway expenditures, whether it is paid the first year, or whether, as is authorized by law, it goes into the money tax of the following year; the money being liable to be expended for the benefit of the highways, for which it was originally assessed.

As assessors of plantations are held to perform all the duties required of the selectmen of towns, relating to highways, and are invested with the same powers, when a fund applicable to highways is assessed and in a train for collection, they may draw orders on highway account, to the extent of the fund, before it is actually received by the treasurer; and such order will be available to the holder against the plantation, if not paid when demanded; and his rights will not be impaired by any irregularity or want of fidelity in the officers charged with the collection.

The assessors are the constituted organs to liquidate and adjust all claims against the plantation for services rendered in making highways therein; and when there exists a fund, upon the strength of which their powers may be legally called into exercise, and where they have a full knowledge of the subject, and there is no fraud, such adjustment is conclusive upon the plantation.

ASSUMPSIT on an order of which the following is a copy:—

"Argyle, Oct. 14, 1835. To Nathaniel Danforth, Jr. Treasurer of the plantation of Argyle. Please pay to Silas Barnard, or order, the sum of two hundred sixteen dollars, twenty-four

cents, in twenty days from date and interest, it being the balance due the said Barnard for making a road in the plantation of Argyle, in the year 1834.

"WARREN BURR, } *Assessors of*
"GIDEON OAKES, } *Argyle.*"

It was admitted, that Burr and Oakes were a majority of the assessors of Argyle, but their authority to bind the plantation was denied. The evidence introduced at the trial appears in the case, but the view taken by the Court renders it unnecessary to state it. Barnard acted for the State under a "Resolve in favor of Argyle plantation," passed March 4, 1833. Waterville College owned a part of the land through which the road passed. On March 17, 1834, the plantation "voted that $1000 shall be expended on the new road, so called, under the direction of the State agent, agreeably to a resolve of the legislature;" and on March 16, 1835, "voted to raise the sum of one thousand dollars, to be expended on the highway the ensuing year." In January, 1836, before the commencement of the suit, the order was presented to the treasurer of the plantation for acceptance and payment, who refused to accept or pay it, and notice thereof was given to the assessors. After the evidence had been introduced, the defendants were defaulted, but the default was to be taken off, and the action stand for trial, if, in the opinion of the Court, a defence was made out.

J. Appleton argued for the defendants, and cited 13 Maine R. 293; 4 Pick. 149; 9 Greenl. 89; 2 Pick. 41; 15 Mass. R. 144; 7 Greenl. 132; 13 Pick. 348; 4 Pick. 152; 12 Wend. 179; 3 Conn. R. 560; 18 Johns. 125; 8 Cowen, 191; 1 Cranch, 143; 5 Cowen, 603; 1 Gill & J. 497; 4 Pick. 230; 9 Pick. 341.

J. Hodgdon argued for the plaintiff.

The opinion of the Court was by

WESTON C. J. — It appears, that the plaintiff performed certain services and incurred certain expenditures in relation to a road in the plantation of Argyle, of which they had the ben-

efit. The greater part of his claim was paid by the State of Maine and by the trustees of Waterville College. The balance has been recognized and liquidated by the assessors of Argyle; and the action has been brought upon their order, drawn for the amount. If there existed any fund, upon the strength of which their powers might legally be called into exercise, they were the constituted organs of the plantation, in reference to the subject matter; and the plaintiff, to establish his claim, is under no necessity of going behind the adjustment made between the parties. They acted with full knowledge of what had been done. No suggestion of fraud is set up; nor is it pretended, that the assessors acted under any mistake or misapprehension. If they were duly authorized, both parties are bound. And it is neither necessary nor proper to unravel the proceedings, anterior to their settlement.

When this case was under consideration before, 16 Maine R. 276, the money of non-residents, paid instead of labor and materials on account of the highway tax, was regarded as subject to the order of the assessors, on account of highway expenditures. And it is in our judgment equally so, whether it is paid the first year, or whether as authorized by law, it goes into the money tax of the following year. The money is liable to be expended on account of the highways, for which it was originally assessed. As assessors of plantations are held to perform all the duties, required of the selectmen of towns relating to highways, and are invested with the same powers, St. 1821, c. 118, § 22, we are of opinion, that when a fund, applicable to the highways, is assessed and in a train for collection, they may draw orders, on highway account, to the amount of the fund. There may be great necessity for incurring expense, on the credit of the fund, before it is actually received by the treasurer. The order becomes evidence of debt, available against the plantation, if not paid, when demanded. The rights of the holder are not to be impaired by any contingency, by which the collection may be delayed or defeated. He is not responsible for any irregularity, or want of fidelity in the officers charged with the collection.

In the case before us, the order was drawn in October, 1835. Assessments for money due from non-residents, for delinquency in the payment of their highway tax of the preceding year, to a greater amount than the order, had then been for some months in the hands of the collector. The order then was properly drawn, and the defendants rightfully charged.

Judgment for the plaintiff.

GEORGE W. ROBINSON *& al. versus* SAMUEL A. GILMAN.

The public seal of a State, affixed to the exemplification of a law, proves itself. It is a matter of notoriety, and will be taken notice of as a part of the law of nations acknowledged by all.

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

Assumpsit upon a promissory note. The evidence offered to prove a law of the State of Massachusetts was objected to by the defendant, but admitted. It is stated in the opinion of the Court. The deposition of Charles L. Jones was introduced by the plaintiffs to prove the partnership of the plaintiffs. The counsel for the defendant requested the Judge to instruct the jury, that the evidence was not sufficient to prove the issue on the part of the plaintiffs. The Judge declined, and left it to the jury to decide upon the evidence, whether the partnership was proved. The verdict was for the plaintiffs, and the defendant filed exceptions.

J. Appleton and *Hill*, for the plaintiffs.

Rogers and *Gilman*, for the defendant.

The opinion of the Court was by

EMERY J. — The questions raised here are upon exceptions from the Court of Common Pleas.

The writ calls the defendant "to answer to George W. Robinson and Simon P. Wiggin, both of Boston, in the county of Suffolk, and State of Massachusetts, merchants and co-part-

ners under the firm, Robinson & Wiggin." It contains two counts, one on an account annexed to the writ, in the sum of fourteen hundred dollars, and another count charged the defendant as indebted to the plaintiffs in the sum of two thousand dollars for so much money had and received to the plaintiffs' use. The general issue was pleaded. The proof was, that the plaintiff firm was composed of said Robinson and James S. Wiggin.

The principal difficulty seems to have arisen from the fact, that Simon P. Wiggin, one of the firm, as described in the writ, had been permitted, by the legislature of Massachusetts, to take the name of James S. Wiggin; and the question most insisted on, was whether the proof offered was sufficient. It was a copy, certified by John P. Bigelow, secretary of the Commonwealth, whereby it appears, "that Simon P. Wiggin, of Boston, may take the name of James S. Wiggin," the act having been approved on the 22d day of March, 1834.

This copy was certified with this conclusion — "Witness my hand, and the seal of the State. John P. Bigelow, Sec'y of the Com'th. Secretary's office, May 17th, 1838," — with the seal of the State of Massachusetts impressed, over which a part of the signature of the secretary is written.

And we are satisfied, upon the reason of the thing, as well as upon authority, that the public seal of a State, affixed to the exemplification of a law, proves itself. It is a matter of notoriety, and will be taken notice of as part of the law of nations, acknowledged by all. *Lincoln* v. *Battelle*, 6 Wend. 475; Norris's Peake, edition of 1824, from 5th London ed. 109 and 110, note; 3 East, 222; *The United States* v. *Johns*, 4 Dall. 412, 416.

The whole evidence, we think, was rightly permitted to go to the jury, to decide whether it proved the issue on the part of the plaintiff. And if they believed the testimony of Charles L. Jones, we do not perceive that they could properly omit giving their verdict in favor of the plaintiffs.

The exceptions are overruled.

James B. Fiske *& al. versus* J. Wingate Carr.

The Statute of 1836, c. 240, concerning assignments, fixes the time when creditors may become parties, and therefore the omission in the instrument of assignment to specify any time for that purpose, does not render the instrument inoperative.

A creditor who has become a party to the assignment, cannot object to its validity, because it contains a full discharge of the whole claim of the creditor upon the debtor.

If the magistrate who administers the oath to the debtor, in his certificate thereof, makes a mistake in the date of the year, he may afterwards correct it.

The St. 1836, c. 240, concerning assignments, protects the property assigned from attachment thereof, made after the execution and delivery of the instrument, but before notice is published in the newspaper, if publication is made in manner required by the Statute within fourteen days after the assignment shall have been made.

As the St. of 1838, c. 325, "*in relation to the mode of transfer of shares in corporate bodies*," declares that "*the title to such stock shall not pass from such proprietor, until such transfer has been so far entered on the corporate records, as to show the names of all the parties thereto, and the date of the transfer*," the title to shares in a bank remain in the original proprietor after an assignment thereof has been made and notice been given to the bank until the entry is made upon the books of the bank; and may be holden against such assignee on an attachment, made after such notice, in a suit by the bank against such assignor.

Where furniture is mortgaged to secure the mortgagee against the payment of a note to a third person, given by the mortgagor as principal, and the mortgagee as surety; and the mortgagee assigns the same furniture for the payment of his debts; the assignee may maintain trespass against an officer attaching the furniture on a writ in favor of the third person, against both the mortgagor and mortgagee on the note referred to in the mortgage.

Trespass against Carr, as late sheriff of the county, for the acts of two of his deputies; the one of J. Leavitt in "taking and carrying away twenty shares of the capital stock of the Lafayette Bank on the 20th of June, 1838;" and the other of F. F. French, in taking and carrying away a quantity of furniture, all alleged to have then been the property of the plaintiffs. The writ in this suit was dated Oct. 9, 1838.

At the trial, before Emery J. the plaintiffs introduced a writ in favor of the Lafayette Bank, the party in interest in the defence, dated June 20, 1838, returnable to the next term of the

S. J. Court for this county, against E. T. Coolidge and C. H. Hammond. On this writ, on the day of its date, Leavitt returned an attachment of twenty shares in the Bank, and French returned an attachment of the furniture. On Nov. 1, 1838, the furniture was sold by consent of parties, and the proceeds deposited in the bank, to be holden in the same manner as the furniture would have been, and without prejudice to their rights. The plaintiffs then offered in evidence an assignment from Hammond to them of the bank shares and furniture, with other property, for the payment of the debts of Hammond to the plaintiffs and his other creditors, who should become parties thereto, dated June 18, 1838. No time was fixed within which other creditors might become parties, and a provision was inserted, that the debtor should be fully discharged by the creditors. The certificate of Hammond's oath to the assignment was dated June 18, 1837, but was in fact made June 18, 1838. The defendant objected to this paper being read in evidence, because the requirements of the St. 1836, c. 240, concerning assignments, had not been complied with. The plaintiffs then proved that a notice dated June 20, 1838, had been published in the Whig & Courier, a public paper printed at Bangor, on the 21st, and on the 26th of the same June. The defendant assented that the justice should amend his certificate of the oath, if it could legally be done. The instrument was then read, subject to all legal objections, the due execution and delivery having been admitted. The assignment was executed by the Lafayette Bank, among the creditors. The plaintiffs also gave in evidence a bill of sale of the furniture from Coolidge to Hammond, dated April 11, 1838, containing a stipulation that "the disposal of said furniture is to be left discretionary with said Hammond," and providing that if Coolidge should pay two notes to the Lafayette Bank, signed by Coolidge as principal, and by Hammond as surety, that Hammond should "release to said Coolidge the furniture alluded to and sold said Hammond this day." These notes remained unpaid. On the ninth of October, 1838, before the attachment at the suit of the bank, the plaintiffs went

to the Lafayette Bank and requested them to transfer the stock of Hammond to them, and exhibited the assignment, and the certificate of the stock to Hammond. No transfer was made of this stock from Hammond on the books of the bank. This testimony was objected to, but admitted.

The defendant contended that trespass would not lie against the officer for attaching bank stock, no levy having been made on execution, and no judgment in the suit having been rendered; that the plaintiffs had not shown any legal title to the property; that the assignment had not been executed according to the provisions of the statute concerning assignments; that the provisions of the statute had not been complied with in its execution and publication of notice; that no legal transfer of the stock of Hammond had been made by him to the plaintiffs; that the plaintiffs, knowing of the agreement between Coolidge and Hammond, could not hold the furniture for the benefit of the creditors of Hammond; that Hammond had no right to transfer and assign it for such purpose; and that the defendant had a lawful right to attach it, and apply the proceeds on the notes of Coolidge and Hammond to the bank, being the same notes described in the writ on which the attachments were made.

The Judge, intending to reserve the questions of law, ruled that upon this evidence the plaintiffs were entitled to recover, and instructed the jury to return a verdict for the plaintiffs, and to estimate the damages by finding the value of the bank stock, with interest from the date of the writ, and the value of the furniture, with damages for the taking and detention, and interest from the date of the writ. The jury returned a verdict for the plaintiffs for $1701,03 — on account of bank stock $1463,58, and on account of furniture $237,45.

The verdict was taken, subject to the opinion of the whole Court; and if the action could be maintained for the bank shares and the furniture, the verdict was to stand; if it could not for either, a nonsuit was to be entered; and the Court was to have authority to alter or amend the verdict.

M. L. Appleton, for the defendant, argued in support of the positions taken at the trial. He also contended that if any action would lie for attaching the bank shares, this action of trespass *vi et armis* would not; that if any action could be maintained, it should have been against the bank for refusing to make the transfer and not against the officer; and that by the St. 1838, c. 325, the entry of the transfer on the books of the bank is necessary to transfer the title. He cited Jacob's Law Dic., Trespass; *Hussey* v. *Man. & Mech. Bank*, 10 Pick. 415; 10 Johns. 484; *Plymouth Bank* v. *Bank of Norfolk*, 10 Pick. 454; St. 1836, c. 240.

Hobbs argued for the plaintiffs, and cited 3 Dane, 108; 5 Dane, 157; St. 1831, c. 519, § 18; 1 Esp. N. P. 380; St. 1835, c. 178, respecting trespass and trespass on the case; 2 Saund. Pl. & Ev. 343; 8 Pick. 90; 10 Mass. R. 125; 16 Pick. 206; 16 Mass. R. 191; 5 Mass. R. 435; St. 1838, c. 344; *Fox* v. *Adams*, 5 Greenl. 245; *Halsey* v. *Whitney*, 4 Mason, 206; *Hatch* v. *Smith*, 5 Mass. R. 42; *N. E. Mar. Ins. Co.* v. *Chandler*, 16 Mass. R. 275; *Emerson* v. *Knower*, 8 Pick. 63; *Stevens* v. *Bell*, 6 Mass. R. 339; *Clapp* v. *Smith*, 16 Pick. 247; 10 Mass. R. 476; 7 Johns. Ch. R. 132; 9 Pick. 202; 5 Pick. 232; 8 Pick. 133; 7 Greenl. 173; *Holbrook* v. *Baker*, 5 Greenl. 309; *Melody* v. *Chandler*, 3 Fairf. 282; *Lunt* v. *Whitaker*, 1 Fairf. 310.

The opinion was by

Weston C. J. — The counsel for the defendant, who represents the interests of the Lafayette Bank, objects to the instrument of assignment, which is the basis of the plaintiffs' title, as containing certain provisions, not authorized by law, and omitting to specify therein a time, within which creditors may become parties. As to the time allowed to creditors, the period of three months is provided by Statute, of which the assignees are required to give notice. This renders the specification of the time in the assignment unnecessary. If there is any weight in the other objections, we are of opinion, that they are not open to be taken in behalf of the Lafayette

bank who have assented to the terms of the assignment, by becoming parties thereto. With regard to the date of the year, in the certificate of the oath to Hammond, which is manifestly a mistake, it may be corrected by the justice.

It is insisted, that as the attachment was made, before public notice was given of the assignment, the attachment is entitled to priority. We are however of opinion, that by the Statute of 1836, c. 240, the property assigned is protected from attachment, if the notice required is published, within fourteen days after the execution of the assignment. In the schedule of the personal property, upon which the assignment was intended to operate, is to be found twenty shares in the Lafayette Bank. They had not been transferred on the books of the bank, prior to the assignment. But as it is property assignable in its character, it is contended that this formality is not essential to the plaintiffs' title. The case of *Sargent & al.* v. *the Franklin Insurance Company*, 8 Pick. 90, has been cited to show, that the assignable character of this species of property, cannot be restrained by formalities imposed by the by-laws of the corporation. But the objection taken here is, that the entry of the transfer upon the corporate records, to give legal validity to the title, is expressly required by the Statute of 1838, c. 325. And such is the fact, that Statute declaring, that until this is done the title shall not pass from the former proprietor; and the date of the transfer, and the names of all the parties thereto, is required to be recorded. This was doubtless intended to render accessible, to all persons interested to know, record evidence of the title. This statute is too positive in its terms to be disregarded. In our judgment therefore the title to these shares, the assignment notwithstanding, remained in Hammond, and that their attachment in behalf of the bank is justified.

By the transactions between Hammond and Coolidge, the former became mortgagee of the furniture, subject to the conditions specified in their agreement. Hammond assigned his interest to the plaintiffs, as he might lawfully do, whereby they took his place as mortgagees, subject to the rights of Coolidge. It was not attachable then, as Hammond's property, nor had

Coolidge such an interest as rendered the property itself liable to be attached by his creditor. The officer therefore cannot justify the attachment, although the writ was against both Hammond and Coolidge. And the plaintiffs, being the assignees of the mortgagee, may maintain trespass against him for taking the furniture. By the agreement, in virtue of which the case finds that property was sold, the plaintiffs were to cause the sale to be made and the proceeds to be deposited in the bank, for the benefit of the prevailing party. This sum, it is fairly to be understood, was to represent the furniture; and as it was to lie in deposit, it could not be intended, that interest should be allowed.

The verdict is accordingly to be amended so as to stand for the sum of two hundred dollars, upon which judgment is to be rendered.

ISAAC DANFORTH *versus* AMOS M. ROBERTS *& al.*

Although where the result will determine only which creditor of the witness will be paid, he is competent; yet where, if the party calling him shall prevail, his debt to his creditor will be paid, but if the opposing party prevail the debt to the creditor will remain unpaid, and the witness will have a claim to the same amount against an insolvent man, the interest is not balanced and he will not be a competent witness.

Where an equity of redemption is attached, the debtor may lawfully remain passive, and suffer the mortgage to become foreclosed, and may even persuade another creditor to take his interest as security, and assign it to him, and if such other creditor should so take it such arrangement is not a fraud upon the attaching creditor, although the assignee knew of the existence of the attachment.

Nor is it a fraud upon the attaching creditor, if the assignee make an agreement with the mortgagee, that the latter shall hold the mortgage until the time for redemption has expired, and then convey the land to the assignee on being paid by him the amount secured by the mortgage.

If the statement of the mortgagee to the mortgagor, made one month prior to the time when an entry to foreclose the mortgage would become perfected, that "he would give him some time, but that he must not wait long, as he might take advantage of the mortgage," be binding on a grantee or assignee of the mortgagee without notice of such statement, yet the right of redemption no longer remains, where five years have expired, and no payment, or offer of payment, has been made to the mortgagee or his assignee.

If the grantee of the mortgagee, is proved to have been in possession of some land not included in the mortgage, to which the plaintiff in equity shows a title, the bill cannot be supported thereby, because the plaintiff has a full and adequate remedy at law.

BILL in equity. The plaintiff claimed title to a tract of land by virtue of a levy thereon as the property of B. Garland, made July 2d, 1836, on an execution in his favor against Garland, the same having been attached on Jan. 26, 1836, and the levy having been made seasonably to preserve the attachment. The bill, among other things, alleged, that prior to the attachment Garland had mortgaged the land in controversy to Dwinel to secure the payment of $960,16; that Dwinel assigned this mortgage to Nathaniel Treat, July 9, 1832; that on Oct. 25, 1832, Treat entered to foreclose the mortgage; that on Sept. 24, 1835, Garland paid Treat about $700 more, leaving then due on the mortgage about $160, and that Gar-

land then "obtained from Treat an extension of the time of redemption, Treat promising to take no advantage of lapse of time, if the balance was paid soon;" that on Oct. 27, 1835, Garland paid the balance, whereby the equity attached was taken away by the act of Garland, and the estate became one in fee simple, whereon the plaintiff levied, making no deduction for any mortgage; that Garland was insolvent Jan. 25, 1835, and has so continued since; and that Roberts had entered into possession of the land under a pretended title under that mortgage.

There was a sale for taxes to Carleton, the other defendant, and a combination between the defendants to defraud the plaintiff by means thereof, charged in the bill.

The answer of Roberts alleged, that Treat legally entered to foreclose the mortgage at the time mentioned in the bill; that the sum of 160 dollars remained due until after the foreclosure of the mortgage, and has never yet been paid for the purpose of discharging the mortgage, and has never been paid by Garland; that Greely was a creditor of Garland on account of having been compelled to pay money as his surety, and that Garland was indebted in a large amount, much exceeding the value of the land, to Greely and his partner, French; that Garland, finding himself unable to redeem the land, assigned his right to Greely to secure him and his partner, French; that Greely, by advice of counsel, made an arrangement with Treat, whereby it was agreed, that Treat should retain the property in his hands until the right to redeem the mortgage had expired, and should then convey to Greely on being paid the sum due on the mortgage; that after the right had expired, Greely paid with his own funds that amount to Treat, and took a conveyance of the land from him; that the defendant knew nothing of the attachment or levy of Danforth until Sept. 1837; that on Jan. 1, 1836, Farley, a creditor of Greely, attached the land, recovered judgment, and within thirty days, on Oct. 2, 1837, duly levied his execution on the premises as the property of Greely; and that Roberts had acquired the title of Farley.

It was contended, that Roberts was in possession of a small portion of the premises, covered by the plaintiff's levy, and not by the mortgage.

The depositions of Greely, French, and Garland, were introduced by the defendants, and objected to by the plaintiff. The defendants objected to the admission of Treat's deposition, introduced by the plaintiff.

Hobbs was for the plaintiff, and in his argument cited 8 Mass. R. 554; 5 Pick. 240; 11 Pick. 297; 14 Pick. 328; 15 Pick. 82; 9 Ves. 275; 2 Johns. Ch. R. 93; 2 Fairf. 9; 2 Ves. Jr. 84; 3 Ves. 22; 1 Johns. Ch. R. 594; 1 Rand's Powell on Mort. 380, 389; 3 Johns. Ch. R. 129; 1 Hilliard's Ab. 290; 3 Rand's Powell, 951; 1 Ball & B. 385; 5 Pick. 146; 1 Vern. 270; 6 Pick. 176; 11 Mass. R. 222; 16 Mass. R. 400; 1 Story's Eq. 88; Story's Eq. Pl. 268, 274, 678; 1 Sum. 507; 1 Paige, 461.

Rogers and *Moody* argued for the defendants, citing 1 Story's Eq. 75, 396, 397; 1 Johns. Ch. R. 213, 288; 18 Johns. R. 543; 7 Johns. Ch. R. 65; 4 Johns. Ch. R. 497; ib. 566; 1 Johns. Ch. R. 131, 333, 370; 2 Johns. Ch. R. 585, 630; 17 Mass. R. 419.

The opinion of the Court was by

Weston C. J. — David Greely must be regarded as an interested witness; and his testimony cannot be legally admitted. If the defendants' title prevails, his debt to his creditor, Farley, is paid; if it does not prevail, his debt remains unpaid. This is not balanced, by a revival thereby of his claim against Garland, an insolvent man. Greely held for himself and in trust for his partner, French. We are not therefore satisfied, that the deposition of French can be received to sustain that title; although his interest is not so clear and direct as that of Greely. Garland, we doubt not, is a competent witness for the defendants. The result as to him will determine only which creditor shall be paid.

The title is in the defendant, Roberts, unless it has been made to appear, that the mortgage given by Garland has been

discharged. This is denied by the answer; and the question is, whether this denial is countervailed by the proof, adduced by the plaintiff. From the deposition of Treat, he appears to have understood, that he received the balance due him, as payment of the mortgage in behalf of Garland. His conveyance by deed to Greely within a few days, would seem to give the transaction a different character.

That Garland intended the title should pass to Greely, and that the latter so understood it, Garland positively testifies; and there is nothing in his first deposition, put into the case by the counsel for the plaintiff, if that is admissible, which contradicts this fact. The principal conflict between the two depositions, arises from the uncertainty in the mind of the witness, whether when the arrangement between himself, Greely and Treat was made, he knew of the existence of the attachment by the plaintiff, or whether, if so, when he previously consulted counsel, that fact was taken into consideration. In the first deposition, he appears finally to settle down upon the fact, that he did know of the attachment.

We are not satisfied, that this conflict renders Garland unworthy of credit. The mortgagee, Treat, had taken possession for the purpose of foreclosure. Garland was under no obligation to redeem, or to keep the mortgage open, by obtaining an extension of time, for the benefit of the plaintiff. He might lawfully remain passive, and suffer the foreclosure to be consummated. If he procured Treat to convey to Greely, it placed the plaintiff, as creditor, in no worse situation, than if the equity had expired while the estate was in the hands of Treat. This movement had no tendency to injure the plaintiff. So long as Garland did nothing affirmatively to impair his rights, he was at liberty to persuade Greely to take the estate. Nor did the arrangement become fraudulent, by any agreement on his part to accept it as security for any debt due from Garland, or for any liability on his part. Treat is not sustained, but contradicted by Garland. Taking that in connexion with the evidence, arising from the deed executed by Treat, perhaps it would not be too much to say, that the weight of the testimo-

ny rather is, that the mortgage was not intended to be discharged; but certain it is, that there is not proof enough, that it was so intended, to countervail the answer.

If the mortgage is not proved to be paid and discharged, it is insisted, that it should not be regarded as foreclosed, but as still subsisting; and that the plaintiff, as a levying creditor, ought to be let in to redeem; and he moves for leave to amend his bill, if necessary, to make this right available. The foreclosure attached on the twenty-fifth of October, 1835, unless it was waived, or continued open by an extension of time. There is no evidence, that Treat waived the foreclosure. As to an enlargement of time, he deposes, that he told Garland he would give him some time, but he must not wait long, as he might take advantage of the mortgage.

Assuming that this intimation is binding upon the defendant, Roberts, it was made more than five years ago, and the plaintiff offers no proof of tender, or of payment, other than what has been before considered. Giving the intimation its most extended construction, the enlarged time has long since expired. If the superior knowledge of Garland and Greely has given the latter, and those who claim under him, an advantage over the plaintiff, it resulted from the foreclosure, which was in a train for consummation, and which they were not bound to arrest for his benefit. French and Greely had fair claims upon Garland, for payment and indemnity. The legal title has gone to Greely to secure or satisfy them; and we perceive no superior equity in the plaintiff, by which it can or ought to be disturbed.

Having thus disposed of the main question, if the defendant, Roberts, is in possession of any strip or passage way not embraced by the mortgage, the plaintiff has for this a full and adequate remedy at law, to which he must be referred.

Bill dismissed.

SAMUEL L. HUNT *versus* CHARLES ELLIOTT.

It is provided by the St. of 1835, c. 165, § 6, that in actions founded on contract, the defendant may consent in writing to be defaulted, and that judgment shall be rendered against him for a sum specified by him in said writing; and that the same shall be entered on record. After the record has been made under the direction of the Court, it is the best evidence of the fact, and evidence to contradict the record may properly be excluded.

But where no offer to be defaulted has been made in writing, if it appears that an entry of such offer was made on the docket by the clerk upon the authority only of a verbal direction of the attorney of the defendant, the Court must disregard it.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit to recover fifty dollars for so much money had and received. The exceptions state, that at the Oct. Term of that Court, 1838, this entry was made by the clerk on his docket under the action, at the verbal request of the defendant's attorney. "1 day. Defendant offers to be defaulted for $20", and that this entry still remains on the docket, but that no offer was made by the defendant in writing; that the action was continued until the October Term of that Court, 1839, when the general issue was pleaded and joined, and the cause opened for trial to the jury, and a witness called by the plaintiff and examined to support his claim; that after the examination of the witness, the plaintiff's counsel stated to the Court that he was disappointed in the testimony, and would consent to a nonsuit; that a nonsuit was entered, no objection being made; that immediately afterwards the same counsel stated to the Court, that he believed there was an offer to be defaulted, which offer he would accept, and moved the Court to take off the nonsuit, and that his acceptance should be recorded; that the defendant objected that no offer was made which was binding upon either plaintiff or defendant, and that if there was, such acceptance was too late; that the presiding Judge ruled that the offer, as made, was binding upon the defendant, that the nonsuit should be taken off, and that the plaintiff's acceptance of the offer should be recorded; and that the defendant filed exceptions thereto. After all these statements, there is upon

the paper the recital of an agreement of the counsel of the parties, from which their clients dissented, and it was rescinded.

Cutting, for the defendant, contended that there was no such offer to be defaulted, as the statute requires, to be binding on the parties. It was not in writing, and the clerk has no authority to enter any offer to be defaulted, which is not in writing. But had it been in writing, it does not go far enough. It is only an offer to be defaulted for $20, when it should have gone further, and stated that he was willing to have judgment rendered against him for that sum and costs. St. 1835, c. 165, § 6. The subsequent proceedings were a waiver of any offer to be defaulted, and was so understood by the parties.

Ingersoll, for the plaintiff, argued that the plaintiff could only look to the docket to ascertain whether there was or was not an offer to be defaulted. The defendant cannot set up the illegality of his own acts for his own advantage. 4 Mass. R. 161; 16 Mass. R. 335. Whether to take off a nonsuit, or not, is a mere matter of discretion in the Judge of the District Court, and is not subject to revision in this Court by exceptions.

The opinion of the Court was by

Shepley J. — It is provided by Statute, 1835, c. 165, § 6, that in actions founded in contract, the defendant may consent in writing to be defaulted, and that judgment shall be rendered against him for a sum by him specified in said writing; and that the same shall be entered on record.

After the record has been made as provided, under the direction of the court, it is the best evidence of the fact; and evidence to contradict the record may properly be excluded.

In this case evidence was received apparently without objection, that no offer was made by the defendant in writing. And the entry on the docket does not appear to have been made from any other authority than a verbal request from the attorney to the clerk. This court has decided to disregard all agreements not reduced to writing; and the effect of the record having been destroyed, this offer can only be regarded as of that character. *Exceptions sustained.*

William Head *versus* Nathan Sleeper *& al.*

In an action against the acceptors upon an order drawn on them for a sum certain, to be paid "when you receive your payments from W. on his house," and accepted by the partnership name of the defendants, "to be paid as here stated;" the plaintiff must prove, to maintain his action, that one at least of the defendants accepted the order by the partnership name; that they were at that time partners in the business to which it related; and that they had "received their payments from W. on his house."

The Court may according to our practice order a nonsuit, when the testimony introduced by the plaintiff will not authorize the jury to find a verdict in his favor.

Exceptions from the Eastern District Court, Allen J. presiding.

The writ was dated Nov. 27, 1837. The action was assumpsit upon an order of which a copy follows: —

"Sleeper & Clark. Please to pay William Head the sum of thirty-three dollars, seventy-six cents, when you receive your payments from A. Woodman on his house, for value received. August 1, 1836. James Proctor."

Upon it was written, "Accepted to be paid as here stated. Sleeper & Clark."

There were two small indorsements of payments on the order.

The paper was introduced and read in evidence by the plaintiff.

After having released Proctor, his deposition was taken and read in evidence by the plaintiff. Proctor stated, that he gave the order to the plaintiff; that he took a job of Sleeper & Clark in finishing Woodman's house, and while at work there, gave the order; that Sleeper & Clark informed him, that they had accepted the order; that he settled with them, Nov. 10, 1836, and received of them their account, receipted, one item of which was — "To paid your order to William Head, $33,76," which sum was allowed them by him; that they remarked at the time, that they should be obliged to pay the order, and should not lose much if they did not get their pay of Woodman, as they had received all their pay excepting about fifty dollars, for which they had taken Woodman's note at the time

they gave the contract up. Sleeper told him, that the contract between Sleeper & Clark and Woodman had been discharged.

The plaintiff here rested his case, and thereupon the counsel of the defendants moved the Court, that a nonsuit should be directed. The presiding Judge ordered a nonsuit and the plaintiff filed exceptions.

Wilson, for the plaintiff, contended that the Judge has no right to order a nonsuit in any case when the plaintiff appears. 1 Tidd's Pr. 798; 2 W. Black. R. 239; 2 T. R. 281; 3 T. R. 662; 1 Burr. 358; Cowper, 483; 1 Strange, 267; 2 Strange, 1117; 3 Bl. Com. 316; Const. of Maine, Dec. of Rights, § 20. But our Court have never gone further, than to order a nonsuit, where the evidence is all on one side, and not sufficient to enable the plaintiff to hold his verdict, if one was found in his favor. 2 Greenl. 7; 6 Pick. 117. He insisted that in the present case, the Judge had entirely misapprehended the testimony, and that it was abundantly sufficient to justify, and indeed to require a verdict for the plaintiff.

Washburn, for the defendants, argued that there were two sufficient grounds of nonsuit.

1. That there is not a particle of evidence, that the persons sued as defendants, were the persons who accepted the order, or that they are, or ever were, partners, or ever had any knowledge of this contract.

2. The order, if accepted by the defendants, was to pay the plaintiff only when they should receive their payments from A. Woodman on his house. There is no proof whatever that this condition has been performed.

The opinion of the Court was by

Shepley J. — To entitle the plaintiff to recover he must prove, that one at least of the defendants accepted the order by the partnership name. That they were at that time partners in the business, to which it related. And that they had received their "payments from A. Woodman on his house." The order having been read in evidence, the only inference,

which this Court can make, is that the signature of the partnership name was either admitted or proved to have been made by one of the defendants. The existence of a partnership between them might be proved by their acts and declarations. Proctor states, that they made the contract with him. That they informed him, that they had accepted this order; that they settled with him for his labor; that they spoke of being obliged to pay the order; and of having made a contract with Woodman, and of having adjusted it and delivered it up, taking his note for about fifty dollars. These acts and declarations a jury might infer were to be attributed to both the defendants, for Proctor speaks of their declarations and of those, which Sleeper alone made to him, shewing that he apparently made a distinction between what was said by one and what was said by both. From this testimony a jury might conclude, that they were partners in that transaction and that the signature was binding upon both of them. And might fairly conclude from the testimony of the same witness, that they had made a written contract with Woodman by which payment was secured for the labor upon his house; that after the order was accepted in August they had settled that contract and discharged Woodman from it; that when they settled with Proctor in November following they admitted it to have been so discharged as to render them liable upon the order, and in consequence of it took their pay of him for it as having paid it. The indorsements on it might tend to corroborate his statements.

They took Woodman's note on their settlement with him which does not appear to have been paid. That however would not be conclusive evidence, that they had not received their payments of him on account of his house. If they chose to receive it on that settlement in payment, they could not, as against others, allege the contract to remain unpaid. Whether the note was received in payment it was the province of the jury to determine. And they might from all the circumstances stated by the witness conclude, that all the payments on ac-

count of the house had been fully made although the defendants had not received a note in part payment.

The Court may, according to our practice, order a nonsuit when the testimony introduced by the plaintiff will not authorize the jury to find a verdict in his favor. But in this case, the Court does not perceive, that it would have been obliged to set aside the verdict if one had been found for him.

Exceptions sustained, nonsuit set aside, and a new trial granted.

ELIPHALET PERKINS, JR. *versus* WILLIAM DOUGLASS.

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

EXCEPTIONS from the District Court for the Eastern District, ALLEN J. presiding.

Trover for a yoke of oxen. The writ was dated May 29, 1838. The plaintiff, to prove the property of the oxen to be in him, introduced a paper, of which a copy follows: —

"Orono, Jan. 5, 1836. Received of Eliphalet Perkins, Jr. four oxen, which I agree to return to him in good order on the first day of July next, with usual rent, or pay him ninety-five dollars, with interest from date. WM. BURTON."

Burton testified, that he bargained with the plaintiff for the oxen at the time mentioned in the paper, and took possession of them, and let him have a horse in part payment; that he considered that he gave the plaintiff a lien upon the cattle by executing the paper; that he never sold the oxen to any one; that he was in partnership with one Annis in the lumbering business; and that Annis sold the oxen in the partnership name, without his knowledge or consent, to the defendant. The defendant claimed title under the sale from Annis, and introduced evidence tending to show, that the oxen were sold by consent of Burton.

The Judge instructed the jury, that the contract in writing between the plaintiff and Burton was not a bailment, but that it amounted to a sale; that when one receives an article of property, and agrees to return it or pay its value in money, the property passes; that the election in this case was with Burton to return the oxen or pay for them, and that the plaintiff was divested of his interest in them; that if Burton did not return the cattle by the time specified in the contract, he was to be considered as electing to hold them as his own; and that the only remedy of the plaintiff was for the price or value stated in the contract.

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

Wilson, for the plaintiff, contended that the plaintiff had never parted with any title to the oxen, and had merely hired, or let out, the oxen on certain conditions, neither of which has been performed. Burton must do one or the other before any right accrues to him. The contract clearly indicates the intention of the parties, that the property should remain in the plaintiff, until the money was paid. He cited Shep. Touchstone, 118; *Tibbetts* v. *Towle*, 3 Fairf. 341; *Lunt* v. *Whitaker*, 1 Fairf. 310; *Gleason* v. *Drew*, 9 Greenl. 79; *Galvin* v. *Bacon*, 2 Fairf. 28; *Lane* v. *Borland*, 2 Shepl. 77.

J. Appleton, for the defendant, contended that the instruction of the District Judge was right; and cited *Holbrook* v. *Armstrong*, 1 Fairf. 34; *Hurd* v. *West*, 7 Cowen, 752; *White* v. *Perley*, 15 Maine R. 471; *Smith* v. *Clark*, 21 Wend. 83; Story on Bailments, c. 6, § 439; *Dearborn* v. *Turner*, 16 Maine R. 17.

The opinion of the Court was by

Shepley J. — The intentions of the parties to it, must be ascertained from the written contract, which will determine their rights. It is in the alternative, and permitted Burton to return the oxen, or pay the money, at his election. The legal effect of contracts of this description has been considered in the cases of *Holbrook* v. *Armstrong*, 1 Fairf. 34; *Dearborn*

v. *Turner*, 16 Maine R. 17 ; *Buswell* v. *Bicknell*, 17 Maine R. 344. Such a contract does not reserve to the seller any right in the property for the security of the purchase money. There may be reason to fear, that the parties designed to make a contract, that would have that effect ; but they have used such language, that it cannot, according to the well settled rules of law, thus operate. In the cases cited by the counsel for the plaintiff the contracts were not in the alternative ; the intentions of the parties to them were made sufficiently apparent ; and there was no rule of law violated in permitting them to be effectual.

Exceptions overruled.

FRANKLIN ROLLINS *versus* JEREMIAH BARTLETT *& al.*

After a note is written and signed by one promisor, the attestation generally, when he was not present, by a subscribing witness, on seeing another promisor affix his signature, if done through inadvertency, and not designed to have any injurious effect, does not impair the liability of the first promisor.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Assumpsit upon a note, of which a copy follows ; —

"Monroe, Nov. 2, 1836. For value received we promise to pay Benjamin Rich, or order, the sum of eighty-seven dollars and fifty cents, in one year from date with interest.

"JEREMIAH BARTLETT,
"LOT BARTLETT,
"JOHN RICH."

"Attest:
"ELIZABETH G. STOWERS."

The note was indorsed by the payee, "without recourse."

The action was commenced March 26, 1838. The signature of Jeremiah Bartlett was denied, and the deposition of E. G. Stowers was introduced, who stated, that she signed as a witness to the note ; that the note was brought to the house where she was, with the name of Jeremiah Bartlett upon it, by Lot

Bartlett, who signed it in the presence of Benj. Rich, the payee, and she witnessed it; that Jeremiah Bartlett was not present, and the name of John Rich was not then upon the note. Benjamin Rich testified, that he saw John Rich sign the note; that he was acquainted with the handwriting of Jeremiah Bartlett, and thought the signature genuine; that he negotiated this and other notes of the same parties in Dec. 1836, to one Twitchell; that two or three months afterwards he saw J. Bartlett, who told him he was to pay about $300 of the notes as his part; that afterwards, Jeremiah told the witness he had the money to pay the notes, and on being informed that they had been sold, requested the witness to ask the indorsee to bring down the notes and he would pay them; and that the notes were given as part of the consideration of a farm sold by him to Lot Bartlett. The plaintiff also introduced a paper signed by Jeremiah Bartlett, of which the following is a copy: —

"Due John Rich four hundred and seventy-five dollars out of the Durgin farm, to satisfy said John for putting his name to five notes of hand running to Benjamin Rich, with Lot Bartlett. Mr. Rich is to have the first pay on the farm when sold.

"Monroe, March 28, 1838. JEREMIAH BARTLETT."

The exceptions state, that hereupon the defendants moved that the plaintiff be nonsuited, because Stowers witnessed the note without having seen Jeremiah Bartlett sign it, and not in his presence; which motion the Court granted, and ordered a nonsuit. The plaintiff filed exceptions.

A. W. Paine, for the plaintiff, contended that the nonsuit was improperly ordered.

An alteration in a contract, however material, does not destroy it, unless it was done fraudulently. And this question should be left to the jury. 11 Coke, 27, Pigott's case; 4 T. R. 329; 15 East, 17; Ryan & M. 27; 10 Serg. & R. 164, 170; 4 Johns. R. 59; 8 Cowen, 71; *Martendale* v. *Follett*, 1 N. H. R. 95; *Bowers* v. *Jewell*, 2 N. H. R. 543; *Nevins* v. *De Grand*, 15 Mass. R. 438; *Smith* v. *Dunham*, 8 Pick. 249; *Wheelock* v. *Freeman*, 13 Pick. 165; *Granite Railway Co.*

v. *Bacon*, 15 Pick. 239; *Ford* v. *Ford*, 17 Pick. 418; *Hale* v. *Russ*, 1 Greenl. 334; 9 Cranch, 28.

To avoid the note, the alteration should be made by the payee, or holder, or by their procurement. This, too, is a question for the jury. 4 T. R. 320: 1 Greenl. 73; 6 Mass. R. 521; 11 Mass. R. 312; 6 Cowen, 746.

Here was no such alteration as would avoid the note, because it was witnessed before it was completed or delivered. 2 Stark. R. 45; 7 Ad. & Ellis, 444; 20 Johns. R. 188; 5 B. & A. 674; 11 Conn. R. 531; 16 Serg. & R. 44; 1 Greenl. 334.

There was no alteration, for the attestation was true. The witness saw the note signed by a party. 8 Pick. 249; Chitty on Bills, 102.

Hobbs, for the defendant, contended that a material alteration of a *contract* avoided it. If the alteration changes the contract, it renders it of no effect, whether such alteration was made with a fraudulent intent or not. The alteration is a fraud in law, which discharges the party. 4 Petersd. Ab. 242, and following pages, and authorities there cited; *Hervey* v. *Harvey*, 3 Shepl. 357.

Affixing the signature of a subscribing witness to a note, changes its character, and makes the party signing liable for twenty years, when he was before holden for but six years. This makes it a different contract, and destroys it. *Homer* v. *Wallis*, 11 Mass. R. 309; *Brackett* v. *Mountfort*, 2 Fairf. 115; *Farmer* v. *Rand*, 2 Shepl. 225.

Taking collateral security by one of the makers of the note, does not admit it to be his, or show his assent to it.

The payee was present at the time the witness signed the note, and it is to be presumed to be done by his procurement.

Where the evidence is all on the side of the plaintiff, and insufficient to maintain the suit, it is proper for the Judge to order a nonsuit. It is then a mere matter of law.

The opinion of the Court was drawn up by

Weston C. J. — The execution of the note by all the defendants, is sufficiently proved. After it was signed by Jere-

miah Bartlett, and when he was not present, it received the attestation of a witness, which apparently increased his liability, by depriving him of the advantage and protection of the statute of limitations. But this has been fully explained in a manner, which negatived fraud. The attestation of the witness was properly and lawfully affixed, but it should have been noticed on the instrument, that it applied only to one of the signers. The omission to do this was manifestly an inadvertency, not designed to have any injurious effect. The testimony of the witness is not necessarily inconsistent with the form of the attestation. It should not, in our judgment, as explained, impair the liability of Jeremiah Bartlett and Rich upon the note, as an instrument as to them not attested by a subscribing witness. *Exceptions sustained.*

SOLOMON GOODALL *versus* THOMAS WENTWORTH.

Where notes are signed by three persons for a joint debt, each is a principal for one third, and a co-surety for the other two thirds.

If one pays another's share of the notes, after they become payable, he has a legal claim upon the third for contribution.

And if the third party voluntarily pays the one half in pursuance of such legal obligation, the law raises an implied promise on the part of him for whose benefit the notes were paid, to refund the same.

It is not essential to the support of such action, to prove an inability of the principal at the time they were paid, to pay his share of the notes.

ASSUMPSIT on the money counts. The plaintiff, defendant, and one Jordan, gave three notes of hand to John Black, dated Nov. 13, 1833, for $1198,61 each. These notes were to be equally paid by each of the three, having been given for a bond for land to be conveyed to the three in equal shares on payment of the notes. The plaintiff sold to Jordan, they agreeing in writing that Jordan should pay the amount of Goodall's liability to Black, and that it should be accounted for and allowed by the plaintiff to Jordan. Jordan afterwards purchased Wentworth's share of the bond, but did not agree to

pay his share of the notes. He then sold the bond to Dwinel, taking his obligation to pay the notes to Black. Dwinel paid the notes to Black for the benefit of Jordan. Jordan claimed of the plaintiff one half of the amount paid to Black, to which the plaintiff at first objected, but it was allowed and paid in their settlement. One sixth of the three notes then amounted to $700.

If the action could be maintained, a default was to be entered, and if not, a nonsuit.

J. Appleton, for the plaintiff, said that the case was, that the plaintiff and Jordan paid equally, each of his own funds, the defendant's share of the three notes, to the payment of which they were all equally liable, as sureties for each other. The notes had become due before the payment, and no benefit could be derived from the bond until payment of the notes. The plaintiff therefore can recover of the defendant the amount thus paid as his surety. And the action is rightly brought, as no joint action could be maintained by Goodall and Jordan, for the payment was not made jointly, or from joint funds. It is wholly unnecessary to show the inability of a principal to pay; but here the defendant was himself the principal. *Odlin* v. *Greenleaf*, 3 N. H. R. 70; 8 Johns. R. 249; 14 Pick. 285 2 B. & P. 268, 270; 3 Car. & P. 467; 2 Esp. R. 478; 1 Pothier, § 430; 8 Cowen, 168.

Rowe, for the defendant, contended, that Jordan was liable under his contract with the plaintiff to pay only his third. Such was the construction put upon it by the plaintiff himself, and it is the true one. There is no evidence of the inability of the defendant to pay. Jordan paid the defendant's third, and he alone can recover it. 2 B. & P. 268, 270, cited for the plaintiff; Saund. Pl. & Ev. 679; 13 Petersd. Ab. 779, note.

But if the plaintiff has any claim, it is a joint one with Jordan. If the latter paid for the plaintiff, as well as for himself, it can furnish only the foundation for a joint action. 5 East, 225.

The opinion of the Court was by

WESTON C. J. — Each one of the signers of the notes to Black was principal for one third of their amount, and co-surety for the other two thirds. The defendant being principal for one third, the plaintiff and Jordan became his sureties, for the payment of his proportion. The plaintiff, having sold his share to Jordan, agreed in writing, that if the latter would pay his proportion to Black, he, the plaintiff, would allow the amount, as a part of the purchase money. By the proportion of the plaintiff, thus provided for in that agreement, must be understood that part, for which the plaintiff was liable as principal; for with regard to the defendant's part, it was doubtless expected that he would pay it himself. Under that agreement, then, Jordan had no claim to be allowed by the plaintiff any sum, beyond the one third, which he had paid for him.

But Wentworth having failed to pay his part, Jordan procured Dwinel to pay it, which was the same thing as if Jordan had paid it. It was paid out of his funds, which were due to him from Dwinel. The plaintiff and Jordan, being co-sureties for Wentworth, the whole amount was paid by Jordan. This gave him a right to call apon the plaintiff for contribution. This claim the plaintiff could not legally resist. It was voluntarily paid, but in pursuance of a legal obligation. The money thus paid by him, was paid for Wentworth, and thereupon an assumpsit was raised on his part, by implication of law, to refund the money. There existed between the parties all the privity, which arises between sureties and their principal. If joint, or co-sureties pay money for their principal, they have a several right of action against him for reimbursement. *Gould* v. *Gould*, 8 Cowen, 168.

Odlin v. *Greenleaf*, 3 N. H. R. 270, is a case exactly in point. One of two sureties, on a negotiable note of hand, had paid and taken it up; and he had received from the other surety, the plaintiff's testator, half the amount by him paid, by way of contribution. For the moiety thus paid, the plaintiff sustained an action against the defendant, the principal. And it was there intimated, that a surety, who pays, may have a

remedy against his co-surety, without showing an inability in the principal to pay. But it was held to be settled law, that a surety may pay the demand at its maturity, and be entitled at once to his remedy against his principal.

Defendant defaulted.

AMASA HOWARD *versus* ALLEN MINER *& al.*

On a contract for the delivery of specific articles, which are ponderous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one.

And if the debtor be desirous of paying, he should request the creditor to appoint it, or deliver to him in person at a proper place.

The debtor, however, is not obliged to follow the creditor out of the State or country to do this. A reasonable effort to ascertain his residence, and give him the notice, will be sufficient.

If the creditor, being notified, refuses or neglects to appoint, or avoids and prevents the notice, the debtor may appoint a place, and deliver the articles there.

When the intention of the parties as to the place of delivery can be collected from the contract and the circumstances proved in relation to it, the delivery should be made at such place, although it may not be precisely in the condition named in the contract.

On exceptions from the District Court, although the instructions there given may not be entirely correct, our statute does not require this Court to grant a new trial, when it appears that the verdict is correct.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Assumpsit upon a contract in the following terms. "Dutton, Oct. 3, 1836. For value received we jointly and severally agree to pay Amasa Howard, or order, five hundred bushels of good hard wood coal, to be delivered at his shop in Bangor, on or before the first day of January next.

"Allen Miner,
"Lyman Miner,
"David P. Clark."

The declaration alleged, that when the note became due, the plaintiff was at his shop in Bangor, ready to have received the coal, and also at any day previous to that time. The plaintiff offered no evidence in support of this allegation; but after proving and giving the note for coal in evidence, he rested.

The defendant then proved, that sometime in May, prior to the giving of the note, the shop formerly occupied by the plaintiff was torn down, and that from that time until after the commencement of this suit, the plaintiff had no shop in Bangor, but had left the State and resided somewhere in New Hampshire; that before and at the time the note became due, the defendant, Allen Miner, had in Dutton a large quantity of coal, estimated at 3500 bushels, in a condition to be delivered; that before the note became due, he called at the shop of one Collomy in Bangor, and inquired for the plaintiff and the note, and requested Collomy to procure the note, who promised so to do, but could not find it; that A. Miner delivered at Collomy's shop 200 bushels of coal to be paid on the note, if it could be procured, but this coal was afterwards accounted for to Miner by Collomy; and that he lost a large quantity of coal by "its being out," exceeding in value the amount of the note in suit.

The plaintiff in interest called one Ford Whitman, who testified, that about the time the note became due it was left in his hands with other papers by the plaintiff; that he made an arrangement with one Egery, to whom the plaintiff was indebted, to take the coal in payment of the note on the plaintiff's account; that he, the witness, gave no notice to the defendants, and did not demand payment of them. Egery testified to the arrangement made by Whitman with him; that he was ready at that time to have received some four or five hundred bushels of good hard wood coal on account of the plaintiff who was indebted to him; but that he never had the note in his possession, never demanded the payment of it, and never gave any notice to the defendants. He said however, that one Fuller did deliver a load of coal to him for Miner, which he credited to the plaintiff; that subsequently another

load was brought in the same way, which he refused to accept, because it was not merchantable; and that subsequently he paid Miner for the load of coal which had been delivered.

The defendants' counsel requested the Court to instruct the jury, that the plaintiff could not recover, unless he proved that he was at his shop at the time and place of payment ready to receive the coal, as he alleged in his declaration; that if on the day of the maturity of the note, the plaintiff was not in Bangor, and had no shop there, that he cannot recover in this action; that if the plaintiff had no shop nor residence here, and the defendants used due diligence in seeking for his residence, the action cannot be maintained, unless at some time before the bringing of the suit, the plaintiff had made a special demand and appointed a place in Bangor where the articles could he delivered; that if the plaintiff had removed from the State, it was not the duty of the defendants to seek him at such residence, to ascertain where the coal could be delivered in Bangor. The Judge presiding at the trial declined to give such instructions; but did instruct the jury, that if the plaintiff had no shop in Bangor at the time the contract was entered into, nor since, that it is to be considered as though no place of delivery in Bangor had been mentioned therein; that when no place for the delivery of specific articles is designated by the parties, that it is the duty of the promisor to ascertain from the promisee the place at which the delivery shall be made; and that the removal of the plaintiff from this State to the State of New Hampshire, between the time of the making and the maturity of the contract, did not absolve the defendants from their duty to ascertain from the plaintiff what place in Bangor he would appoint for the delivery of the coal on the day of payment.

The verdict having been returned for the plaintiff, the defendants filed exceptions.

J. Appleton, for the defendants.

1. It was a part of the contract, that the plaintiff had a shop, or would have one, at Bangor, at the time of the maturity of

the note. This was an important stipulation, from which neither could recede. By it, the defendants were absolved from the obligation of seeking the creditor, and asking him to appoint a place.

2. The plaintiff having failed on his part, not having fixed the contract place of payment, through his fault it was impossible for the defendants to make the tender, and consequently they are absolved from doing it. *Freeman* v. *Luce*, 4 Mass. R. 176; 1 Ld. Raym. 687; Chipman on Con. 211; 1 D. & E. 645; *Borden* v. *Borden*, 5 Mass. R. 74; 5 B. & C. 628.

3. The ruling of the Court, that if the plaintiff had no shop in Bangor at the time the contract was entered into, nor since, is to be construed as though no place of delivery had been mentioned, was erroneous. It *de facto* authorizes the plaintiff to erase "at his shop in Bangor," and gives him all the legal benefit of such erasure. And yet such erasure would have been a material alteration of the note, and would have avoided it. Chitty on Con. 204; 3 Taunt. 329; 1 M. & S. 735; 19 Johns. R. 391; *Farmer* v. *Rand*, 2 Shepl. 225.

4. As a place was fixed in the contract, if none such existed, it was the duty of the plaintiff to designate such place and notify the defendants of such designation.

5. The Judge erred in saying that the defendants were obliged to follow the plaintiff to New Hampshire, or wherever he might be, to ascertain what place he would designate as the place of payment. Ohio Cond. Rep. 591.

6. The plaintiff alleged in his declaration that he was ready to receive the coal at the time and place mentioned in the note, to wit, at his shop, in Bangor. The facts thus alleged are material, and must be proved. 2 B. & B. 165; 11 Wheat. 171; 1 Pet. 116, 604; 2 Pet. 543; 12 Pick. 132; 4 Verm. R. 313.

A. Walker for the plaintiff.

The first instruction requested was properly withheld, because such averments and proofs are unnecessary. *Bixby* v. *Whitney*, 5 Greenl. 192; *Bacon* v. *Dyer*, 3 Fairf. 19. When such averments are made, no proof need be offered to support them, nor need they be stricken out. *Remick* v. *O'Kyle*, 3 Fairf. 340.

The other instructions requested were properly withheld, because they were indefinite, unintelligible, hypothetical, and contrary to law. Hypothetical instructions need not be given. 2 Fairf. 350; 1 Fairf. 224. In showing that the instructions given were correct, it will appear that those requested are contrary to law.

The law in regard to contracts of this description was correctly laid down by the District Judge. Co. Lit. 210, (b); 4 Cowen, 452; 7 Conn. R. 110; 5 Greenl. 192. The promisor was not absolved from his obligation on account of the foreign domicil of the promisee. 5 Greenl. 192.

If the contract fixes a place for the delivery of the coal, a tender should have been made there, and this was not done. If it does not, then the law was correctly stated to the jury by the Judge.

In cases of this kind, where promisors rely upon a tender, or upon any excuse for non-payment, they must clearly show, that they have done all in their power to perform. 1 Ld. Raym. 687; Chipm. on Con. 211; *Wyman* v. *Winslow*, 2 Fairf. 398. Ability to perform is no defence. The defendants should have made such designation of the coal to be delivered, such separation from the mass of what was intended to be delivered in payment, as would transfer the property therein to the promisee, and enable him to pursue the property itself. Brayton's R. 223; 4 Cowen, 452; 7 Conn. R. 110; 5 Greenl. 192; 1 Root, 55; ib. 443. They should not only have done this, but they should have had the coal in Bangor ready for delivery on the day of payment. It was the duty of the defendants to have made diligent inquiry for the place of residence of the plaintiff. 4 Cowen, 452; Chipm. on Con. 26, 28.

Where justice is done by a verdict, the Court will not order a new trial for errors in the instruction to the jury. *Kelly* v. *Merrill*, 14 Maine R. 228; *Farrar* v. *Merrill*, 1 Greenl. 17. A new trial will not be granted to let in new cumulative evidence to points taken at the trial. 1 Sumn. 482; 8 Johns. 84; 15 Johns. 210.

The opinion of the Court was drawn up by

SHEPLEY J. — On a contract for the delivery of specific articles, which are ponderous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one. And if the debtor be desirous of paying, he should request the creditor to appoint it, or deliver to him in person at a proper place. Yet he is not obliged to follow him out of the State or country to do this. A reasonable effort to ascertain his residence and give him the notice, will be sufficient. If the creditor, being notified, refuses or neglects to appoint, or avoids and prevents the notice, the debtor may appoint the place. Co. Lit. 210, (b); Pothier, part 2, c. 3, art. 4; Chip. on Con. art. 27; 2 Kent, 507; *Aldrich* v. *Albee*, 1 Greenl. 120; *Bixby* v. *Whitney*, 5 Greenl. 192; *Currier* v. *Currier*, 2 N. H. R. 75; *Slingerland* v. *Morse*, 8 Johns. 474.

If the contract in this case is under the circumstances to be regarded as failing to designate the place of delivery, and the defendants as having used reasonable diligence to give the notice, they should have appointed a suitable place and have delivered the articles there.

When the intention of the parties as to the place of delivery can be collected from the contract and the circumstances proved in relation to it, the delivery should be made at such place, although it may not be precisely in the condition named in the contract. For instance, if the contract should designate a store, and it should be changed into a workshop and be occupied by the same person, there could be little doubt respecting the intention. The plaintiff formerly occupied a shop in Bangor, which had been torn down before the contract was made. It does not appear, that he had not continued to control the site, on which it stood; and if he had, it might, after it had been ascertained, that he did not occupy any shop in the city, well be regarded as the place appointed in the contract. Whether the place be regarded as sufficiently ascertained by

the contract or not, the defendants have not performed all their duty to enable them to make a good defence.

Although the instructions may not be entirely correct, our statute does not require the Court to grant a new trial, when it appears, that the verdict is correct.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK, JULY TERM, 1841.

Mem. SHEPLEY J. was employed in trying jury cases in the county of Washington when this and the two following cases were argued, and took no part in the decisions.

PHINEHAS HIGGINS *versus* SHUBAL BROWN.

If a person sells goods belonging to another without authority, and receives the proceeds of the sale in money, he holds this money to the use of the owner of the goods, who may maintain an action for money had and received therefor.

And if the owner of the goods makes his claim for the money, and it is by mutual arrangement deposited in the hands of a stakeholder to await a decision in regard to the right of property, and the seller of the goods afterwards persuades the stakeholder to deliver the money to him, without the consent or privity of the other party, he must be considered as having waived the benefit of the arrangement, and becomes at once without demand answerable to the owner of the goods for the money for which they were sold.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit for money had and received, wherein the plaintiff claimed to recover the proceeds of the sale of a quantity of wood by the defendant, belonging to the plaintiff. The writ was dated Sept. 30, 1839. In the winter of 1838, the defendant and Daniel Bridges made an arrangement whereby Bridges was to cut and haul to the wharf from land belonging to Brown a quantity of wood. This was done. On the

trial, the defendant attempted to show that he was to pay Bridges a sum of money equal to one fourth of the value of the wood for his services, and the plaintiff offered evidence tending to show, that one fourth of the wood hauled to the wharf, was the property of Bridges. On April 17, 1838, Bridges sold his one fourth of the wood to the plaintiff. Near the close of the year 1838, the defendant sold all the wood, including the fourth part in controversy, to the master of a vessel then at the wharf, who commenced taking it off. The plaintiff forbid the taking, claiming one fourth as his, but the whole was taken. The exceptions state, that Lake, a witness, testified in these terms. "The captain called on me to survey the wood, and Brown was with him, and I surveyed it from Brown to the captain. The plaintiff objected to the captain's taking the wood, but finally assented to it, if he could have one fourth of its proceeds. It was agreed between the captain and plaintiff, that one fourth of the pay should be deposited with me for future consideration. It was put into my hands to await the decision of the Bridges claim. The plaintiff assented to the arrangement which was made by the captain and Brown. I think the plaintiff was present and forbid the captain paying the money to Brown. A quarter was put into my hands to await the decision to whom it belonged, Bridges or Brown. I do not distinctly recollect that the plaintiff was there. Brown claimed all the wood. I delivered the proceeds of the quarter, $32,50, to Brown and took his obligation to refund it, if it did not belong to him. I consider it as now being in my hands. If Bridges' claim was good, this money was to be the plaintiff's. They talked about a reference as between Brown and Bridges."

The defendant contended that the plaintiff had agreed, or had assented to an agreement, that the money should be deposited with Lake to await the decision as to the rights between Brown and Bridges; that no decision had been made; that the plaintiff therefore could not maintain any action against any one; that if an action was maintainable, it must be against Lake; and that no action could be maintained against Brown for the money without a demand therefor.

The plaintiff contended that he had never made any agreement, or assented to any, that the money should ever be paid to Lake, and certainly not to await the decision of the defendant's and Bridges' rights, as that would be inconsistent with his prior claims and acts, and put his rights upon the issue of a question he had no means of compelling a decision upon; that this agreement was at the captain's request, who might be in danger of paying the money twice, and that it was solely between the defendant and the captain; and that if he had assented to it, the situation of the parties had since been so changed by the voluntary act of the defendant in taking the whole proceeds of the sale of the wood into his hands and for his use, and that he was liable to this action without any demand upon him for the money.

The Judge instructed the jury, that if they were satisfied the bargain between the defendant and Bridges was, that the latter should receive one fourth of the proceeds of the wood, or a sum equal to it, and that he had no interest in the wood, but that all the wood was Brown's, the plaintiff acquired nothing in the wood by his bargain with Bridges, and could not maintain the action. But if they were satisfied, that by the bargain between Brown and Bridges, one fourth of the wood belonged to the latter, and that he had sold it to the plaintiff — and that the defendant had sold it to the captain of the vessel, and had received the money for it — the plaintiff would, so far as this transaction was concerned, maintain the action, and they should give him a verdict for such sum as the wood was then worth, with interest from the date of the writ; that if the plaintiff was not a party to the agreement to deposit the money with Lake, of which they must judge, nor assented to the agreement, the plaintiff's right to recover would not be altered, nor affected by the deposit so made, nor by any decision under the agreement; that if the jury were satisfied, that the plaintiff was a party to this agreement, or assented to the money being so deposited, although no decision in regard to the right to the wood as between Brown and Bridges had been made, nor any request therefor had been made by the plaintiff, yet if they

were also satisfied, that the money had been paid to the defendant by his procurement and voluntary act without the assent of the plaintiff, all motives for the plaintiff to have a decision being removed by this change in the condition of the parties, and that a reasonable time had elapsed before this suit was brought for the defendant and Bridges to have had a decision, then the plaintiff's right to maintain this action would not be altered, although no demand had been made by the plaintiff for the money, and although Lake still considered the money as in his possession, having in fact paid it over to the defendant, taking his indemnity for security.

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

Hathaway, for the defendant, contended: —

1. The money being deposited with a stakeholder or trustee generally, by agreement of the parties, the trustee, and he only, was liable to the rightful owner. 9 East, 378; Hammond on Parties, 52; 1 Saund. Pl. & Ev. 142; *Ulmer* v. *Paine*, 1 Greenl. 84.

2. If the defendant was liable to the plaintiff, it was not in this form of action.

3. As there was no demand made, nor request for a reference or decision, nor attempt to ascertain to whom the money rightfully belonged, the action cannot be maintained. *Ulmer* v. *Paine*, 1 Greenl. 88.

4. If a man takes upon himself the responsibility of a stakeholder, he must defend himself as well as he can; and that it may be a hardship upon him, ought not to be taken into consideration. He may generally be secured, and he was so here. 2 Kent, 567; 2 Story's Eq. 110 to 128.

Pond argued in support of the instructions of the District Judge, contending that each particular was in accordance with the law on the subject.

To show that the action was rightly brought for the money, the defendant having received it for the plaintiff's wood, he cited Doug. 137; 5 Greenl. 381; 9 Mass. R. 538; 12 Mass. R. 34; 3 Pick. 420; 15 Maine R. 285; 17 Mass. R. 560.

To show that the instruction in relation to the omission of the plaintiff to make a demand of the money was right, he cited 7 Greenl. 72; 14 Pick. 428; 10 Pick. 20; 5 Pick. 334; 12 Pick. 150.

The question was properly left to the jury, and they decided rightly. 1 Salk. 11; 1 Bac. Ab. 89; 1 Strange, 480; Cro. Jac. 183; 1 Esp. R. 130; 2 Salk. 309; 1 Saund. 35.

The opinion of the Court, (SHEPLEY J. being absent,) was by

WESTON C. J. — The wood in controversy, the jury have found, was the property of Daniel Bridges, of whom the plaintiff purchased it. The defendant was fully apprized of this fact, having himself sold the wood to Bridges. It appears that he sold it a second time to a third person, and that he has actually received the proceeds. It is very clear, that he holds this money to the use of the plaintiff, to whom the wood belonged, and is liable to his action for it, unless the plaintiff's remedy has been suspended by the arrangement made with Lake, who received the money as a stakeholder. If this was done by the consent of the plaintiff, which is controverted, when the defendant persuaded Lake to pay to him the sum he had received without the privity or consent of the plaintiff, in violation of that arrangement, he must be considered as having waived the benfit of it, and he became at once answerable to the plaintiff, if he was in fact the owner of the wood.

Exceptions overruled.

GEORGE CRABTREE *versus* DANIEL CLARK *& al.*

Where the subscribing witness to a note testifies to his own signature, but can recollect nothing more, and fails to prove its execution by the payer, other evidence of the genuineness of the signature is admissible.

Where a note appears from inspection to have been altered, and the jury are of opinion, that the alteration was made after the execution of the note, it will be their duty to return their verdict for the defendant. But whether altered subsequently, or not, is a question for them, if no explanatory testimony is adduced. They are not to be instructed as matter of law, that if not accounted for by the plaintiff, the note is void.

If a note is partly written by one hand, and finished by another with a different ink, this does not furnish *prima facie* evidence, that the note was fraudulently altered.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit upon a promissory note, dated July 9, 1836, payable to the plaintiff, and alleged to have been made by the defendants. Their signatures were denied, and one Abner Lee, who appeared on the note to have been a subscribing witness thereto, was called by the plaintiff. He testified that it was his genuine signature; that he did not know that he saw either of the defendants sign the note; that he thought he did not put his name to it as a witness at the time it was made; that about the time the note was made, he had it in his possession for a time, and thought he then put his name to it as a witness; that he did not recollect of seeing the parties together, nor the defendants together, nor any thing in regard to the consideration, nor any circumstance in regard to its execution, nor any acknowledgement of either of the defendants, that the signatures were theirs; and that he could not tell at whose request he witnessed the note, nor who gave it to him, nor how long he continued in possession of it, nor how or to whom it went from his possession.

The Judge thereupon ruled, that the signatures might be proved by other evidence, the defendants objecting thereto. On the introduction of other evidence, the note was read to the jury. On inspection of the note, it appeared that the

words "*and interest*," and "*attest, Abner Lee*," were in different ink from the rest of the note, and in a different handwriting. The rest of the note was in the handwriting of one of the defendants. Lee, on being recalled, said that those words were in his handwriting.

The defendants then contended that it was apparent on the note that these words were added after the note was made, and were alterations of it after it was executed, and that it was incumbent on the plaintiff to prove that the alterations were made under justifiable circumstances, or the note would be void.

The plaintiff then introduced evidence tending to show, that about the time the note was given, Lee had sold a horse to the defendants in which he had some interest as mortgagor, and the plaintiff as mortgagee, and that this note was passed to the plaintiff to extinguish his mortgage. Lee, however, denied any agency for the plaintiff in the sale of the horse, and could remember nothing of the consideration of the note. The plaintiff introduced a witness, who testified, that at the request of the plaintiff he went with the note to the defendants; that he saw Clark in May or June, 1837, and requested payment of it; that Clark at first said the note was not good because the word pay was omitted in it, but that afterwards Clark took the note and read it, and said it was good, and it was of no use to give another, that he could not pay it then, but was expecting some money soon. The witness also called upon the other defendant, who said he could not pay it then, and wished there was some way to get it out of Lee, but could not say the note was read by that defendant. The witness stated that no alteration had been made in the note since he first saw it.

The defendants' counsel again objected, that the note had been altered since it was signed, by the addition of the words, "*attest*, Abner Lee" and "*and interest*," and that under the circumstances of this case, it was incumbent on the plaintiff to show, that it had not been altered, or he could not prevail.

The presiding Judge instructed the jury, that forgery and crime were not to be presumed, the note having been proved

to have the signatures of the defendants to it; that if they would have the benefit of an alteration of the note after it was made, it was incumbent on the defendants to show it, and not on the plaintiff to disprove it; that if the words in the different ink had since been added without the assent of the defendants, it was forgery, and they were absolved from all obligation to pay it, and the verdict would be for them. But that if these words were added with the defendants' knowledge and assent, it did not invalidate the note; and that the jury might take into consideration the testimony tending to show the assent of the defendants to it afterwards, and give it such weight as they considered it entitled to.

The verdict was for the plaintiff, and exceptions were filed by the defendants.

Hathaway & Herbert, for the defendants, contended that the Judge erred at the trial, in permitting the introduction of other testimony than that of the attesting witness to prove the signatures of the defendants to the note. The case does not come within any of the exceptions under which such testimony is admissible.

Under the circumstances of this case, it was incumbent on the plaintiff to prove that the alteration in the note was made for justifiable purposes, and not for the defendants to prove the contrary. 10 Coke, 92, (b); Chitty on Bills, 312, 313; 3 Nev. & Per. 375; 1 Peters, 369; 1 Dall. 67; 2 B. & P. 283; Saund. Pl. & Ev. 90.

But if the burthen of proof was in the first instance on the defendants, it was changed to the other party by the evidence.

T. Robinson, for the plaintiff, said that the plaintiff was bound only to furnish the best evidence. He brings into Court the attesting witness, who swears to his own handwriting, and knows nothing beyond this. Other evidence is then admissible of necessity, or the plaintiff must lose his note. Chitty on Bills, 624, and cases cited in the notes.

He did not understand, that the exceptions showed an alteration of the note, after it was signed, but the contrary. The

case does not therefore come within the principles which the cases cited for the defendants were intended to establish. This was not a question of law, but of fact to be submitted to the jury for their decision. The instructions were strictly correct. 2 Stark. Ev. 294; 6 Car. & P. 273; Chitty on Bills, 625; *Gooch* v. *Bryant*, 1 Shep. 386.

The opinion of the Court (SHEPLEY J. being absent,) was by

WESTON C. J.—A note, which has the attestation of a subscribing witness, is to be proved by calling that witness. But if, from defect of memory or any other cause, such witness fails to prove the execution of the note, other evidence of the genuineness of the signature is admissible. Chitty on Bills, 625; *Lemon* v. *Dean*, 2 Camp. 636. The recollection of the subscribing witness in this case, failing him altogether, there could be no legal objection to the admission of other testimony to show, that the signatures were the proper handwriting of the defendants.

Where a note has been manifestly altered, cases have been cited for the defendants to establish the position that it is incumbent upon the holder to account for such alteration. If he does not, and the jury are of opinion, that it was made after the execution of the note, it will be their duty to return their verdict for the defendant. But whether altered subsequently, or not, is a question for them, if no explanatory testimony is adduced. They are not to be instructed, as matter of law, that if not accounted for the note is void. *Bishop* v. *Chambre*, 3 Car. & P. 55; *Taylor* v. *Mosely*, 6 Car. & P. 273; *Gooch* v. *Bryant*, 13 Maine R. 386.

But if the rule was such, as is contended for by the counsel for the defendants, that if a note has been manifestly altered, the plaintiff cannot recover, without proving that it was fairly done, it does not appear to us, that the note in controversy is to be pronounced altered upon inspection. If so, a note partly written by one hand, and finished by another, who happens to dip his pen in a different inkstand, is *prima facie* a note fraud-

ulently altered. Such a conclusion, besides being founded upon an assumption of forgery, which is not to be presumed, would be at least as likely to be erroneous as correct. Such a circumstance may throw suspicion upon the instrument, but whether valid or not must necessarily be left to the jury. But in truth in this case the admission of one of the defendants, who inspected the note, in its present condition, that it was good, fairly removes all suspicion that any fraudulent alteration had been practised upon it.

Exceptions overruled.

MOUNT DESERT *versus* SEAVILLE.

A pauper whose settlement in a town was acquired by a residence in the part of it which was afterwards incorporated into a new town, but whose residence and home at the time of the division were in the part remaining, being then supported there by the town as a pauper, does not have a settlement in the new town by the act of incorporation.

FROM a statement of facts agreed by the parties, it appeared that the action was brought to recover for taxes paid, and for the support of one pauper whose settlement was admitted to be in Seaville. For these sums, amounting to $80,24, the defendants offer to be defaulted. The plaintiffs also claimed to recover a further sum for the support of Elias Bartlett and his wife, alleged to have their legal settlement in Seaville; and if that was their place of settlement, it was agreed that the plaintiffs should also recover the amount charged for their support.

Elias Bartlett and wife lived in that part of Mount Desert which is now Seaville, for twenty-five years or more preceding 1826 or 1827, at which time they became paupers, and were removed as such to the part of the town which is now Mount Desert, and have been supported there by the town of Mount Desert ever since.

In 1838, a part of Mount Desert was incorporated into a new town by the name of Seaville, the act of incorporation containing no provisions in respect to paupers, and leaving the

rights of the parties as they stand by the general laws of the State. At the time the act passed and went into effect, Bartlett and wife were supported as paupers by the town, in that part of it which still remains Mount Desert. Immediately preceding the incorporation of Seaville, Bartlett and wife had their legal settlement in the town of Mount Desert, which settlement was acquired in that part of Mount Desert which was incorporated into the town of Seaville, they having ever resided there until they were removed as paupers in 1826 or 1827, to that part which is now Mount Desert, and where they have ever since been supported as paupers.

Hathaway, for the plaintiffs, contended that by the provisions of the St. 1821, c. 122, § 2, sixth mode, the legal settlement of Bartlett and wife was in Seaville. As there were no stipulations respecting the support of paupers in the act of incorporation, the general laws must govern. *Great Barrington* v. *Lancaster*, 14 Mass. R. 253. The incorporation of a part of Mount Desert into a new town was a division of the town. As the paupers had gained a settlement on the territory now Seaville, and were paupers at the time of their incorporation, and their residence there was involuntary, it is to be considered as being where their legal settlement was. *Southbridge* v. *Charlton*, 15 Mass. R. 248; *Hallowell* v. *Gardiner*, 1 Greenl. 93; *Milo* v. *Kilmarnock*, 2 Fairf. 455. Being paupers, they gained no settlement by the act of incorporation different from that originally acquired in Seaville. *East Sudbury* v. *Waltham*, 13 Mass. R. 460. The incorporation of the town fixes there the settlement acquired in the new town, whether then within it or not. *St. George* v. *Deer Isle*, 3 Greenl. 390; *Groton* v. *Shirley*, 7 Mass. R. 156. The term *all persons*, in the statute, is limited to those who are capable of gaining a settlement in their own right. It has been so decided in regard to the fifth mode, and there is the same reason with respect to the sixth. *Hallowell* v. *Gardiner*, 1 Greenl. 93; *Milo* v. *Kilmarnock*, 2 Fairf. 455. It can make no difference, whether the paupers were supported as such in one part of the town or another. They had no residence of their own at the time of

the incorporation, and should be considered as if out of town, in which case it is clear that the paupers belong to Seaville. Or their home must be still in the last place where they resided voluntarily, and acquired their settlement, acting for themselves, which was in Seaville.

Kent, for the defendants, said that pauper laws were entirely arbitrary, and the only inquiry was, to which town, by the fair construction of the law, the paupers belonged. The defendants had no part of the property of the town, and there is no equity in favor of the plaintiffs beyond what exists in favor of the defendants. The paupers had their settlement in Mount Desert, and there it must remain, unless the plaintiffs show, that it was transferred to Seaville by the act incorporating that town. Seaville had no existence as a town prior to 1838, and of course was under no liabilities until then. No person within the town gained a settlement in Seaville by reason of its incorporation, unless he was in the new town at the time. *Hallowell* v. *Bowdoinham*, 1 Greenl. 129; *Sutton* v. *Dana*, 4 Pick. 117; *Fitchburg* v. *Westminster*, 1 Pick. 144. It makes no difference in which part of the town the settlement was gained. It is to be determined entirely by ascertaining in which he dwelt at the time the act was passed. They were already paupers of Mount Desert at the time of the division of the town, and not living in Seaville, but in Mount Desert, the settlement was not changed.

The opinion of the Court, (SHEPLEY J. being absent,) was drawn up by

WESTON C. J. — The act incorporating Seaville, containing no provision as to the settlement of paupers, their liability for their support must depend on the general law. By the statute of 1821, c. 122, § 2, under the sixth mode of gaining a settlement, it is provided, that upon the division of towns persons having a settlement therein, but removed therefrom at the time of the division, shall have their legal settlement in that town, wherein their former dwelling place or home shall happen to fall upon the division. This applies to a party, removed from

the town before such division, and having his home elsewhere. This case does not therefore fall under that clause. It is further provided, under the same mode, that all persons, settled in the town, before its division, 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. The liability of such town when incorporated, in regard to all settlements, not derivative, is limited to such as are thus provided for under the sixth mode.

At the time of the incorporation of Seaville, the paupers in question did not dwell or have their home within the bounds of the new town, nor had they done so for eleven years next preceding. This is decisive against the liability of Seaville, for their settlement, which was in Mount Desert, is not to be changed to the new town unless in the manner provided for under the sixth mode. That they had their home at a former period, within what has become the new town, does not vary the case. Nor is it material, under what circumstances they have resided in what has remained Mount Desert. If indeed they had there only a temporary residence, their home still remaining where it was before, the case might fall within the principle of some of the decisions cited for the plaintiffs. But it does not appear, that they had any inducement to return to their former residence. They had been town paupers for many years, having no home of their own, but availing themselves of such as was provided for them by the overseers of the poor. Upon the facts as agreed, we are of opinion that their settlement remained in Mount Desert, for which town judgment is therefore to be rendered, without including the amount incurred for their support. *Sutton* v. *Dana*, 4 Pick. 117, presents a case, not to be distinguished from the one before us.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTIES OF WASHINGTON AND AROOSTOOK,

JULY TERM, 1841.

CALVIN HAVEN *& al. versus* WARREN HATHAWAY.

Payment of part of a debt, liquidated and ascertained by a contract, is an admission that the whole was then due.

An indorsement on a note by the holder *after the Statute might operate*, affords no satisfactory evidence of such admission.

In an action upon a note payable more than six years before the commencement of the suit, it was held, that where the defendant had delivered another note to the plaintiff "to collect the same, and apply the proceeds to the payment" of the note in suit, and the plaintiff had accepted it, that he was bound to comply with these directions; and that as soon as he collected money upon it he was obliged to consider it a payment of so much on the note in suit; and that proof of a payment on the collateral note would operate as proof of payment of the same sum on the note in suit.

But in such case, if the plaintiff has not used that reasonable diligence which the law requires to collect the collateral note, and the payments have been made later than they should have been, they cannot be considered as made by order of the defendant; otherwise they will be so considered.

ASSUMPSIT upon a promissory note of the defendant to the plaintiffs for 1201,50, dated April 19, 1826, payable in four months. The statute of limitations was pleaded and relied upon. There were three indorsements on the note amounting in all to $1106,50, the last of which was dated Sept. 7, 1831. It did not appear in whose handwriting the indorsements were made. The action was commenced May 1, 1835. To show

that the indorsements were made with the knowledge and consent of the defendant and for his benefit, it was proved that the defendant left with the plaintiffs the note of one Loder, an inhabitant of the Province of New Brunswick, as collateral security for the note in suit, and requested the plaintiffs "to collect the same and apply the proceeds to the payment" of this note; that the Loder note was sent to St. John for collection, and three sums received upon it, and sent by the agent to the plaintiffs, one sum having been sent in June, 1829, one in Nov. 1829, and the other in Sept. 1831; and that the defendant was advised from time to time of the collections of Loder, and urged the plaintiffs to hasten the collection, as he was anxious to have it go in extinguishment of this note.

The trial was before EMERY J. who directed a nonsuit. If this direction was erroneous, the nonsuit was to be taken off, and the action was to proceed to trial.

Hobbs, for the plaintiff, contended, that as the nonsuit was ordered against the wishes of the plaintiff and without his consent, it should be taken off, unless it appeared conclusively that the suit could not be maintained. 9 Price, 291; 12 Petersd. Ab. 532; 2 T. R. 281; 14 East. 239; *Mitchell* v. *New Eng. Mar. Ins. Co.* 6 Pick. 117. The question in this case was one of fact, which should have been submitted to the jury. 9 Price, 291.

The payment of a part of the note takes it out of the statute of limitations. And this payment may be inferred from facts proved. The Loder note was to be applied in payment of the note in suit, as collected. It was the duty of the plaintiff to apply and indorse the sums received, without waiting for orders from the defendant; and the case, too, shows that the defendant was advised of the plaintiffs' proceedings. *Clapp* v. *Ingersoll*, 2 Fairf. 83; *Coffin* v. *Bucknam*, 3 Fairf. 471; *Whitney* v. *Bigelow*, 4 Pick 110; *Brewer* v. *Knapp*, 1 Pick. 337.

B. Bradbury, for the defendant.

There must be payment of a part, an actual promise to pay, either absolutely or on condition, or an unambiguous acknowl-

edgement of present indebtedness, to take a demand, once barred, out of the operation of the statute. *Bangs* v. *Hall*, 2 Pick. 368; *Whitney* v. *Bigelow*, 4 Pick. 110; *Perley* v. *Little*, 3 Greenl. 97; *Porter* v. *Hill*, 4 Greenl. 41; *Clapp* v. *Ingersoll*, 2 Fairf. 83; *Howe* v. *Thompson*, ib. 152; *Lombard* v. *Pease*, 14 Maine R. 349. Here there is no evidence, that any of these indorsements were made with the assent of the defendant. If the Loder note was to be considered as a partial payment of this, the payment was made when the note was delivered to the plaintiffs, more than six years before the commencement of the suit. *Whitney* v. *Bigelow*, 4. Pick. 471. The plaintiffs by their delay in collecting the note had made it their own. They could not by their own neglect prevent the statute from barring their claim. *Porter* v. *Blood*, 5 Pick. 54.

The opinion of the Court was by

Shepley J. — Assuming that no person would voluntarily pay a debt which he did not owe, it has been decided, that payment of part of a debt liquidated and ascertained by a contract, is an admission that the whole was then due. An indorsement by the holder, after the statute might operate, affords no satisfactory evidence of such acknowledgement. It might be made without any payment or consent of the debtor. If the debtor pay through the agency of another person, the effect is the same as a payment by himself. The act is his own. The testimony of Brooks proves, that the note of Loder was delivered to the plaintiffs as collateral security for the note in suit, "to collect the same and apply the proceeds to the payment" of it. The plaintiffs having accepted it, were obliged to comply with these directions. As soon as they collected money upon it, they were obliged to consider it as a payment of so much on this note. Proof of payment on the Loder note, would operate as proof of payment of the same sum on this note. It is not perceived how payment thus made can differ in principle from payments through any other agent. The plaintiffs became the legal agents of the intestate, coupled with

an interest. And they were responsible for any neglect of duty either in the collection or application of the money. If they acted faithfully, and used all reasonable diligence to collect, the collection and application of the money was made according to the order of the intestate. And the payments on this note would then be made from his property and by his direction. Neither party to the arrangement could avoid it, or the consequences resulting from it, without the consent of the other. These principles were recognized in the case of *Porter* v. *Blood*, 5 Pick. 54, where the maker of a note placed certain merchandize in the hands of the holder to be sold and the proceeds applied in payment of it. Yet in that case, it was decided, that the sales were not made within a reasonable time, and that the indorsement of the proceeds could not therefore be considered as made by the order of the maker. The holder could sell the merchandize when he pleased. Whether the Loder note could be collected did not depend alone upon the diligence of the plaintiffs. The ability and disposition of the maker to pay were to be considered. If the plaintiffs have not used that reasonable diligence which the law requires, and the indorsements have been made later than they should have been, they cannot be considered as made by the order of the defendant; otherwise they must be so considered, and the plaintiffs will be entitled to recover.

Nonsuit set aside, and new trial granted.

HENRY MCKENNEY *versus* BENJAMIN F. WAITE.

The books of a person who had deceased, containing charges against the plaintiff in the action for payments made to him, the deceased not having acted as the agent or clerk of the defendant, or in his behalf, are not competent evidence for the defendant, to prove payments made by him.

Where a witness testifies to certain acts of the party, and states certain words spoken by him, and then states what he understood by the words spoken, and where the words spoken would not warrant the conclusion drawn by the witness, but the acts and words spoken, taken together, would justify it, and the verdict of the jury was in accordance with it; although the *opinion* of the witness was inadmissible, and ought to have been excluded, yet as the verdict was sustained by the evidence, the Court will not set it aside.

ASSUMPSIT, on an account annexed, for labor in logging in the woods, and getting the logs to the mills. At the trial before EMERY J. the plaintiff produced, with other evidence, the deposition of one Furlong, whose testimony is thus stated in the report of the case: — "He testified that Waite had employed him to river drive in the same crew with the plaintiff at $2,00 per day. This bargain was made at the bridge in Milltown, and at the same time that the defendant employed the witness; that the defendant remarked to him, the witness, "here is Mr. McKenney, who is also going. We went up and staid about two weeks, and came down on account of the fall of the water. The next day Mr. Waite got some more men, and told me to call on McKenney to go up again, which we did. I think McKenney worked about thirty days driving. *From Waite's words at the time he hired me, I understood that he hired McKenney, and was to pay him.*"

At the time of the taking, the defendant objected to the last sentence in the deposition, and renewed his objection at the time the deposition was offered at the trial. The Judge permitted this part of the deposition to be read with the rest. The substance of the other testimony on this point is given in the opinion of the Court.

The defendant filed a set-off, on which was this item: — "This amount paid by Simeon Bradbury, the person who had charge of the teams, but who has died since the commencement

of this suit, $60,00." To prove this, the defendant proposed to prove Bradbury's death, and that there were on his books, in his handwriting, charges to that amount against the plaintiff, and a memorandum of the time when the plaintiff commenced work, and of his wages per month. This was objected to by the plaintiff, and the Judge ruled that it was inadmissible, unless offered on the ground that Bradbury was the agent of the defendant in making the payments. The defendant's counsel denied that he was such, and the books were excluded. The defendant also offered some orders drawn by Bradbury for the payment of other men's labor, which did not appear ever to have been out of his possession. They were not admitted.

The verdict was for the plaintiff, subject to be set aside if the ruling of the Judge were erroneous.

Bridges, for the defendant, contended that the Judge erred both in admitting the portion of the deposition objected to, and in excluding the books of Bradbury. On the last point, he cited 1 Stark. Ev. 46, 78, 307; 1 Phil. Ev. 157, 196, 211; 14 Serg. & R. 275; 14 Maine R. 116, 201, 208.

B. Bradbury, for the plaintiff, said that the witness stated the words used by the defendant, and the circumstances attending the speaking of them, and his own conclusions drawn from them. If it was erroneous to admit his conclusions, it cannot affect the verdict, because he drew the same inference which the jury would have done.

The books would have been admitted, had they been offered as the books of an agent of the defendant. They were offered merely as the acts of a third person, unconnected with the parties, and were rightly rejected.

The opinion of the Court was by

Weston C. J. — The orders signed by Bradbury, and his books, were properly excluded. They were but statements in writing of a third person, without the sanction of an oath. Such statements of a deceased person are not generally to be received in testimony. There are exceptions to this rule, as

when they are made by a deceased clerk upon the books of his employer, or made in some official character; but they do not embrace this case.

The case finds, that the defendant was the owner of the land, from which the logs were cut, upon which the plaintiff was employed, that he owned the teams, and that the timber was to remain his property, until he was paid for his claims and advances. It further appears, that Simeon Bradbury, who had contracted to buy the timber at a stipulated price, and who had charge of the teams, was deeply insolvent, and there was evidence tending to prove, that Bradbury could not obtain laborers on his personal responsibility. The defendant, retaining a lien on the property, had hired the deponent, Furlong, as a laborer in the prosecution of the business, undertaken by Bradbury. When he made a bargain with the deponent, he said "here is Mr. McKenney, who is also going." After they had labored about two weeks, the defendant got some more men, and told the deponent to call on Mr. McKenney to go up again, which he did, working in all about thirty days.

The part of the deposition objected to is, that from the defendant's words, at the time he hired the deponent, he understood that he hired the plaintiff and was to pay him. How far the defendant was to be held liable, by reason of the words used, was a question for the jury, and they could not be extended beyond their just meaning, whatever might have been his understanding. If however he gave their import fairly, connected with the facts, it would furnish no sufficient ground for setting aside the verdict. It is very apparent, that the words themselves, if the defendant had no connection with the business, are not evidence of any assumption of liability on his part. But taken in connection with the subject matter and the acts and declarations of the defendant, the deponent might well have understood, that the defendant hired and was to pay the plaintiff.

The deponent says he so understood the words used; but the acts of the defendant and the subject matter must have been connected in his mind with the words, to produce this

understanding. And we cannot say, that taken together, they do not justify this deduction. The timber remained the property of the defendant. The labor of the plaintiff gave it an additional value. Bradbury was insolvent and consequently without credit. The deponent was employed by the defendant, and looked to him for payment. He said McKenney was also going, and he was sent again by the defendant, through the agency of the deponent. The latter understood the defendant hired and was to pay him. The whole matter was left to the jury. They had all the data, from which this conclusion was drawn. And although we are of opinion, that the answer of the deponent objected to, ought not to have been received, yet it does not furnish sufficient ground to disturb the verdict, which, in our judgment, is sustained by evidence in the case, which is unexceptionable.

GUILFORD D. PARKER *versus* THE CUTLER MILLDAM COMPANY.

Where the legislature created a corporation, and empowered it "to erect, maintain, repair, and rebuild a milldam on their own land across the head of Little River harbor, with flood gates thereto at least fifteen feet wide, so as to admit the passage of gondolas and boats at high water," the corporation may erect their dam across the head of the harbor, although it may not only be below high water mark, but across a part of the channel below where the tide ebbs and flows.

The words "*on their own land*," in the act, were not inserted to fix the place of building, but were intended merely to exclude any inference that the legislature designed to authorize the corporation to take the land of others for that purpose.

The possession of the dam and mills, and of the land on which they were erected, under the authority given, is sufficient evidence of title for defence of an action for damages done to the land of others by the flowing of the water.

The regulation of the navigable waters within the State, is vested in the sovereign power, to be exercised by laws duly enacted; and the navigation may be impeded, if in the judgment of that power the public good requires it.

And if the more apparent object be the profit of a grantee, it is the right and duty of that power to determine whether the public interest is so connected with the private, as to authorize the grant.

The corporation, while acting within the powers granted, is not liable for any injury suffered by an individual by altering the flux and reflux of the tide.

The colonial ordinance of 1641 extended the right of riparian proprietors *in the soil* from high to low water mark, where it did not exceed one hundred rods. But this was a qualified right to use the interest granted in such a manner as not to interrupt the rights of the public, as secured by the ordinance.

In rivers where the tide ebbs and flows, as well as in the sea, the right of taking fish is common to all the citizens, and extends to the taking of shell fish on the shore of a navigable river.

CASE for an injury to the fishing and water privileges of the plaintiff's land in Cutler, fronting upon tide water of Little River, by a dam erected by the defendants obstructing the river. In one count, the plaintiff alleged that the river was an arm of the sea, navigable, and a public highway. In the other, he claimed a prescriptive right to pass to and from the sea to his land unobstructed, and alleged a free enjoyment of this right, until the milldam was erected by the defendants.

The defendants, with the general issue, alleged by brief statement, that they had good right to erect the dam by force of an act of the legislature of Maine, passed March 16, 1836, entitled "An act to incorporate the Cutler Milldam Corporation." From the testimony given at the trial, before EMERY J. which is spread at full length upon the report, it seems that the plaintiff proved title in himself to the land described in the declaration; that a dam was built by the defendants on land of which they had a deed, across where the tide ebbs and flows, and across the channel at the head of Little River harbor, and that they had four saw mills, and several lath machines carried by means of a head of water raised thereby; that there was a place on the plaintiff's land to build a wharf; and that before the building of the dam fishermen used sometimes to dig clams for bait on the flats opposite the plaintiff's land. The plaintiff introduced evidence tending to show that some damage was occasioned to the plaintiff by the raising of the water higher upon the beach by the defendants' dam, although no part of his land was flowed. The defendants offered evidence tending to show, that the plaintiff's property was rendered more valuable by the building of the dam, to the admission of which the plaintiff objected, but it was admitted.

The Judge instructed the jury, that if they found the plaintiff had sustained damage by reason of the dam, their verdict should be for the plaintiff for such damages as they should find he had sustained above the benefit extended to him by reason of the defendants' dam and mills. The jury found a verdict for the plaintiff, assessing the damages at ten dollars above the benefits derived from the dam and mills; and also, under the direction of the Court to find on the subject, they found that the dam was erected across the head of Little River harbor. The verdict was to stand, be amended, or set aside, as in the opinion of the Court the law requires.

Thacher, for the defendants, contended that no action could be maintained upon the facts appearing in this case.

To show that the act was constitutional, he cited 10 Mass. R. 70; 3 Mass. R. 352; 1 Pick. 180; Angell on Tide Waters,

48, 107; 7 Pick. 344; 12 Pick. 476; 4 Pick. 460; 15 Wend. 113; 1 Penn. R. 462; 16 Pick. 101; 7 Greenl. 292.

The defendants were in possession, and the validity of their grant will be presumed until the contrary be shown. Angell on Tide Waters, 146; 2 Doug. 441; 6 Pick. 94; 16 Pick. 87.

No portion of the land of the plaintiff has been touched by the acts of the defendants. They have kept entirely within their act of incorporation. The legislature have power to grant away the right of the public, and no action lies for consequential damage to an individual occasioned thereby. 4 Pick. 460; 15 Wend. 113; 7 Greenl. 273; 1 Pick. 430; 7 Pick. 472; 12 Mass. R. 220; 17 Johns. 100.

But if the plaintiff is entitled to damages, he has mistaken the remedy. He should have proceeded under the statute of flowing. 11 Mass. R. 364; 1 Pick. 430.

J. Granger, for the plaintiff, said the main question was, whether the action was maintainable. The jury have found, that the plaintiff has sustained damages by the acts of the defendants above any possible advantages derived. The defendants attempt to justify under their act of incorporation. But this affords them no protection.

1. Because the dam is not erected in accordance with its provisions. The charter only authorizes them to erect it *on their own land.* It is not erected on their own land. The expression *across the head of Little River harbor*, is indefinite, and is limited by *their own land.* After purchasing the land of the proprietors, they should have erected their dam within low water mark, and not across the channel, where the land belonged to the public.

2. But if the dam had been erected in accordance with the act, the utmost that can be deduced in favor of the defendants from it, is merely a protection against an indictment for a nuisance, leaving those who are injured by the dam to their remedy by action. 5 Cowen, 165. A private act for the benefit of a particular corporation, is never to be so construed as to destroy the rights of others, unless such construction results from express words, or necessary implication. 4 Mass. R. 145.

An act authorizing an injury, without just compensation to the citizens injured by it, is void. 1 Fairf. 447.

3. This is not a case coming within the statute regulating mills. 12 Pick. 68; 2 Shepl. 473.

4. This is a public highway, and an obstruction of the right of way of an individual is the subject of damages. 8 Cowen, 159. This, however, is not an injury to the public, but to a few individuals. Where a nuisance occasions special damage to any particular person, he may recover damages, although others may also be injured. 7 Cowen, 609.

The opinion of the Court was by

SHEPLEY J. — This corporation was created by the act approved March 16, 1836, Spec. Laws, ch. 123, and was "empowered to erect, maintain, repair and rebuild, a milldam on their own land across the head of Little river harbor in the town of Cutler, with flood gates thereto at least fifteen feet wide so as to admit the passage of gondolas and boats at high water." The counsel for the plaintiff contends, that the act did not authorise the corporation to build the dam below the highest point to which the tide usually flowed. The gates were to be constructed for the purpose of admitting gondolas and boats to pass through the dam at high water. The corporation is authorised to "use the water retained by said dam," which is to be built across, not above, the head of the harbor. This language exhibits an intention to permit the dam to be built in such a manner as to allow the corporation to retain and use the tide water. And the fact, that there is no natural fall in the river near that place, would tend to remove all doubts respecting the design of the act.

It is said, that the place of building was limited and nearly designated by that part of the act, which requires it to be built on their own land. The first section authorises the corporation to take and hold real estate, but it would own no land until a purchase had been made. It is the body corporate, not the corporators, that is authorised to build "on their own land." The provision must therefore have been inserted for some other

purpose than to designate the place of building. It probably was to prevent any inference, that the legislature intended to authorise the corporation to take the land of others for that purpose.

The corporation is proved to have been in possession of the dam and mills, and of the lands on which they were erected, and that is sufficient evidence of title for this defence.

The regulation of the navigable waters within the State is vested in the sovereign power to be exercised by laws duly enacted. The navagation may be impeded, if in the judgment of that power the public good requires it. And if the more apparent object be the profit of a grantee, it is its right and duty to determine whether the public interest be so connected with it as to authorise the grant. To refuse it this right, would be to prevent the union of public and private interests for the accomplishment of any object.

The jury have found that the dam was erected across the head of Little River harbor, the corporation is not therefore liable for any injury, which the plaintiff may have suffered by obstructions to the navigaton, by altering the flux and reflux of the tide. This will embrace the flowing of the beach complained of as an injury to the plaintiff in repairing vessels; the alleged injury to his mill site by retaining the tide water; and the increased difficulty in navigating the river occasioned by the flood gates.

In rivers where the tide ebbs and flows as well as in the sea the right of taking fish is common to all the citizens. *Warren* v. *Mathews*, 1 Salk. 357; *Ward* v. *Creswell*, Willes, 265; *Carter* v. *Murcot*, 4 Burr. 2162. And in *Bagott* v. *Orr*, 2 B. & P. 472, this right was decided to extend to the taking of shell fish on the shore of a navigable river. The colonial ordinance of 1641 extended the right of the riparian proprietor in the soil from high to low water mark, where it did not exceed one hundred rods. But this was a qualified right to use the interest granted in such a manner as not to interrupt the rights of the public, as secured by the ordinance. The right of navigation was expressly reserved And the right of each house-

holder to have free fishing, so far as the sea ebbs and flows, had been in the same ordinance declared. It was the policy of the colonial legislatures, instead of granting away any portion of the public right of fishery, to extend and enlarge it. Hence the claim and appropriation to public use of that which by the common law was private property, the fishery in rivers where the tide does not ebb and flow. It cannot readily be admitted under such a state of legislation to have been the intention of the legislature by that ordinance to part with any of the public rights of fishery. The right to fish in waters where the soil was private property, having been appropriated and secured to the public, a grant of the soil in navigable waters to an individual could not have been regarded as putting him in possession of greater rights than he would have had by owning it without such grant. And it would be a strange construction to consider the right of fishery as granted away indirectly by another part of the same ordinance, which declared it.

The testimony in this case does not prove any appropriation of the clam fishery to private use. The witnesses speak of the fishermen generally, and not of the owners of the flats, as taking them for bait.

The case does not show any such injury as will authorise the plaintiff to maintain the suit. It is not therefore necessary to examine the principles upon which the damages were assessed.

Verdict set aside.

NATHANIEL NORTON *versus* ZIMRI B. HEYWOOD.

Although the general presumption of law is, that when the plaintiff, sueing as indorsee, produces at the trial the bill indorsed, that he became the holder before it fell due; still where the defendant shows that the indorser was in possession of the bill, and claiming to own it, before and until after it became due and was protested, the presumption is so rebutted, that the admissions of the indorser are competent evidence.

Where an original contract is proved to have been last seen in the hands of the party in interest in the suit, although not a party to the record, and notice to him to produce it has been given, a copy is admissible in evidence.

Where a contract in relation to land is explicit in its terms, and gives no authority to cut timber thereon, testimony to show that the owner had permitted others under similar contracts to cut timber without considering them as trespassers, is inadmissible to prove a license from the owner to cut timber in the case on trial.

The defence of want of consideration, is established by proof, that the bill was accepted in part payment of the acceptor's own contract as surety, which was without consideration to the surety or to the principal.

ASSUMPSIT against the defendant as indorser of a bill of exchange drawn by B. F. Waite on Hall & Duren, payable seventy-five days after date at the Suffolk Bank in Boston, for $900, to the order of the defendant, and by him indorsed. The bill was not paid at maturity, and was duly protested.

The defendant contended, at the trial before EMERY J., that Heman Norton was the holder and owner of the bill at the time it fell due, and was the plaintiff in interest in this action; that the bill was an accommodation one, made for the benefit of Hall & Duren, the acceptors thereof; and that there was a failure of consideration for the bill. The facts appearing in evidence are correctly stated in the opinion of the Court, and need not be here repeated.

After the evidence was closed, the plaintiff requested the Judge to instruct the jury, that unless Hall & Duren were liable on account of the trespass, neither they nor any other party to the bill could make this defence. The Judge did not grant the precise request, but did instruct the jury, that if they were satisfied from the evidence, that the timber, to pay for which the draft was made, was cut off from the land of the Bingham heirs, and that their agent had forbidden the conver-

sion of the timber, and called on the trespassers for payment, and that no authority was given by the owners to cut the timber, there was a failure of consideration.

The plaintiff proposed to introduce testimony to show that Col. Black, the agent of the Bingham heirs, had for twelve years been in the practice of giving contracts, like the one given to Ramsdell, to actual settlers, and that in most instances he had suffered the persons to whom the contracts were given to occupy and cut timber without considering them as trespassers, and contended that such evidence would be sufficient to justify the jury in finding an implied license to Ramsdell and his assigns to cut the timber. The Judge ruled, that such evidence would not be sufficient to justify the jury in finding such implied license, inasmuch as the contract by the terms of it gave no authority to cut timber; and the evidence was rejected.

The verdict for the defendant was to be set aside, if the rulings or instructions of the Judge were incorrect.

Fuller, for the plaintiff, contended, that proof of possession of the bill was *prima facie* evidence, that it was indorsed to him before it fell due. *Green* v. *Jackson*, 15 Maine R. 138; 7 Paige, 616. Before the defendant should have been permitted to go into the defence set up, he should have been required to prove by legal evidence, that the bill came to the plaintiff after it was dishonored. Heman Norton was not a party to the suit, and was not proved to be a party in interest. His admissions were not legal evidence. There is no difference, whether the evidence is offered to charge another, or to defeat his rights. *Adams* v. *Carver*, 6 Greenl. 390; *Carle* v. *White*, 9 Greenl. 104; *Baker* v. *Briggs*, 8 Pick. 122; 15 Johns. 493; 8 Johns. 121; *Russel* v. *Doyle*, 3 Shepl. 112.

There was no legal evidence to prove that Hall and Duren were trespassers, and the instructions requested on that subject should have been given.

There was no foundation laid for introducing a copy of the bond instead of the original. This is a sufficient cause to set aside the verdict.

A license may be implied from custom and usage in similar cases. It merely shows how the bond was understood by the parties.

Downes, for the defendant, insisted that there was no error in the ruling or instructions. There was sufficient evidence in the case before the declarations of Heman Norton were received, to show that Heman Norton was the holder of the bill until after it became due, and that he is still the plaintiff in interest. This is sufficient to let in the declarations of Heman Norton, and the defence of want of consideration.

Hall and Duren were mere sureties, and they can show a want of consideration wherever the principal can ; and the indorser can always make the defence, when the acceptor may.

The bond was in Heman Norton's possession, and he was notified to produce it. His keeping it back, was merely another attempt to force the defendant to call the real plaintiff.

The evidence offered to prove the common practice of the agent of the owners, was rightly rejected by the Judge, as varying the terms of a written contract. But the evidence offered was wholly irrelative, as it applied to actual settlers, and not to speculators like the plaintiff in interest.

The opinion of the Court was by

SHEPLEY J. — The testimony in this case shows, that the agent of the devisees of William Bingham contracted with Charles Ramsdell to convey to him or his assignees, township numbered four in the county of Hancock, on payment of certain notes. There was no license to cut on it. This contract having been assigned to Heman Norton and others, he authorised Samuel Dunn, by a written permit, to enter and cut timber on it paying a certain sum for each thousand feet. Hall and Duren became sureties to secure the payments to be made by Dunn to Norton. This bill of exchange was drawn and indorsed for the accommodation of Hall and Duren, who accepted it and delivered it in part payment of the sums agreed to be paid by Dunn. The owners of the land by their agents then interposed and forbid payment of the value of the timber

to others, claiming it for themselves. Dunn acquired no title to the timber thus cut without authority from the owners. He was but a trespasser and accountable to them. His contract to pay the value to Norton was without consideration, and so of course was that of his sureties. And they having accepted this bill in part payment of a contract voidable for want of consideration, it was liable to the same objection. The defendant might as indorser shew these facts in defence against Heman Norton, and a verdict was properly found for the defendant, if the plaintiff became the holder of the bill after it was over due and dishonored, and they were proved by legal testimony.

The presumption of law being, that the plaintiff became the holder before the bill became payable, it is contended, that there was no legal proof to rebut it; and that Heman Norton's declarations were not admissible for this purpose. His declarations after he ceased to be the holder are not evidence. The testimony received is not properly described, when spoken of as the declarations of H. Norton. It was, that he was in possession of the bill claiming to own it, and that such possession by himself and his agents continued until it was over due and protested. These are facts capable of being proved by any other witness as well as by him. It is said, that he might have negotiated it after it was sent to Messrs. Griggs and Chickering and before it became payable. He could not have done so in the usual course of business for he had not the bill to deliver. He might have assigned it, but if he had, that proof should have come from the plaintiff. It was sufficient for the defendant to introduce the usual and proper evidence of title in H. Norton by shewing it to be in his possession until after it was over due.

Another objection is, that the testimony does not prove, that Hall and Duren were trespassers. And it is said, that the instructions requested on that point, should have been given. It was not necessary to the defence, that they should appear to be liable as trespassers. It was only necessary, that it should appear in proof, that the bill was accepted in part

payment of their own contract as sureties, which was without consideration to their principal or to themselves. The instructions requested were therefore properly refused, and those which were given were not liable to objection.

Another objection has reference to the admission of a copy of the contract between the agent of the devisees and Ramsdell. There was testimony tending to prove, that H. Norton was the real party in interest, that notice to produce the original had been given, and that it was last seen in his hands. Under such circumstances the copy proved to have been correctly taken was properly admitted.

It is contended, that the testimony offered to prove, that the agent of the devisees had permitted actual settlers to cut timber under similar circumstances without treating them as trespassers, should have been received. Such testimony having reference to actual settlers and not to purchasers by the township could have afforded no excuse for this trespass. If it had related to contracts in all respects similar, to receive it, would be to permit many instances of indulgence and forbearance towards trespassers to be used as authorising others to commit them as matter of right. *Judgment on the verdict.*

JAMES H. PETERSON *versus* EBENEZER GROVER *& al.*

The rule, that parol testimony is not to be admitted to vary an instrument in writing, prevails as well in equity as at law. But courts of equity admit of an exception to it, where a mistake is alleged; and if clearly proved or admitted, they will give relief.

If a mistake be made in a deed of land, according to the rules of equity, it should be reformed, and the mistake corrected, so as to make the deed read as it should have done.

It is also a rule, that he who seeks equity should do equity. But this rule does not extend so far, as to make one who had committed a mistake, responsible for all the remote consequences, which may arise out of its leading others to commit errors by placing confidence in its accuracy, instead of examining for themselves.

BILL in equity, heard on bill, answer, and proof. The facts are stated in substance in the opinion of the Court.

Thacher, for the plaintiff, said the mistake set forth in the bill was admitted in the answer; and the defence sets up an alleged injury to himself, to which the plaintiff was neither party nor privy, to justify an admitted mistake and wrong to the plaintiff. The plaintiff is not bound to redress the injuries inflicted upon the defendant by others. The principle that he who seeks equity must do equity, does not extend thus far. The principle is correctly laid down in *Second U. Society* v. *Woodbury*, 14 Maine R. 283. The subject matter must be the same and a part of the same transaction. The Court will not assist a mere wrongdoer. 1 Story's Eq. 77. The answer is no evidence where it is not responsive to the bill. *O'Brien* v. *Elliott*, 15 Maine R. 125. Where a mistake in a deed is shown, a court of equity will correct it. 1 Story's Eq. 164, 171, 174; 1 Mad. Ch. 48, 49, and notes. Under a general prayer for relief, the proper relief will be granted. Story's Eq. Pl. 40, 41, and notes.

Hobbs argued for the defendants. The general grounds taken by him are stated in the opinion of the Court. He cited 1 Story's Eq. 608, and 2 Story's Eq. § 799.

The opinion of the Court was drawn up by

Shepley J. — The bill alleges, in substance, that in the year 1821, the complainant made a mistake in writing a deed of release of a lot of land in the township now called Cutler, by writing the word south-east instead of south-west, in stating the first bound of the lot. That the effect of this mistake was to describe the lot immediately easterly and adjoining, which was owned by the complainant in fee, instead of the one intended to be conveyed, in which he owned only the improvements. That the lot intended to be conveyed, or part of it, is now numbered twenty-one, and that conveyed is numbered twenty. That one of the grantees entered upon and has continued to possess the lot intended to be conveyed, while the complainant and his grantees have continued in the possession of the one conveyed. The mistake is clearly proved by the testimony, and is admitted by the answers. The rule,

that parol testimony is not to be admitted to vary an instrument in writing, prevails as well in equity as at law. Courts of equity admit an exception to it, where a mistake is alleged; and if it be clearly proved or admitted, they give relief. This is a case in which, according to the rules of equity, the deed should be reformed by correcting the mistake, unless the matters set forth in the answers vary the rights of the parties. The grievances alleged by the respondents, and for which one of them claims to have compensation made before the error is corrected, so far as they are proved by their own testimony, are in substance these. That the complainant was employed by Jones and others, the owners in fee of the lot intended to be conveyed, to survey it, when, in the same year, 1821, one of the respondents purchased it of them. That he was instructed to run out one hundred acres of good land exclusive of the heath, and that he did so run it out. That there were about fifty acres of heath found in the lot, not computed as part of it. That eight or nine years ago the complainant was again employed to run out the land lying northerly of the lot, and that he ran the southerly line of the lot, now partially designated as lot numbered seven, so as to take off a large number of acres belonging to lot 21, as it was originally surveyed. That there was a large quantity of timber on the part so taken off, constituting the principal value of the whole lot. That when the fee of the lot was purchased of Jones and others, the deed was made by copying the boundaries of the lot described in the deed from the complainant. That Jones and others, in the year 1832, conveyed lot numbered seven to Marston and others, who prosecuted one of the respondents for cutting, where he alleges it should have been in his own lot, and that he was obliged to pay damages for it.

The argument for the respondents is, that if the deed from the complainant had described and conveyed lot 21, they should have acquired by that deed and by the deed of the fee of the same, a good title as far northerly as the spotted tree, named in the deed as the north-east corner, although it might have stood more than two hundred and seventy-one rods from

the first bound. That in consequence of the deed from Jones and others to Marston and others, they cannot, if the mistake in their deed be now corrected, hold the title to that extent against them; and must lose the most valuable portion of their land, through an error originating with the complainant. The allegations and proofs, out of which this argument arises, are many of them strongly controverted: but let them for this purpose be regarded as proved. The inquiry will then arise, how far the complainant is responsible for such a result. It does not appear, that he made or had any connexion with the deed from Jones and others to one of the respondents. If the mistake in his deed to them be corrected, it will still convey, whatever change may have taken place since, all that it was intended to convey, the improvements on the lot. If the respondent, who received the deed from Jones and others with warranty, obtained no title, it is to be presumed he will obtain a full indemnity for the loss of it. Or if by any process the error in that should also be attempted to be corrected, and it should be found, that by reason of subsequent grants made by them, it could not be so corrected as to operate as it would have done, had it been correctly made, it is to be presumed, that the Court would give relief only upon the principle of making one who seeks equity, do equity. It would be a hard rule to hold, that one who had committed an error, was responsible for all the remote and possible consequences, which might arise out of its leading others to commit errors by placing confidence in its accuracy, instead of examining for themselves. This would make him responsible not only for the consequences of his own errors, but for the negligence of others. There is little occasion for it here, where there is apparently a sufficient remedy for all losses against the parties, who conveyed the fee, and who are responsible for their own errors on their covenants. The complainant does not appear to have committed any fraud in the original survey of the lot, for the proof is, that it was run out according to his instructions. The surveys, which he has since made, cannot affect the title, and cannot therefore have occasioned any essential injury. The complainant is en-

titled to have the mistake corrected by a reform of the deed so as to make it read as it should have done, and to a decree, that will secure the rights of the parties accordingly.

As he made the mistake, which has brought difficulties upon the other parties as well as upon himself, he is not entitled to costs. Nor are either of the respondents, for they had an opportunity of relieving themselves from expense and trouble by a voluntary correction of an admitted error.

TIMOTHY GILBERT & *al. versus* RENDOL WHIDDEN.

When suits are brought by partners, their partnership may be proved by persons who have done business with them as partners.

And if it be shown that they were acting as partners before and after the time of the date of a note, thus made to them, this is proper evidence to be left to the jury, to establish the fact that they were so at that time

If in transacting business, they spoke of each other as partners in connexion with the business, such declarations may be given in evidence in their favor, to prove their partnership.

In a suit by Timothy Gilbert and *Henry* Safford, testimony that the deponent knew *H.* Safford as the partner of Timothy Gilbert, is competent evidence to go to the jury to prove the identity.

ASSUMPSIT on a promissory note, dated Sept. 7, 1837, payable in twelve months to "T. Gilbert & Co." or order, and signed by the defendant. The suit was in the names of Timothy Gilbert and Henry Safford, as plaintiffs, transacting business in the partnership name of T. Gilbert & Co.; and to prove that the plaintiffs composed that firm, they introduced the deposition of B. Williams, taken in 1839. He stated in his deposition. "I am acquainted with the persons composing the firm of T. Gilbert & Co. I have been at their place of business every time I have been in Boston for the last four years. Timothy Gilbert and H. Safford compose the firm. I do not know the christian name of Safford, except that its initial is H. I have seen them both in the establishment doing

business. At my first visit, Mr. Gilbert introduced me to Mr. Safford, as his partner. I have done business with whichever one I found in. In July, last year, I paid them for one piano forte, and selected another, and they were both at that time transacting business in the store. I have been at Boston once a year, and I am not certain whether the last time I went was three or four years ago. I have no other knowledge that these individuals compose the firm of T. Gilbert & Co. except that Gilbert had spoken of Safford as his partner, and Safford had spoken of Gilbert as his partner, and from seeing them there and doing business with them as partners."

The defendant objected to that part of the deposition which relates to what each of the partners had told him in reference to each other, and their partnership, objection having been also made at the time the deposition was taken. EMERY J. then holding the Court, overruled the objection, and admitted the whole deposition. To this the defendant excepted.

J. Granger, for the defendant.

Downes, for the plaintiff.

The opinion of the Court was by

WESTON C. J.—When actions are brought by partners, their partnership may be proved by persons who have done business with them as partners. Gow on Part. 140; Collyer on Part. 406. The testimony of the deponent, Williams, sufficiently proved the connection of the plaintiffs as partners, aside from their declarations. These were not necessary to establish the fact as it was otherwise known to the deponent, who had been in the habit of doing business with them. And if he found them acting as partners before and after the date of the note, it was proper evidence to be left to the jury, that they were such at that time.

But their declarations were admissible as acts. The introduction of the deponent, by one of the plaintiffs, to the other, as his partner, was an act, leading as it did to buisness with each of them, as having a right to act for and represent the firm. So if in transacting business, they spoke of each other

as partners, this was, in connection with the business, evidence that they stood in that relation. It was no otherwise creating evidence for themselves, than is done by other acts, indicating the connection. If they had entered into partnership by deed, that would be creating evidence, made expressly for that purpose, and yet it is admissible to prove the fact.

The deponent knew that H. Safford was the partner of Timothy Gilbert. Henry Safford sues, claiming to be the same person. We are of opinion, that it was competent testimony to go to the jury, to prove the indentity.

Judgment on the verdict.

JOHN M. BALKHAM *versus* WILLIAM P. LOWE & Trustee.

Property may sometimes be in such situation, that a person may be charged as trustee on account of it, where at the same time a direct attachment of the property might have been made.

Where a vessel was built by one man, and the materials were furnished by another who was to receive towards the payment an eighth of the vessel at a stipulated price per ton, and the parties settled their account wherein the eighth was charged and allowed as paid in the adjustment, and the papers were taken out by the builder in his own name, with the assent of the person furnishing the materials; — *it was held*, that the former might be charged as the trustee of the latter.

THE question arose upon the disclosure of William Stetson, who had been summoned as the trustee of Lowe, the debtor. The answer was made in June, 1839. W. Stetson and his brother built a schooner of about ninety tons, and launched her in July, 1838. Lowe furnished materials for building the schooner, and was to have one eighth at twenty-eight dollars per ton towards payment for the materials furnished. When the schooner was finished, the papers were taken out in the name of W. Stetson, as it was expected, at the time, that he should sell Lowe's eighth if he could. He did not succeed in effecting a sale. A settlement was made by him with Lowe, in which he charged Lowe with the eighth of the schooner at

$28 per ton, and took a note for the balance due from Lowe for the eighth of $57. He "gave no bill of sale of the eighth, supposing nothing further was necessary, and did suppose, and does now suppose, that the business respecting the schooner was also settled." It did not appear from the disclosure, unless from the above statements, who had been in possession of the schooner. EMERY J. was of opinion that the trustee should be discharged, to which the plaintiff excepted.

B. Bradbury, for the plaintiff, contended that Stetson had one eighth of the schooner in his hands, belonging to the debtor. The title was in Stetson. He built her; the papers were in his name; he had the possession, and Lowe had paid for the eighth in full.

J. Granger, for the trustee, said that Lowe was one of the original builders of the vessel, and it was no more necessary that Stetson should give Lowe a bill of sale, than that the latter should give Stetson one. But had Stetson been the owner, it was not necessary to give a bill of sale to pass the property in the eighth to Lowe. Like any other chattel, it would pass by delivery. *Taggard* v. *Loring*, 16 Mass. R. 336; *Lamb* v. *Durant*, 12 Mass. R. 54; 3 Kent's Com. 130. A bill of sale is only necessary to enable the purchaser to take out the papers, and to have her treated as a vessel of our own. The eighth was open to attachment by the ordinary process of law, as the property of Lowe, and Stetson is not his debtor, and has none of his property.

The opinion of the Court was by

WESTON C. J.—It appears from the disclosure, that the supposed trustee and his brother built the vessel in question, that Lowe, the principal debtor, furnished the materials, for which he was to become the owner of one eighth. This was matter of contract, and while it so remained, did not invest him with the rights of an owner. It was agreed, that the papers should be taken out in the name of the trustee, so that whatever interest Lowe had, was left in his hands. An adjustment afterwards took place between them; and the trus-

tee charged Lowe with one eighth, the papers remaining unchanged. It does not appear, that Lowe took any delivery. This may not be necessary or practicable, where only part of a vessel is sold, but it would seem, that if the vendee does not have or take possession, that he should receive some evidence or muniment of title. Without it, the sale may be good between the parties; and perhaps possession by the vendor, as owner of the part, he retains, might enure to the benefit of the vendee, yet his title under such circumstances is, to say the least of it, liable to be brought into controversy. Abbot on Shipping, 12. Kent, treating of the sale of part of a ship, says, "delivery of the muniments of title will be sufficient, unless the part owner be himself in the actual possession." 3 Kent's Com. 132. This seems to imply that the one or the other is necessary to perfect a sale.

A direct attachment of the eighth in question, as the property of Lowe, might have created a lien in favor of the attaching creditor. Whether it would have prevailed, if the trustee had been summoned as such at the suit of another creditor of Lowe, may be questionable. And whether it might not have been exposed to be attached as the property of the trustee, may not be altogether free from doubt. In the actual posture of the case, we think the process of foreign attachment ought to be sustained. It may sometimes be proper, where a direct attachment might also have answered the purpose. Where goods are deposited for safe keeping, the bailee may be summoned and charged as a trustee; and yet if the officer can get access to the goods, he may doubtless take them, on a common writ of attachment against the general owner.

Trustee charged.

CHARLES HAPGOOD *versus* HIRAM HILL *& al.*

The return of the fact on the execution issued upon the judgment, is *prima facie* evidence of a demand for the property upon the attaching officer.

A demand, in whatever words made, which would inform the attaching officer, that the sheriff having the execution desired to obtain from him the property attached, would be sufficient.

ASSUMPSIT upon a receipt given by the defendants to the plaintiff, formerly a deputy sheriff, for property attached on a writ in favor of W. Todd, Jr. against Hill. At the trial, before EMERY J. it was proved that the property was legally attached on the writ by Hapgood; that the receipt was given to him therefor by the defendants; that the action was entered and judgment rendered in favor of Todd at the June Term of the C. C. Pleas, 1838; that an execution duly issued thereon; and that it was put into the hands of the then sheriff of the county, who made the following return thereon. "Washington, ss. Dec. 29, 1838. By virtue of this execution, on the ninth of July, 1838, I demanded of Luther Brackett, Esq. late sheriff of said county, in person, and of Charles Hapgood, Esq. late deputy sheriff in said county, the property which I was notified was attached by them on the original writ in this action, and no property having been delivered to me by either of them, and finding none within my precinct to the acceptance of the creditors within named, to satisfy the same, I return this execution in no part satisfied. G. W. McLellan, Sheriff."

July 9, 1838, was within thirty days of the day on which the judgment was rendered.

Upon this evidence the defendants requested the Judge to order a nonsuit, contending, as the exceptions state, that the action could not be maintained, as there was no evidence that the defendants were notified of the judgment in favor of the plaintiff in that suit; and that the return on the execution does not furnish evidence, that the property attached and receipted for was legally demanded.

The Judge declined to order a nonsuit, and directed the jury to return a verdict for the plaintiffs. The defendants ex-

cepted to the omission of the Judge to order a nonsuit, and to his direction to the jury.

J. Granger, argued for the defendants.

1. The sheriff's return in this case is not legal evidence of what it states. It is evidence only when a return is required by law. It would be productive of great mischief to allow it. The law does not require this, and it was no part of the duty of the officer to make it. The fact of a demand is a matter *en pais*, and may be proved by witnesses. The sheriff was a competent witness. *Bradbury* v. *Taylor*, 8 Greenl. 130.

2. The return does not set forth enough to show, that a sufficient and legal demand was made. It does not show, that the same property which was attached on the original writ was demanded of the officer making the attachment. He does not state what property was demanded, or that it was the same property attached on the writ, but merely says it was the property which he was *notified*, or told, was attached.

Fuller, for the plaintiff.

Hill, one of the present defendants, was the defendant in the other action. The action is a joint one against the three; and if notice is necessary, notice to one is sufficient. *Bradbury* v. *Taylor*, 8 Greenl. 130; *Holbrook* v. *Holbrook*, 15 Maine R. 9; *Higgins* v. *Kendrick*, 14 Maine R. 85.

The return of the sheriff is legal evidence of the facts therein set forth. *Kendall* v. *White*, 13 Maine R. 245.

The demand of the property fixed the liability of the plaintiff, and he can maintain this suit against the receipters. Story on Bailments, 95.

The officer's return of the demand was sufficiently explicit to charge the plaintiff. The object of notice is, that the officer making the attachment may not return the property to the debtor at the end of thirty days after judgment. The term property includes every thing to which we attach the idea of value. *Sheldon* v. *Root*, 16 Pick. 507. The plaintiff knew that the property demanded was the same attached by him, and that was enough to make him liable.

The opinion of the Court was by

SHEPLEY J. — It was decided in the case of *Kendall* v. *White*, 13 Maine R. 245, that the return of a sheriff on the execution was *prima facie* evidence of a demand for the property upon the attaching officer. After demand he becomes accountable to the creditor, and is therefore entitled to bring a suit to recover the property from the receipters. The principal objection however is, that the return of the officer does not shew a demand of the property attached, but only of that, which he was informed had been attached. It does not appear, that he was not correctly informed, or that the plaintiff made any objection to a delivery because the very property attached was not demanded. A demand in whatever words, which would inform the plaintiff, that the sheriff having the execution desired to obtain from him the property attached, would be sufficient. And he could scarcely misunderstand what property was intended even if erroneously described, for the demand as stated in the return of the sheriff referred to the attachment made by him on the writ. Such a return not excepted to by the officer is regarded as sufficient.

Exceptions overruled.

JAMES WALLACE *versus* JAMES CARLISLE *& al.*

Since the statute of 1835, c. 195, if a debtor be arrested on an execution issued on a judgment in an action commenced in 1833, founded on a contract made in 1821, the bond to obtain his release should be made pursuant to the provisions of the statute of 1822, c. 209, and the proper oath to be administered is the oath prescribed in the latter statute. If, therefore, in such case, the oath provided in the poor debtor act of 1836 be administered, it is not a performance of the condition, the bond is good at common law, the statute of 1839, c. 366, does not apply, and the creditor is entitled to recover his debt, with costs, interest, and officer's fees.

DEBT on a bond, dated April 18, 1837, given by the defendants to the plaintiff, to procure the liberation of Carlisle from arrest on an execution in favor of the plaintiff against Carlisle,

issued on a judgment recovered at the March Term of the C. C. Pleas, 1834, for $36,73, damage, and $10,24, costs. That action was commenced in 1833. The debt on which the judgment was recovered was contracted in 1821. The condition of the bond, after reciting the execution, judgment, and arrest, was, — "Now if the said James Carlisle shall in six months from the date of this bond cite the execution creditor before two Justices of the Peace, *quorum unus*, and submit himself to examination, and take the oath or affirmation prescribed by law for poor debtors, or pay the debt, interest, costs and fees arising on said execution, or deliver himself into the custody of the jailer, within said time, then," &c. The parties agreed, "that Carlisle cited the attorneys of the creditor to hear his disclosure before two justices of the peace and of the quorum, according to the provisions of the act for the relief of poor debtors, passed March 4, 1835, except that prior to his citation he did not make application or complaint to the jailer, as required by the act aforesaid, under which, and the supplementary act of April 2, 1836, the bond was given." Within the six months, the oath prescribed in the act of 1836, was duly administered to Carlisle by two justices of the quorum. Although notified, the creditor was not present, personally or by attorney, at the examination and administering of the oath. It was agreed that if the action could be maintained, judgment should be rendered for the debt, costs, interest, and officer's fees, unless the Court should also be of opinion that the case fell within the provisions of the statute of Feb. 8, 1839, and that the act was constitutional and binding; in which case, the Court were to assess the damages.

D. T. Granger, for the plaintiff, contended that the condition of the bond had not been performed. The taking of the oath prescribed in the poor debtor act of 1836, was an act wholly inoperative. As both the cause of action arose, and judgment was rendered prior to the passing of the act of 1835, the oath to be taken was that prescribed by the act of 1822, c. 209. *Gooch* v. *Stephenson*, 3 Shep. 129; *Hastings* v.

Lane, ib. 134. Taking the oath prescribed in the poor debtor act of 1836, was a void act, and the parties stand as they would have done if no attempt had been made to take any oath.

The statute of 1839, c. 366, does not apply to or affect this suit. This is not within the cases enumerated by the statute. That furnishes a remedy merely where there was a failure by the debtor to apply to the jailer, and have the application to the justices go from him. Here there was no oath taken. We do not claim to recover on account of any error in the citation, but because nothing was done. The damages, therefore, should be the debt, costs, interest, and officer's fees.

J. Granger, for the defendants, conceded that the proceedings should have been under the statute of 1822, but insisted that the case fell within the operation of the statute of 1839, c. 366. The words of that statute are as general as can be found. Merely nominal damages can be recovered.

The opinion of the Court was by

Emery J. — On the impression which we entertain of the merits of this case, it becomes quite unimportant to settle whether the act of 8th of Feb. 1839, be unconstitutional, though we should be slow in coming to such a conclusion. The present case seems not to come within the class of cases intended to be affected by that statute. That was intended to be confined to cases arising under the acts of 1835 and 1836, and to bonds rightfully taken under those acts.

We are satisfied that the bond now under consideration was designed to be taken by virtue of the statute of 1822, as it ought to have been. The debt arose in 1821. The suit for its recovery was in 1833. The bond is dated in 1837.

In the action, *Huntress* v. *Wheeler*, 16 Maine R. 290, it has been decided that a bond to obtain a release from imprisonment, on an execution on a judgment on a contract made before the statute of 1831, c. 520, where the action on which the judgment was rendered was commenced before the statute of 1835, c. 195, went into operation, should be made pursuant

to the provisions of the statute of 1822, c. 290, and if it be taken in accordance with the provisions of the statute of 1835, it is not good as a statute bond, but only at common law, and the plaintiff can recover only the original debt, costs, and interest.

In the present bond, the condition provided that if the said James Carlisle shall in six months from the date of the bond, cite the execution creditor before two justices of the peace, *quorum unus*, and submit himself to examination, and take the oath or affirmation prescribed by law for poor debtors, or pay the debt, interest, costs, and fees arising on said execution, or deliver himself into the custody of the jailer, within said time, then this bond shall be void, otherwise remain in full force and virtue, and that is the condition prescribed in the statute of 1835, c. 195.

By the agreed statement of facts, we perceive that Carlisle took the oath prescribed in the act of 1836. Neither the plaintiff nor his attorney were present, and prior to the citation of the plaintiff's attorney, said Carlisle did not make application or complaint to the jailer.

Under these circumstances, having heretofore decided that the act of 8th Feb. 1839, was constitutional, though we do not think that this case is protected by it, we must adhere to the decision in *Huntress* v. *Wheeler*, so far as to consider this a good bond at common law, and give judgment for the plaintiff, as the parties have agreed, for the debt, costs, interest, and fees.

CYRUS STOCKWELL *versus* ELIAS CRAIG *& als.*

Where a contract, made at Augusta, stipulated for the delivery of a certain quantity of pine merchantable clapboards at Providence within a specified time; and where it did not appear but that the same clapboards which were merchantable at Augusta, were also merchantable at Providence; whether the term, *merchantable*, is to be referred to the one place or to the other, testimony to show that the clapboards delivered, were merchantable at Augusta is admissible.

When no such question was raised at the trial in the district Court, on instructions on the point given or requested, it cannot be raised in this Court upon exceptions.

If an agent of the purchaser receive the clapboards under the contract, this is evidence of performance by the party contracting to deliver them.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Assumpsit on a contract made at Augusta, of which a copy follows: —

"Augusta, June 21, 1833. Due Mr. Cyrus Stockwell four thousand of pine merchantable clapboards, valued at ten dollars per thousand, freight three dollars, to be delivered to James M. Earl at Providence, within five weeks. ELIAS CRAIG & Co."

At the trial, before ALLEN J. the defendants proved that they did deliver to James M. Earl at Providence, within the five weeks, four thousand of clapboards. The clapboards were afterwards sent to Worcester, Massachusetts, by Earl, by order of a man calling himself Cyrus Stockwell, and supposed by Earl to be the plaintiff. The plaintiff produced testimony from persons who saw the clapboards at Worcester, that they were not merchantable but of poor quality, and would not be considered at Worcester as merchantable clapboards.

The defendants introduced the deposition of T. W. Smith, who stated that he was a dealer in lumber in Augusta; that there were two kinds of clapboards manufactured there; that one kind was called clear, which was of the first quality, and that the other kind was called merchantable, which was of the poorest quality. The defendants offered evidence tending to show, that the lumber sent to Providence by the defendants would be considered at Augusta as merchantable. The plain-

tiff objected to the evidence offered by the defendants, but the Judge admitted it.

The Judge instructed the jury, that it was incumbent on the defendants to show a delivery at Providence of merchantable boards, and submitted to them the determination of the question, whether the boards delivered to Earl at that place were merchantable. He also instructed them, that if they believed from the evidence in the case, that Earl was the agent of the plaintiff to receive the delivery of the clapboards, and that they were received by him at Providence, within the time, under the contract, that it would be a performance of it on the part of the defendants.

The plaintiff excepted to the rulings and instructions of the District Judge.

Bridges, for the plaintiff, contended that the deposition of Smith was improperly admitted. It goes to show what were merchantable clapboards at Augusta. This is wholly irrelevant. The question is to be determined entirely by whether they were merchantable at Providence, the place where the contract was to be performed. *Blanchard* v. *Russell*, 13 Mass. R. 1; *Prentiss* v. *Savage*, ib. 20; Story's Conflict of Laws, 233.

The name of Earl was inserted in the contract merely to show to what wharfinger the clapboards were to be delivered. The instruction assumed that he was the agent, when such was not the fact. 7 Com. L. R. 191.

The delivery of these clapboards was not a performance of the contract. They were not surveyed or marked, and the sale is prohibited by statute. *Wheeler* v. *Russell*, 17 Mass. R. 258; *Coombs* v. *Emery*, 14 Maine R. 404.

B. Bradbury, for the defendants, said there were but two questions made at the trial, or raised in the exceptions. One was as to the place where the contract should be construed. The ruling of the Judge was, that "it was incumbent on the defendants to show a delivery at Providence of merchantable boards." To do this, the first step was to show the boards to be merchantable at the place from whence they were taken.

The testimony was much more pertinent, than to show what were merchantable boards at Worcester. But as the contract was made at Augusta, it is to be construed, as if that had been the place of the delivery of the boards also.

The other was, whether Earl was the agent of the plaintiff. This was a mere question for the jury, and the instructions are clearly right.

There was no question raised at the trial, whether the boards were, or were not, surveyed, and it is too late to bring up that question now.

The opinion of the Court was by

WESTON C. J. — The contract declared on, stipulates for the delivery of a certain quantity of pine merchantable clapboards, at Providence, within a specified time. By the testimony of the deponent, Smith, which was objected to, it appears that at Augusta, this species of lumber embraces two qualities, clear, which is the best kind, and merchantable, which is the poorest kind. Whether the term, merchantable, used in the contract, is to be referred to Augusta, where it was made, or to Providence, where the clapboards were to be delivered, it does not appear that a different classification of qualities exists at these places. If the lumber forwarded was merchantable at Augusta, nothing appears in the case to show, that they were not equally so at Providence. We are of opinion therefore, that the deposition of Smith was admissible. It was as well entitled to be received as the opinion of witnesses at Worcester, all of which was left to the jury, to determine whether the lumber delivered was, or was not, merchantable, as required by the contract.

As to the necessity of having the clapboards surveyed, according to the provisions of the Statute of 1821, c. 158, no such question was raised at the trial, or instructions upon this point given or requested.

By the contract, the lumber was to be delivered to James M. Earl, at Providence. This designation, as well as Earl's deposition, was evidence to be left to the jury, that he was the

agent of the plaintiff, to receive the delivery. This being found, the Judge was well justified in instructing the jury, that if he received them under the contract, it would be evidence of performance on the part of the defendants.

Exceptions overruled.

EDWARD E. TITCOMB *versus* JAIRUS KEENE *& al.*

Where a poor debtor's bond, the condition of which was to be performed in six months, was dated Jan. 6, 1838, and the officer returned on the execution, that on the same day he arrested the body of the debtor, "and at the same time he tendered to me a bond which I have annexed herewith;" in an action on the bond, parol evidence will not be admitted to show, that the bond was delivered at an earlier day than the day of its date, and thereby that the six months commenced prior to the sixth of January.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

The parties, in that Court, submitted the case upon a statement of facts, wherein they agreed, that the plaintiff could prove by parol, and it was to be considered as proved, if the Court should consider it to be legal and admissible evidence, that the poor debtor's bond, on which this action is founded, bearing date Jan. 6, 1838, was signed, sealed and delivered to Charles Hapgood, the deputy sheriff who made the arrest, a long time prior to that of the date; and that the principal did not disclose within six months of the time of the delivery of the bond to the deputy, although he did so within six months from the date, before two Justices of the Quorum, and was by them discharged according to the provisions of the statute. It was agreed, that the execution, with the return thereon, bond, oath and other proceedings in the case, should be referred to by either party. They are sufficiently stated in the opinion of the Court. The Court was to order a nonsuit or default.

The District Judge ruled, that oral evidence was admissible, and that a default should be entered; to which the defendants excepted.

Vance, for the defendants, contended that the officer's return was conclusive, and that parol evidence was inadmissible to contradict, or vary it, unless in an action against the officer. *Davis* v. *Maynard*, 9 Mass. R. 242; *Winslow* v. *Loring*, 7 Mass. R. 392; *Bott* v. *Burnell*, 9 Mass. R. 96; *Kendall* v. *White*, 13 Maine R. 249; *Boody* v. *York*, 8 Greenl. 272; *Agry* v. *Betts*, 3 Fairf. 415.

Pillsbury, for the plaintiff, said that this, like other bonds, took effect from the time of its delivery. As soon as it was delivered, it became binding on the defendants as a bond. Parol evidence is always admissible to show the delivery of a deed, or other instrument. If the bond had been dated three months later, it could not have extended the time for taking the oath another three months. Proving the time of the delivery does not contradict the deed. The making of the deed, and its delivery, are distinct acts. The delivery must always be proved by parol, or be inferred from facts proved in the same mode.

The opinion of the Court was by

Emery J. — The defendant, Keene, having been arrested on the 6th day of January, 1838, by virtue of an execution in favor of the plaintiff, bearing date the 8th day of July, 1837, returnable to the clerk's office of the Supreme Judicial Court, within six months from the date of the execution, was relieved from the necessity of submitting to a commitment, in consequence of the bond now in suit. It is executed by the defendant, Keene, as principal, and Joseph Whitney, as surety, in the penal sum of eighty-four dollars, and bears date at Calais, the sixth day of January, A. D. 1838. The condition is, if the said Jairus Keene, Jr. shall in six months from the date of this bond, cite the execution creditor before two justices of the peace, *quorum unus*, and submit himself to examination, and take the oath or affirmation prescribed by law for poor debtors, or pay the debt, interest, costs, and fees, on said execution, or deliver himself into the custody of the jailer within said time,

then this bond shall be void; otherwise remain in full force and virtue.

Two disinterested justices of the peace for said county and of the quorum, approved of the sureties in this bond.

Mr. Keene, within the six months from the apparent date of the bond, did disclose and was discharged by two justices of the peace and quorum, according to the provisions of law in such case made and provided.

This discharge the plaintiff would render unavailing, by shewing, if he can by law, that this bond was signed, sealed, and delivered to Charles Hapgood, deputy sheriff, a long time previous to that which it bears date, and that the principal defendant in said bond did not disclose within six months from the time of delivery aforesaid of the bond, although he did disclose within the six months from said apparent date. But can we, under the circumstances of this case, permit this evidence to be introduced? It is true, in general, that the mere circumstance of a date to an instrument, shall not decide the time of delivery, from which it may be deemed to take its efficiency. The duty of an officer is to execute his precepts with diligence and despatch. It is apparent, however, from the length of the time appointed for the return of the precept to the Court, of the officer's doings, that something must necessarily be left to the discretion of the officer. Such a change has come over the legislature in relation to the remedy against the body, that it need not, on arrest, be immediately incarcerated, but further indulgence be extended, upon bond being given to cite the creditor to hear the debtor's disclosure, to pay the debt, or deliver himself into the custody of the jailer within six months. It is perhaps on the pleasing theory that such will be the love of justice on the part of the debtor, that if practicable, he will within the time allotted, make every exertion to pay his honest debt, with interest; and if, unfortunately, he should be unable, he will give notice to the creditor to hear the exposition of the state of his funds, and leave to the proper tribunal to decide whether he be the poor debtor who ought to be liberated. After all these fail, the other alternative is the

surrender to the custody of the jailer. Whether the benevolent and humane design of the law, to call forth all the reverence of debtors for the convenient appropriation of their effects to *satisfy the judgment creditors*, will be accomplished, remains to be ascertained. To secure the officer from imputation, and the debtor against surprize, it may be imagined *that a bond may have been transmitted to the officer to be ready for application on arrest being made.* But in this case, it is to be recollected, that by the agreement of the parties the execution is made part of the case, together with the bond. Upon that execution we find this return — "Washington, ss. Jan. 6, 1838. By virtue of this execution, for want of property of the within named Keene to satisfy the same, I arrested his body, and at the same time he tendered me a bond which I have annexed herewith. CHAS. HAPGOOD, Dep. Sh'ff.

"Fees — 3 pr. c. on $39,17 is 1,46

"Travel, 2,15

3,61."

This return we must believe, and that the arrest was truly made on that 6th day of January. The bond cannot be considered as having, for any legal purpose, *been delivered, to be effectual, until the arrest.* By a different inference, the whole system of relief for poor debtors would be at once broken in upon, and the law authorizing six months from the returned arrest, which was designed to be extended to the debtor, frustrated and turned into a measure of oppression by entrapping the credulous debtor into a belief, that he would have six months from the time when the officer determined to close negotiation, by returning the arrest on a certain day, when in fact it was intended to leave the matter in total uncertainty as to the time from which the six months should commence running.

Between these parties, upon this subject, the officer's return must be taken to be conclusive, and not to be contradicted. According to the agreement of the parties, we are satisfied that the proposed evidence is inadmissible. We are of opinion, upon the facts agreed, which are legally admissible, that the

principal defendant has complied with the obligation of the bond. The exceptions must be sustained, and the plaintiff must therefore become nonsuit.

LEWIS WILSON *versus* GEORGE M. CHASE.

To render the indorser of a writ liable for costs recovered, the original defendant must make use of reasonable diligence to collect the costs of the original plaintiff.

And to show such reasonable diligence as will charge the indorser, the inability or avoidance of the original plaintiff should be shown by an officer's return thereof on an execution for costs, issued within one year from the time the judgment was rendered. Parol evidence is inadmissible to supply the omission.

EXCEPTIONS from the District Court, ALLEN J. presiding.

Scire facias against the defendant as indorser of a writ in favor of H. P. Hoyt, described as of Calais, against Wilson, in which action the present plaintiff, and then defendant, recovered judgment for costs, at the September Term of the C. C. Pleas, 1835. This writ of *scire facias* was sued out Feb. 19, 1838. The defendant for one plea, by brief statement, alleged, that no execution was duly and seasonably sued out, and seasonable and proper return thereof made of the avoidance, or inability, of Hoyt. On Sept. 30, 1835, Wilson sued out an execution against Hoyt, and afterwards in succession five other writs of execution, but no one of them was given to an officer, and of course no return was made. On June 27, 1837, the seventh execution was sued out and given to the sheriff of this county, who duly returned the same into the clerk's office, with his return thereon, dated Sept. 19, 1837, wherein he stated that the execution was delivered to him July 29, 1837; that he had made diligent search for the property and body of Hoyt, and could find neither within his precinct; and that he returned the execution in no part satisfied.

The defendant then moved for a nonsuit, because the plaintiff had himself shown a want of due diligence in obtaining

payment of the execution of Hoyt. This motion was overruled by the Judge.

The plaintiff offered evidence tending to show, that Hoyt had left Calais and the county of Washington, before the judgment was rendered, and could not be found until the execution was in the hands of the officer. To this the defendant objected, but the testimony was admitted.

The defendant introduced evidence tending to show that Hoyt, during the time, resided in another county within the State, and had property subject to be taken to satisfy the execution.

The defendant requested the Judge to rule, that the plaintiff had not shown evidence of legal steps taken to charge the defendant as indorser of the writ, and to instruct the jury that the plaintiff had not shown reasonable diligence to recover the costs against Hoyt, and that the delay in putting the execution into the hands of an officer, and procuring his return of the same, absolved the defendant from his liability.

The Judge declined thus to instruct the jury, and did instruct them, that the plaintiff should use reasonable diligence to recover the costs against Hoyt, before he could have recourse to the indorser; that if Hoyt was not in the county of Washington during the intervening period between the day of judgment and the seventh execution issued thereon, on which *non est inventus* was returned, this would be conclusive evidence of an avoidance within said county; that if Hoyt was resident within this State, and that the plaintiff, by reasonable diligence, could have arrested him, and did not so arrest him, they should find a verdict for the defendant; and submitted the question to the jury, whether such reasonable diligence had been used.

The verdict being for the plaintiff, the defendant filed exceptions to the rulings and instructions of the Judge.

Chase & Fuller argued for the defendant, that the liability of the indorser of a writ is but collateral and conditional. The plaintiff must use due diligence to determine the avoidance or inability of the principal. Due diligence must be used to con-

vert a conditional into an absolute liability. *Reid* v. *Blaney*, 2 Greenl. 128; St. 1821, c. 59, § 8.

The case, *Ruggles* v. *Ives*, 6 Mass. R. 494, settles, — 1st, That the execution must be sued out within one year from the time of judgment, to charge the indorser. 2d, That it must appear from the *officer's return*, that the principal has avoided, or is unable to pay. 3d, That reasonable diligence to collect of the principal must be used, before resort can be had to the indorser.

Miller v. *Washburn*, 11 Mass. R. 411, does not conflict with these principles, but merely settles, that after the indorser is fixed, the *scire facias* need not be sued out within the year.

The return should be made upon the execution so sued out within the year. Merely taking out an execution, without putting it into the hands of an officer, is not using due diligence. There can be no necessity of taking out the execution, if it is to be kept in the desk of the attorney.

And this is a question for the determination of the Court, and not for the jury. *Atwood* v. *Clark*, 2 Greenl. 249; *Ellis* v. *Paige*, 1 Pick. 43; 2 Stark. Ev. 255, and notes.

Hobbs, argued for the plaintiff.

By the St. 1821, c. 59, § 8, the indorser of a writ is made liable in case of the avoidance or of the inability of the plaintiff, to pay the costs. And in *Harkness* v. *Farley*, 2 Fairf. 491, it is held, that both need not concur. The plaintiff in this case claims to charge the defendant on the ground of avoidance only.

The principal question is upon the competency of the evidence by which the plaintiff undertakes to support his action.

The officer's return on the execution was sufficient for that purpose. *Ruggles* v. *Ives*, 6 Mass. R. 494; *Harkness* v. *Farley*, 2 Fairf. 491. The statute is silent as to the time of issuing or returning the execution for costs recovered, or in what manner avoidance or inability shall be proved. The return of the officer is conclusive evidence of the avoidance of Hoyt during the time to which it refers.

But if the officer's return is not enough to charge the defendant as indorser, it was competent for the plaintiff, by parol evidence, to show that Hoyt had not been within the county of Washington between the day of the rendition of the judgment and the time of issuing the last execution. *Harkness* v. *Farley*, 2 Fairf. 491 ; *Palister* v. *Little*, 6 Greenl. 350.

The question whether reasonable diligence had been used, was put to the jury in a manner highly favorable to the defendant, and the jury found in favor of the plaintiff. If the plaintiff has used due diligence, the defendant is liable. *Ruggles* v. *Ives*, before cited.

The opinion of the Court was by

Emery J. — As there was no return made by any officer on the several writs of execution, which issued in favor of the plaintiff against Hoyt, the original plaintiff, whose writ the defendant indorsed, until nearly two years after the judgment, the defendant insists that he is thereby relieved from responsibility.

It is not necessary that *avoidance* and *inability* of the principal should *both concur*. If redress be sought properly for either incident, and duly proved, the plaintiff will be entitled to judgment. In *Miller* v. *Washburn*, 11 Mass. R. 411, the Court say, " although it may be reasonable to establish a limitation beyond which such liability shall not continue, it is not for us, but for the legislature to do it." In that case the plaintiff recovered his judgment in May, 1807, and on the 22d of August, 1812, issued his *scire facias*, but on execution issued on that judgment against Alden, whose writ Washburn indorsed, and Alden was committed to jail and afterwards liberated on taking the poor debtor's oath. The time when he was committed does not appear, nor what previous return had been made on executions, nor when they issued.

Our Statute c. 59, § 8, is almost a literal transcript of the Massachusetts provision on this subject. In *Ruggles* v. *Ives*, 6 Mass. R. 494, the solemn opinion of four justices, including Chief Justice Parsons, was given on the construction of the

Massachusetts Statute in 1810, that to charge an indorser of an original writ, an execution must be sued within the year; and that it must appear from the return that the principal has avoided, or that he is unable to pay the costs by suffering his body to be imprisoned for not paying them."

What execution can we suppose the Court contemplated as requiring a return, but one which issued within a year from the judgment? And it was held that the defendant, who recovers costs against the plaintiff, whose writ was indorsed, ought to use reasonable diligence to recover the costs of the principal, the original plaintiff, before he shall have recourse to the surety, the indorser of the writ. In *Harkness* v. *Farley*, 2 Fairf. 491, an execution had issued and been returned in three months in no part satisfied, and a second soon after issued and was returned by a constable of the town of Camden. It is distinctly stated by Parsons C. J. in delivering the opinion of the Court, in *Ruggles & al.* v. *Ives*, that as a reasonable endeavour should be used to compel payment of the costs from the original plaintiff, the execution ought to be sued out within a year after the rendition of the judgment for costs, and not be delayed until obtained by a *scire facias* on the judgment after a year.

We cannot credit that the court intended to except a sort of bye play and concealment of an execution from an officer. But that they were supposing it should be seasonably delivered to one, who should make regular return of his doings on the process seasonably issued, to show that the creditor in the execution was adopting the ordinary course to obtain satisfaction. The mere suing executions out and retaining them in the creditor's or his attorney's possession, without any other step shown by record in an officer's return toward a recovery, if pursued for a greater length of time than one year and three months, which would include the return day of the last execution issued within the year, would be as great a delay in respect of the indorser, as if the omission had been so long in *suing out any execution.* Such a course cannot be considered a reasonable endeavor.

The rules of evidence are framed and decisions made for practical purposes in the administration of justice. And "though in the ordinary instances of suretyship and guaranty by contract, some notice of the principal's default must be given to the surety before he is sued, there is no occasion to give such notice within any particular period; yet in certain species of contracts, as bills, notes, &c. the drawers, payees and indorsers in general, are not responsible unless notice of non-payment has been given them within certain periods, at least with great despatch, not warranting any delay on the part of the holder." And this arises from the conclusions to which Courts have arrived from a design to give to those instruments the most beneficial operation. The rights of persons *collaterally responsible* are not to be slighted, overlooked or abridged. Where should an indorser of an original writ look but at the clerk's office, by inspecting the officer's return, to learn whether any measures were adopted to collect an execution against the person whose precept he had indorsed? If no return of an officer were made on the successive executions, what more natural conclusion could be drawn than that the creditor, for some satisfactory reason, was contented, to wait and give time without seeking to enforce the collection? The neglect to have such return is calculated to *lull* any person collaterally holden in the manner in which the defendant is, into security.

In preparatory proceedings to charge an indorser of writs, we deem it essential that there should be the record evidence of diligence in order to establish avoidance. For the purpose of showing the avoidance only of Hoyt, is this suit brought. And in our judgment, it should appear by an officer's return on some execution issued within a year after the judgment, in order to show reasonable diligence on the part of the creditor, to recover the costs against the original plaintiff; and that parol evidence is inadmissible to supply this omission.

When an issue has been joined upon the plea of no *capias ad satisfaciendum* against the principal, the writ and sheriff's return should be proved by an examined copy of the writ from

the record, as the best proof of which the nature of the case is capable. Petersdorff on Bail, 369.

It is unnecessary now to consider the residue of the exceptions.

Exceptions sustained, verdict set aside, and new trial granted

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RUFUS K. PORTER *versus* SOLOMON M. FOSTER.

Where the plaintiff delivered his horse to another to be kept until a note given for the price became due or was previously paid, and before the time of payment the horse was sold to the defendant by the bailee without notice of the plaintiff's claim, and the defendant, after having had notice of the plaintiff's rights, continued to use and claim the horse as his own after the time limited for the payment of the note had expired without payment; this amounts to a conversion, and the plaintiff may maintain trover without a demand of the horse.

The neglect of a party to proceed against one who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitation interposes.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Trover for a horse, the writ bearing date April 5, 1839.

On Oct. 6, 1836, the plaintiff bargained for and sold a horse to one Atkins Gardner, and at the same time took Gard ner's note for the purchase money, with the exception of $5, paid, payable in eight months; and on the same paper took from Gardner an instrument of the following tenor. "As collateral security for the above note, I hereby convey to said R. K. Porter the bay horse which I purchased of him — and which he is to let me have to use until the time of payment of said note. Oct. 6. 1836. Atkins Gardner." At the time the papers were executed, the horse was standing in the yard of the plaintiff, in the wagon of Gardner, who had the horse for trial. December 1st, 1836, Gardner delivered this horse to the defendant in exchange for another. About Feb. 1st,

1837, Foster knew of the claim of the plaintiff upon the horse; and in September, 1838, knew that the note was not paid. It was in evidence that Foster used the horse after the expiration of the eight months; that the horse was for a time in the possession of a person to whom the defendant had sold several horses, and came back again into the hands of the defendant, and was used by him before the commencement of this suit. There was no proof of any demand of the horse by the plaintiff of the defendant.

The defendant requested the Judge to instruct the jury, that there had been no such delivery of the horse to the plaintiff by Gardner, as to give the plaintiff a lien upon the horse as against a *bona fide* purchaser without notice of his claim; that a demand on the defendant for the horse prior to the bringing of the action, was necessary; and that there had been such negligence on the part of the plaintiff as to forfeit his lien on the horse, if any he had, as against the defendant.

The Judge declined to give the instructions requested by the defendant, and ruled on the several points against him. Exceptions were filed by the defendant.

D. T. Granger, for the defendant, argued in support of the second and third grounds taken in the District Court. To show, that under the circumstances of the case a demand was necessary, he cited 3 Dane, 191, 209; *Van Amringe* v. *Peabody*, 1 Mason, 440. In all the cases found on this subject, it either appeared that a demand had been made, or that no point was made on the subject, such as *Lunt* v. *Whitaker*, 1 Fairf. 310; *Tibbetts* v. *Towle*, 3 Fairf. 341; *Lane* v. *Borland*, 2 Shepl. 77; *Ingraham* v. *Martin*, 3 Shepl. 373.

Porter and *Thacher*, argued for the plaintiff, and cited *Jewett* v. *Warren*, 12 Mass. R. 300; Story on Bailm. 201; *Galvin* v. *Bacon*, 2 Fairf. 28.

The opinion of the Court, was by

Shepley J. — The contract between the plaintiff and Gardner secured to the latter the right to keep and use the horse until his note became due, but no longer. His neglect to pay

at that time would put an end to these rights; and the exercise of acts of ownership would be without right and unlawful. He could not convey to the defendant greater rights or place him in a position more favorable, than his own. The defendant, though ignorant of the title of the plaintiff at the time of his trade with Gardner, was informed of it, before the note became due, and continued, after he knew that it was not paid at maturity, to claim and use the horse. Being no longer able to make out a justification of these acts, they amounted to a conversion, as decided in *Galvin* v. *Bacon*, 2 Fairf. 28.

The case of *Vincent* v. *Cornell*, 13 Pick. 294, cited for the defendant, differs from this case. In that the defendant had parted with the possession, and did not exercise any act of ownership or control after the plaintiff became legally entitled to possession. In this, when the defendant was in the unlawful use, and when the action was commenced he had the right of property and the right to possession.

The neglect of a party to proceed against one, who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitations interposes.

The other point made at the trial was not insisted upon here. *Exceptions overruled.*

AMASA WAKEFIELD *versus* DAVID W. CAMPBELL *& al.*

If an administrator, under a license from Court to sell real estate for the payment of debts, sells and conveys land for an entire sum of money for the whole tract sold, exceeding in amount the sum he was authorized to raise, such sale is void.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

This was a writ of entry wherein was demanded a tract of land in Cherryfield, containing about two acres. The demandant introduced a deed to himself from Joel Farnsworth, ad-

ministrator of the estate of Benjamin Small, deceased, dated Sept. 15, 1836, less than five years before the commencement of this suit. To show the authority of Farnsworth to make the conveyance, the demandant introduced copies from the probate office of the county, from which it appeared, that Farnsworth was the administrator of the estate of Small, and in that capacity was duly licensed at the probate court holden August 2, 1836, and empowered to convey so much of the real estate of said deceased as would raise the sum of *one hundred and eighty-five dollars*, for the payment of debts, charges of administration, and incidental charges. After legal notice given, on September 15, 1836, the administrator sold at public vendue to the demandant, he being the highest bidder therefor, the demanded premises for the sum of *two hundred dollars*, and on the same day made and delivered to the demandant a deed thereof in consideration of the payment of that sum.

Upon this evidence, the counsel for the tenant contended, that as the administrator had but a bare power or license to sell so much real estate as would produce the sum of one hundred and eighty-five dollars, and had sold as much as produced the sum of two hundred dollars, he had exceeded his authority, and that his sale and deed were therefore void. The Judge ruled, that the sale was void, and that no title passed thereby, and a nonsuit was entered.

C. Burbank, for the demandant, said that the deed was not void, and at most but voidable by the heirs. The tenant, having no title, and standing as a mere trespasser, cannot dispute the legality of the proceedings, and cannot question our title. The objection, if any exists, can only be taken by the heirs, or those claiming under them.

Hobbs, for the tenant, said but a single point was presented, whether the sale by an administrator of a tract of land for two hundred dollars under a license to sell to the amount of one hundred and eighty-five dollars was legal. He considered it settled, that such sale was illegal and void. *Adams* v. *Morrison*, 4 N. H. R. 166; *Litchfield* v. *Cudworth*, 15 Pick. 23; Com. Dig. Power, C. (6).

The opinion of the Court was by

EMERY J. — The plaintiff insists, that the defendants, having no title, but coming in as trespassers, they cannot be allowed to dispute the title of the plaintiff in this case. That as the administrator acted in good faith, the deed is not void, because the land was sold for a greater sum than he was licensed to raise.

The defendants rely on the case of *Adams* v. *Morrison*, 4 N. H. R. 167; *Litchfield* v. *Cudworth*, 15 Pick. 23; Com. Dig. Power, C. 6, as decisive of the case in their favor.

The case in New Hampshire was one where a posthumous child was demanding his portion of his father's estate. And the doctrine of the Court was, that if one, under license to raise a particular sum, sells and conveys an entire tract of land for an entire sum of money, exceeding in amount the sum authorized by the license to be raised, the whole sale is void, because the act is entire and there is no way to ascertain what portion of the land he had authority to convey, and what not. When separate tracts are sold for distinct prices, the law is otherwise. One may be legal and the other not so. And the following cases are cited by the Court. *Jenkins* v. *Keymis*, 1 Lev. 150; *Batty* v. *Carswell*, 2 Johns. 48; *Whitlock's* case 8 Co. 138.

The case, *Litchfield* v. *Cudworth*, 15 Pick. 23, was a claim of land by an execution creditor of an heir, by a levy in part, and countenances the idea that "although trustees, who have power to sell, can never by direct or indirect means become purchasers of the trust property, yet these principles do not render the sale absolutely void." It is an abuse of authority which may be taken advantage of by any one whose interest is affected, that is, *cestui que* trusts and all for whom the agent acted have an option to avoid the sale and retain the property, or to confirm the sale and receive the consideration, as may be for their interest. And the Court says an administrator without license from a competent Court, has no power to sell the real estate of his intestate. He is bound strictly to execute "the authority given him, and a deed by him not given in pur-

suance of his authority would have no more operation to pass the estate of his intestate, than a deed made by a stranger. If under an authority to sell a part, he sells the whole, the act is unauthorized and void. He was licensed to sell to the amount of $640, and he sold the whole estate for $953,33.

It must be wholly valid or wholly invalid. How can it be apportioned? Who shall determine what part, and how much the purchaser, and which, and how much the heir shall hold? And further, that a conveyance by one heir, and commencement of suit by his assignee for the land, is a sufficient avoidance of the administrator's sale."

The case of *Adams* v. *Morrison*, 4 N. H. R. 167, was cited by the demandant's counsel but no allusion is made to that case by the Justice in Massachusetts who delivered the opinion of the Court.

The questions by him propounded seem to be made in the conviction, that it is impossible that they should be answered, except in a way to sustain the conclusion to which the Judge arrived.

That there is a difficulty attending a different view, is readily admitted. Yet it would seem to be very essential to the speedy settlement of estates that as far as practicable, in conformity with rules of law, it should be a primary object of the Courts to sustain the doings of administrators. It is a principle in equity to consider that the execution of a power in a way exceeding the authority, is void only for the excess, and good for the residue, if the bounds can be clearly ascertained. And if there be cases in which the bounds may fairly be ascertained, as it is granted there may, if two pieces of land be sold for distinct prices; may it not also be discovered when the sale is made at so much per acre? And would there be any insuperable difficulty in considering the heir as interested in common with the purchaser in so many acres as the price may shew were unwarrantably conveyed? If there be any case then in which injustice may be prevented, by separating the good from the bad, in case of a sale for too great an amount, is it not going too far at once to denounce the whole

as void merely because the sale is made for a greater sum than was needed?

May not cases occur where a fair opportunity for a sale may exist, and very near or quite the full value is offered, which may exceed the amount for which the license is given, a few dollars, as in the present case, and yet if the bargain be not then completed, the like advantageous proposal may not happen again? A new license may be obtained, perhaps, to sell the whole. Additional expense must then be incurred, and possibly, no so good offer be had, and an essential injury is done to all concerned.

May it not deserve consideration, whether, in contemplating the whole operation of our probate system, as to the administration of estates, and our statutes of limitation, a more liberal construction as to the execution of the powers of executors and administrators be not strongly urged upon Courts?

Though an administrator has no direct interest in the soil as administrator, yet at present he is bound to inventory real estate, has a right to the rents and profits, and if licensed to sell, by the bond which he gives, he is placed in such a predicament as to be holden for any excess which he may obtain, if the heirs see fit to call him to account.

The truth is, much of the doctrine of strictness as to the execution of powers, is the result of construction made upon the peculiarities of English conveyances, which are devised to uphold family settlements, raise jointures, and make provision for children. It is professed, that they would guard against perpetuities; yet their practice was to give powers for leasing for years or for lives, and trammeling the subject with nice qualifications and with powers of revocation.

Powers were originally in their nature equitable, but are by the statute of uses transferred to common law. 2 Burr. 1147. There are, there, two kinds of settlement; one by which the issue of the person to whom the first limitation is made, shall certainly take, by giving the first taker only an estate for life. The other, by creating an estate tail in the first instance. But then, Lord Mansfield says, "that is a trick in law, by

which, when the issue arrive at twenty-one, the entail may be barred; and there is a trick against that, to make a strict settlement." And he asks, "what is the use of powers? it implies a strict settlement with power to make jointures, leases, and raise portions." *Doe ex dem. Duke of Devonshire & Duke and Duchess of Portland* v. *Lord George Cavendish*, 4 D. & E. 741, in note.

It is not necessary for us to resort to tricks for the purpose of effecting the settlement of estates. But we are not to misapply, arbitrarily, maxims which the changes of circumstances and law have made less appropriate to the present subject than formerly.

It is a sort of axiom, that naked powers, unaccompanied by any interest, are to be construed strictly. And the case cited, *Batty* v. *Carswell*, 2 Johns. 48, is an instance. Where A authorized B to sign his name to a certain note for a certain sum, payable in six months, and B put A's name to a note for that sum payable in 60 days, A would not be liable.

There are powers given to donees of particular estates, to be *construed strictly* in favor of remainder men, and yet liberally enough to make provision for a posthumous child, though the terms were, "who should be living at his death." *Beale* v. *Beale*, 1 Peere Wms. 244. And an eldest daughter, though first born, when there is a son, has often been ruled to be as a younger child.

There are powers reserved by the donor for the benefit of himself, or of his heir, who would have been entitled to the fee, if it had not been limited by the donor's act.

These have received a liberal construction.

No power can be so framed as to protect an appointment under it from payment of the debts of the person appointing. 2 Ves. 640.

It may not be amiss to observe, that the two leading cases cited in the case, *Adams* v. *Morrison*, 4 N. H. R. 167, *Whitlock's* case, 8 Co. 138, as there stated, and the case of *Jenkins* v. *Keymis*, are both cases arising on the construction of powers such as have before been spoken of.

Lord Mansfield, in *Zouch ex dem. Woolston* v. *Woolston & al.* 2 Burr. 1136, asserted, that whatever is an equitable, ought to be deemed a legal execution of a power. He further said, that in some of the early cases, they reasoned in courts of law, upon these equitable powers from notions applicable to naked authorities, unconnected with any interest, or to mere legal powers introduced by other statutes, instead of adopting the liberality of courts of equity; and considering these powers brought into the common law by the statute of uses, merely as a mode of ownership or property. And Justice Wilmot said that "courts of law ought to concur in supporting the execution of these powers, and ought not to listen to nice distinctions that savor of the sophistry of the schools; but to be guided by true good sense, and manly reason."

The State of New York has legislated extensively on this intricate subject; Maine has not.

The principle on which our system proceeds is, that real estate shall be a fund for the payment of debts, if necessary, that the administrator may sell on license. If he sell, and in the performance of his duty, commit errors, which might be fatal, if taken advantage of in season, yet if the heirs omit to seek their redress in five years, by our statute, c. 52, § 12, they are barred. *Beal & al.* v. *Nason*, 14 Maine R. 344. And this limitation is made for the purpose of expediting the settlement of estates and quieting purchasers. Whether the persons subjected to injury from the misconduct of the administrator have redress on his bond, they can ascertain, if they choose, by action. And in New York, it has been decided that strangers to the title are not to take advantage of this objection. *Jackson* v. *Dalfsen*, 5 Johns. 43. In the present case, five years have not elapsed. The heirs may never claim. Creditors could not, if they have received their dues from the administrator.

Notwithstanding these suggestions and views, which have arisen in examining the decisions to which our attention has been directed, yet considering that the matter under discussion is a real action, in which the plaintiff is to prevail by the

strength of his own title, if he fail to exhibit a *prima facie* good title in his opening, it is his misfortune, and he must bear the consequences of his failure. Our courts have jealously watched the proceedings of administrators on sales of real estate under license. They have been holden to a strict compliance with the requisitions of law in such cases. And if the sale be made of a greater quantity than authorized by the license, when it is ascertained *only by the price,* and that is *greater* than the amount for which the license is given, *the sale* has been *deemed invalid.* We do not feel at liberty to overrule the decisions. We cannot but perceive the great difficulty which might arise from countenancing a departure from the rule so often enforced. By the plaintiff's own showing, the sale was for too large a sum not warranted by the license. And at the time the nonsuit was ordered, it was so ordered in conformity with the law.

The exceptions must therefore be overruled.

WILMOT W. LOWELL *versus* BENJAMIN M. FLINT.

In an action to recover a fine for neglect in the performance of militia duty in a company of light infantry raised at large by enlistment, whether the soldier was enlisted is a question of fact to be decided by the magistrate.

The commission of the captain of a light infantry company raised at large by enlistment, is sufficient evidence of the organization of such company.

Where a private of a company is duly warned to appear at a company training for the choice of an ensign, such private cannot excuse his neglect by proof, that no legal vacancy in that office had occurred.

Where the testimony offered to prove a fact is not free from contradiction and doubt, it is the duty of the magistrate to decide upon it, and to give such weight to the testimony of each witness, and to the circumstances tending to corroborate or to invalidate it, as he judges to be justly due to it. And if it does not appear, that he violated any rule of law, or that he decided without any testimony to authorize the conclusion to which he came, this Court will not revise and reverse his decision.

It is not necessary to insert in, or annex to, the order to warn the company a list of the men to be warned. An order to the clerk, who keeps the records, to warn all the non-commissioned officers and privates enrolled in the company, is sufficient.

The legal presumption is, that persons acting in an official capacity in the militia are properly authorized, and that their official signatures are genuine.

If during the trial of an action for neglect in the performance of militia duty, one party calls upon the other to produce papers proved to be in his possession, and a reasonable time is offered to produce them, and they are not produced, parol evidence of their contents may be admitted by the magistrate. Rule 35 of this Court does not bind a magistrate to its observance.

If the commanding officer of a light infantry company raised by enlistment, signs a notice of the enlistment of a private therein to the commanding officer of the local company in which the private resides, and it is proved that this notice has been delivered, there is no necessity for a written military order.

THIS was a writ of error to reverse a judgment rendered April 27, 1840, by B. Bradbury, a justice of the peace, in an action wherein Flint, as clerk of a company of light infantry, commanded by P. H. Glover, sought to recover of Lowell, as a private enlisted in that company, a fine for neglecting to appear at a company meeting for the choice of an ensign, on March 10, 1840. Eight causes of error were assigned, which are stated in the opinion of the Court.

The plaintiff produced and read in evidence the commission of the captain of said company. This was objected to until an order from the proper authority to form the company of light infantry, or a charter, was produced. It was admitted. Papers were then offered to show the proceedings of the Governor and Council in relation to forming the company. These were objected to, but admitted. With respect to the alleged notice to the commanding officer of the standing company to which Lowell belonged, of his enlistment in the light infantry company, Flint testified as follows. "I presume I gave notice to the commanding officer of the standing company in which said Lowell was enrolled, of his enlistment in the B company of infantry. I never gave any notice except in writing. I cannot swear that I gave the notice in writing as I kept no record of the time of the notice. I have no doubt I gave the notice in writing within five days after the enlistment of said Lowell, but cannot swear positively." The plaintiff called upon Lowell to produce a sergeant's warrant he now holds, and the roll of the standing company in which he was formerly enrolled. The call was made during the trial. These papers were proved to be in his possession, and reasonable time was offered to him to produce them, but he refused. Parol evidence of their contents was then permitted by the justice, and the captain of the standing company testified, that he had seen the roll, and that he had erased Lowell's name from the roll, and made a minute upon it thus — "joined the light infantry." At the time of the warning, and of the alleged neglect of duty, Lowell had been appointed clerk of one of the standing companies. The substance of the testimony on several of the points, is given in the opinion of the Court.

Bridges, for the plaintiff in error, argued in support of the several causes of error assigned. In his argument he cited as pertinent to objection, 1, *Commonwealth* v. *Hall*, 3 Pick. 262. To the 4th, Militia St. 1834, c. 121, § 19; *Sawtell* v. *Davis*, 5 Greenl. 438; *Ellis* v. *Grant*, 15 Maine R. 191; *Abbott* v. *Crawford*, 6 Greenl. 214.

J. Granger argued for the original plaintiff, contending that all the points decided by the justice were rightly decided, and cited *Homer* v. *Brainerd*, 15 Maine R. 54; *Morrison* v. *Witham*, 1 Fairf. 421; *Dean* v. *Gridley*, 10 Wend. 254.

The opinion of the Court was by

SHEPLEY J. — The first error assigned is, that there was no satisfactory proof, that the plaintiff in error enlisted into the company of light infantry. This was a fact to be decided by the magistrate, and his record states, that "Lowell's enlistment was proved."

The second is, that there was no evidence, that the company was legally organized. The commission of the captain was produced. And it is provided by Statute c. 121, § 21, that "the commission of the captain or commanding officer of any company shall in all cases be deemed sufficient evidence of the organization of such company." Whether the other documents introduced for that purpose were duly authenticated was immaterial.

The third is, that there was no evidence of a vacancy in the office of ensign, which the company was called together to fill. The commanding officer of the company is presumed to be in the proper discharge of his duties. It is not for the soldier to refuse obedience because his commander does not exhibit to him the orders of his superior. He must obey the command, and if it have been illegally or oppressively issued, he may have the officer tried and punished.

The fourth is, that the commanding officer of this company did not give notice in writing of the enlistment to the commanding officer of the standing company within five days. The record shews, that the testimony upon that point was not free from contradiction and doubt. It was the duty of the magistrate to decide upon it, and to give such weight to the testimony of each witness and to the circumstances tending to corroborate or to invalidate it as he judged to be justly due to it. In deciding upon the testimony it does not appear, that he violated any rule of law. Nor that he decid-

ed without any testimony to authorize the conclusion, to which he came. This Court is not therefore authorized to revise and reverse his decision upon the fact.

The fifth is, that there was no list of the members of the company annexed to the order to warn them. The statute does not require any list to be inserted in, or annexed to, the order. It is sufficient, that the persons to be warned are made certain; and that may be done by inserting their names in the order or by a reference to another document.

The order in this case directed the clerk, who keeps the record of the company, to warn all the non-commissioned officers and privates enrolled in said company. This reference to the enrolment determined who were to be warned.

The sixth is, that there was no proof of the signature of Balkham, or that he was authorized to act as commander of the regiment. The legal presumption as before stated is, that persons acting in an official capacity are properly authorized, and that their official signatures are genuine. Fraud or crime is not to be presumed.

The seventh is, that parol evidence of what appeared upon the roll was admitted without proof, that it was in the possession of the plaintiff in error and without notice to produce it.

It appears from the record that there was proof, that it was in his possession, and that he was called upon during the trial to produce it, that a reasonable time was allowed him to produce it, and that he refused. The object of the notice is to afford the party an opportunity to produce the original, that he may not be injured by secondary evidence. It must appear, that he had reasonable notice. And what notice would be reasonable must depend upon the circumstances attending each case. Usually a notice given during the trial could not be regarded as reasonable. There may be exceptions, as where the paper is present in Court, or within such short distance, that the Court for the purposes of justice, thinks proper to allow the party full time to obtain it without inconvenience. And such appears to have been this case; for the record states, that the party had a reasonable time to produce it and refused.

That statement must be received as correct and the secondary evidence as properly admitted. This Court, in *Emerson* v. *Fiske*, 6 Greenl. 206, determined to adhere strictly to its thirty-fifth rule, but that did not bind the magistrate.

The eighth is, that there was no order authorizing any person to give notice of the enlistment.

If the commanding officer sign the notice and direct it to be delivered by another and it be delivered, there is no necessity for a written military order. It may be delivered, by an agent, by whom the delivery can be proved. If the act be an official one, it is not of a military character.

Judgment affirmed with costs.

WILMOT W. LOWELL *versus* BENJAMIN M. FLINT.

In an action to recover a fine for neglect in the performance of militia duty, where there is sufficient testimony, although there may be other and conflicting, to authorize the conclusion of the magistrate, his decision upon the fact is conclusive. But where there was no testimony that could authorize his conclusion, the judgment will be reversed.

Thus, where the justice held, that the testimony of a witness, "that he had no doubt that he did notify the said commanding officer within five days, but could not swear positively that he did, but he could not state said notice was in writing," was competent and sufficient to prove that a written notice of the enlistment of a private in a company raised at large was given to the commanding officer of the local company within five days, his judgment was reversed on writ of error.

ERROR to reverse a judgment rendered before T. Jellison, a Justice of the Peace, on Nov. 2, 1839. The original action was brought by Flint, as clerk of a company of light infantry commanded by captain Glover, to recover of Lowell a fine for neglecting to perform his duty as a private in that company at a regimental review and inspection. The then plaintiff claimed to recover a fine on the ground that Lowell had become a member of the light infantry company by due enlistment therein and legal notice thereof to the commanding officer of the local company within which he resided. Lowell, among other

grounds, contended that parol evidence was inadmissible to prove that the name "W. W. Lowell," on the company books was his name; and also objected that no legal notice of his enlistment was given to the commanding officer of the local company in which he lived, and in which he had been appointed clerk. In relation to the notice, the record is in these terms.

"To prove that the captain of the standing company of infantry was notified in writing within five days from the time of said enlistment, and also to give the date of said enlistment, the clerk was introduced, who stated that he had no doubt that he did notify the said commanding officer within five days, but could not swear positively that he did because he made no record of it, but he would not state said notice was in writing."

This evidence was objected to by the defendant as insufficient and incompetent to prove any legal notice. The justice admitted the evidence as sufficient to prove such notice, and adjudged that the action was sustained.

Bridges, for the original defendant, now plaintiff in error, contended that the evidence permitted by the justice to be introduced for the purpose, and which was held sufficient to prove notice, was in itself incompetent; and if admissible, wholly insufficient. It proved no notice in writing, which is expressly required by the statute, and is therefore inadmissible. All such notices, too, should be recorded on the company books, and such record is the best evidence. St. 1834, c. 121, § 12; *Sawtell* v. *Davis*, 5 Greenl. 438; *Ellis* v. *Grant*, 15 Maine R. 191; *Abbott* v. *Crawford*, 6 Greenl. 214.

J. Granger, for the original plaintiff, said that the law only required that a written notice of the enlistment should be given to the commander of the local company within five days. This may be proved to have been done by parol, as is the usual practice in proving written notices to indorsers of notes. No record of the notice is usual or required by law. Whether the notice was proved or not, was a question for the determination of the justice. The testimony was competent; he held it to be sufficient; and his decision of the facts is conclusive.

The opinion of the Court was by

SHEPLEY J. — Several of the errors assigned in this case have been decided in the former case between the same parties, *ante*, p. 401. The fifth error in this, is the same as the fourth in the former case, that written notice of the enlistment was not given to the commander of the standing company within five days. But the testimony of the clerk, as stated in the record of the former case, differs materially from that so stated in this case. The evidence of the clerk is here stated to be "that he had no doubt that he did notify the said commanding officer within five days, but could not swear positively that he did, but he could not state said notice was in writing." And the record states that it was objected to as insufficient, "but it was admitted as sufficient to show such notice." This testimony would authorize the conclusion, that notice was given, but not that it was in writing. There was nothing from which such an inference could be drawn, for the clerk testified that he could not state that it was in writing. In the former case, he is reported to have testified, "I have no doubt I gave the notice in writing within five days after the enlistment of said Lowell, but cannot swear positively." And he also stated that he never gave any notice except in writing. When there is sufficient testimony, although there may be other and conflicting, to authorize the conclusion of the magistrate, his decision upon the fact is conclusive.

In this case, as before stated, there was no testimony, that could authorize the conclusion, that a written notice was given.

Judgment reversed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO, JULY TERM, 1841.

MEM. — SHEPLEY J. was employed in the trial of questions for the jury in the County of Washington, and did not attend during the arguments of the cases in this county, at this term, nor take any part in the decisions thereof.

EDMUND ABBOTT *& al. versus* FRANCIS L. B. GOODWIN.

A contract, free from actual fraud, where the owner of a stock of goods mortgages them to secure the plaintiffs against certain liabilities on certain notes, assumed for him as his sureties, containing a stipulation that the mortgagor should retain the possession of the goods until default should be made in the payment of the notes, or some of them, and "should pay over and account for the proceeds of all sales of said goods to the mortgagees, to be applied in payment of said notes, or directly to apply said proceeds to the payment of said notes, at the discretion of the mortgagees," is a lawful contract.

All persons coming in under the mortgagor, stand by substitution in his place, and are equally affected by the contract, whether notified of its existence or not.

The power of the mortgagor to make sale of the goods may be implied from his covenant to account to the mortgagees for the proceeds of the sales.

If the mortgagor sell the goods, and with the proceeds thereof purchase other goods, these last represent the first, and are substituted for them, and are equally subject to the lien of the mortgagees thereon. So if the mortgagor exchange the goods mortgaged for other goods, and the mortgagees choose to ratify it, the goods received in exchange are equally subject to their lien.

TRESPASS for taking four hundred casks of lime. With the general issue the defendant filed a brief statement, justifying the taking by him, as a deputy sheriff, as the property of George

E. Abbott, on a writ against him in favor of O. Fletcher, a creditor.

To prove the property to be in them, the plaintiffs, E. Abbott, B. Shaw, N. Rich, and I. Rich, Jr. introduced a bill of sale of certain goods from George E. Abbott to themselves, with a condition that if George E. Abbott should cause to be paid certain notes of hand to certain persons named, for certain sums, given by G. E. Abbott as principal, and by the plaintiffs as his sureties, then the sale was to be void. And it was agreed in the same instrument, that until default should be made in the payment of said notes, or of some one of them, G. E. Abbott should retain the possession of the goods, "and pay over and account for the proceeds of all sales of said goods to them, to be applied in payment of said notes, or directly to apply said proceeds to the payment of said notes, at the discretion of" the plaintiffs. The plaintiffs proved the delivery to them of the goods. G. E. Abbott continued in possession of the goods described in the bill of sale, being the stock of a store, and managed the property as before the sale. The lime was not a part of the goods included in the bill of sale, but "was obtained in exchange for goods, and proceeds of sale of goods, which were mortgaged to the plaintiffs." When this contract was made, the law did not require that mortgages of personal property should be recorded.

It was agreed, that the defendant should be defaulted, or the plaintiff nonsuited, as the Court should determine upon their legal rights.

W. G. Crosby, for the plaintiffs, contended, that as the intention was to secure the plaintiffs for their liabilities for G. E. Abbott, and there was no fraud practised or intended, the mortgage is valid against creditors, although he continued in possession. *Ward* v. *Sumner*, 5 Pick. 59; *Homes* v. *Crane*, 2 Pick. 607. A chattel mortgaged is not liable to be seized on execution or attached for the debt of the mortgagor, the money due not having been paid, nor tendered. *Holbrook* v. *Baker*, 5 Greenl. 309.

A mortgagee of personal property, may maintain trespass against a stranger who takes it from the possession of the mortgagor. *Woodruff* v. *Halsey*, 8 Pick. 333; *Fobes* v. *Parker*, 16 Pick. 462; *Ingraham* v. *Martin*, 15 Maine R. 373. But the St. 1835, c. 178, § 1, has abrogated all distinctions between trespass and case, and it is now immaterial which action is brought.

The lime, having been received in exchange for goods belonging to the plaintiffs, is their property. Story on Bailm. § 294; *Macomber* v. *Parker*, 14 Pick. 497. G. E. Abbott was the agent of the plaintiffs. His possession was their possession, and his acts were their acts. The possession of the agent therefore did not impair the rights of the plaintiffs to maintain the action. *Melody* v. *Chandler*, 3 Fairf. 282; *Jarvis* v. *Rogers*, 15 Mass. R. 396; *Kinder* v. *Shaw*, 2 Mass. R. 398; *Ware* v. *Otis*, 8 Greenl. 387.

Kelley, for the defendant, contended that this action could not be maintained, even if a proper one could. Possession is necessary to maintain trespass. The plaintiffs have never had possession of the lime.

The articles contained in the schedule only were conveyed by the bill of sale. That did not include the lime, and the plaintiffs have shown no title to it. The bill of sale does not authorize G. E. Abbott to continue to trade on account of the plaintiffs, but merely to sell the goods and pay over the proceeds on the notes mentioned. In this the plaintiffs trusted entirely to his honesty, and he is responsible to them, if he misappropriates the proceeds of the sales. The lime became his property, and not the plaintiffs', and is liable to be attached and held to pay his debts. If the plaintiffs can prevail, the principle would enable them to follow the property sold by Abbott into the hands of any *bona fide* purchaser, and take it from him. *Reed* v. *Jewett*, 5 Greenl. 96; *Holbrook* v. *Baker*, ib. 309; *Paget* v. *Perchard*, 1 Esp. R. 205.

But these goods were never mortgaged to the plaintiffs; they were never delivered to them, and they have no right to them.

The opinion of the Court was by

WESTON C. J. — The business transacted between the plaintiffs and George E. Abbot, and the bill of sale executed by him to them, must be taken to have been fair and *bona fide*, the report containing no suggestion or intimation of fraud. By that instrument, the goods described therein, were mortgaged to the plaintiffs, to secure them against certain liabilities, which they had assumed for him. If free from fraud, contracts of this kind have been repeatedly adjudged lawful, and of sufficient validity to secure to the mortgagee or mortgagees the property transferred, until vacated by the performance of the condition. And all persons coming in under the mortgagor, stand by substitution in his place, equally affected by the contract, whether notified of its existence or not. *Lunt* v. *Whitaker*, 1 Fairf. 310.

Under the bill of sale, the goods became the property of the plaintiffs, with a right of redemption only in George E. Abbott. Until he did redeem, by performing the condition, as between them, the plaintiffs had all the rights of ownership, modified by a right of possession secured to him, until he made default, with the power of selling the goods, which may be implied, from his covenant to account to them for the proceeds of all sales, to be applied to the payment of the debts intended to be secured, or to be so directly applied by him, at the discretion of the plaintiffs. They authorized sales, and they secured to themselves the power to control the proceeds for the same purposes, for which the goods were mortgaged. The proceeds were purchased with their property, through his agency, under their authority. They represented the goods, were substituted for them, and by the contract, were equally subject to their control. *Blood* v. *Palmer*, 2 Fairf. 414. It was manifestly the intention of the parties, that the proceeds should be subject to their lien. If he sold for cash, the money was theirs, so long as it could be identified. And if with the money received he purchased other property, the property so purchased was theirs, until he extinguished their right, by fulfilling the condition. So if he exchanged the goods mort-

gaged, for other goods, and they chose to ratify it, the goods received in exchange were equally subject to their lien.

This course of proceeding, was not calculated to injure other creditors. The debtor's right to redeem was all, which could be made available for their benefit, under the statute of 1835, c. 188. And the remedy there provided would apply as well to the substituted goods, as to those originally mortgaged. Nor would the mortgagor obtain credit by the possession of the one, any more than by the possession of the other. *Macomber* v. *Parker*, 14 Pick. 497, is a strong case in support of the plaintiffs' right; and we refer to the elaborate opinion there given, without repeating the illustrations, or citing the authorities, upon which it is founded. That possession of the goods by the mortgagor, with the power to sell them does not impair the rights of the mortgagee, was decided in *Melody* v. *Chandler*, 3 Fairf. 282.

The right of the plaintiffs being established, trespass would be the appropriate remedy, if the mortgagor had made default in the performance of the condition, and case, if he had not. *Woodruff* v. *Halsey & al.* 8 Pick. 333; *Forbes* v. *Parker*, 16 Pick. 462. No objection can be taken then to the remedy; the Statute of 1835, c. 178, § 1, having made trespass and case equally available, where either was proper before.

Defendant defaulted.

Edwin Beaman *versus* John Whitney *& als.*

Where a large number of persons, by an agreement in writing, associated together to form a company for the establishment of a store to deal in English and West India goods, to be conducted under the direction of a board of managers, a part of whose duty was "to provide a store for the company," the managers have power to purchase a store, and land whereon to place it, and to give the notes of the company to secure the payment of the consideration.

And if the only grantees named in the deed are "Whitney, Watson & Co.," the name under which they conducted their business, Whitney and Watson being persons well known and members of the company; if the other persons embraced under the general term, company, could not take as grantees, Whitney and Watson could, and they would hold for themselves and those associated with them. This would be a sufficient consideration for the notes given for the purchase money.

The persons liable to the payment of the notes, besides Whitney and Watson, are to be ascertained by proving who constituted the company at the time the notes were made, and embraced all who had then signed their agreement of association.

As some of the persons sued had not joined the company at the time, they cannot be holden as defendants. But under the St. 1835, c. 178, § 4, the plaintiff may amend by striking out their names, on payment of their costs, to be taxed severally, after issue has been joined, and the case has been opened for trial.

If the acknowledgement of a deed be taken by a grantee and certified by him as a magistrate, it is but a void acknowledgement, leaving the deed operative between the parties.

This was an action of assumpsit upon a promissory note in the following terms: — "Brooks, June 10, 1837. For value received we promise to pay Jacob Roberts, or bearer, seven hundred and twenty-five dollars, within one year from October next and interest. Whitney, Watson & Co.,

"by R. W. Files, Agent.

"Attest: John Fogg."

The cause coming on for trial, the plaintiff, to maintain the issue on his part, introduced Reuben W. Files, having first released him from all liability for having signed the note as agent, who testified that at the time said note was given, he was acting as the agent of the firm of Whitney, Watson & Co. and exhibited his certificate of agency; that he had no special

power to purchase real estate on the account of said company; that they were not dealing in real estate, and that such dealing was no part of their object, which was dealing in merchandize; that the consideration of the note aforesaid, and two others of the same amount, was a conveyance from Jacob Roberts to "Whitney, Watson & Co." of a store and land about it, said conveyance being produced, and being witnessed by and acknowledged before the same Michael Chase, who is one of the defendants; that the affairs of said company were under the direction of a board of managers annually chosen, which board at the time of the conveyance, consisted of Michael Chase, Thomas Watson, and Ebenezer Page, said Chase and Watson being two of the defendants; that he signed said notes by direction of said Chase, said Watson and Page being present or thereabouts; that he understood said Watson and Page as assenting thereto, and that he should not have signed them had he known that they objected; that one of said notes was paid and taken up when it fell due, and that the money, or four hundred dollars of it, was raised by an assessment made in September, 1837, upon the shares of the members of said company, and balance of assessment went to pay for goods in Boston; that the premises have been in the occupation of said company from the time of said conveyance to the present time; that said conveyance and notes were executed the same day that an appraisal of said property was made by Johnson, Butman, and Dodge. Files further testified that at the time the notes were given by the firm of Whitney, Watson & Co., the following persons, viz. John Whitney, Thomas Watson, Edmund Smith, Solomon Stone, Ebenezer Crockett, George Files, Wm. Hill, Joseph Whitney, Solomon Boulton, Judah Cilley, Michael Chase, Hill Clements, Tisdale D. Clements, Wm. Ford, Wm. Ford, Jr., and others not parties to this suit, had signed the paper called the constitution of the company; that the other defendants in this suit joined said company subsequently.

The constitution provided for the establishment of a store of "English and West India goods;" that the majority of votes should govern the proceedings; that there should "be chosen

annually by ballot an agent, or agents, and also two managers, whose duty it shall be to provide a store for the company, employ a clerk, and give the agent or agents the necessary directions relating to the business of the company," and contained other provisions respecting conducting their affairs.

Said Files further testified that the vote to accept a member was usually taken at the next regular meeting after his signing the constitution; that the following named persons had not been voted into the firm at the time of giving said note, viz. Hill Clements, Tisdale D. Clements, Wm. Ford, and Wm. Ford, Jr.; that the assessment voted in June, 1837, was for $725, and was the only one ever voted; that it was his impression that the assessment was made for the purpose of paying one of these notes, although it did not so appear upon the records, and that that sum had been appropriated by him as before stated without any special directions, and that he thought that other members of the company from whom he collected assessments understood it as he did, but does not know the fact.

He further testified, that Collins Pattee, David Pattee, Daniel Pierce, John Fogg, and Ezra Manter, defendants, who joined after said notes were given, were severally assessed to pay their part of said assessment. He further testified, that he knew of but two of the company being consulted as to the expediency of the purchase, one of whom, George Files, decidedly objected to the purchase, and the other, E. Smith, consented, if it was the wish of the company. The plaintiff then introduced one Wellington J. Roberts, who testified, that he wrote the deed aforesaid, and that it was made to Whitney, Watson & Co. by direction of said Chase and Watson, who were both present, as was also John Fogg, who witnessed the note; that the deed was delivered to said Watson; that he was present at the meeting in June, 1837, and understood the assessment then made to be for the purpose of paying one of these notes; that he joined the company subsequently to the giving of said notes, and was assessed for his part of the first note, and paid it; that said Files was acting as the agent of the company at the time these notes were given, and was in the habit of signing

bills and receipts in the same form as the notes were signed; that it was the rule of the company not to transact any business at any meeting unless a majority of the company, in interest, were present; that the value of said store and land was fixed by an appraisal made by Johnson, Butman, and Dodge, agreed upon between Roberts the grantor, and the managers, and that at the appraisal, Chase, Watson, and Page appeared and acted for the company, they being the board of managers at that time.

The plaintiff then introduced as a witness H. H. Johnson, who testified that he, together with Butman and Dodge, made the appraisal aforesaid; That Chase, Watson, Page, Files the agent, and Roberts the grantor, were present, and that Watson managed the most of the business.

The defendants then introduced Abner Ham who testified, that in July, 1839, he heard the plaintiff say that at the time the note in question was transferred to him by Jacob Roberts, he knew what the consideration of said note was, and how the deed from said Roberts was written, and that said conveyance of said store and land was the consideration of said note.

It did not appear that the company ever acted in relation to the purchase at any meeting of the company.

It is agreed that either party may refer in the argument of this case to the books of records of said company commencing January 13, 1836. The cause was thereupon taken from the jury, the parties agreeing that if upon the foregoing evidence the Court should be of opinion that the plaintiff is not entitled to recover, he is to be nonsuit, and defendants to recover their costs. But if the Court should be of opinion that the plaintiff is entitled to recover against any of the defendants, judgment is to be rendered in his favor against such as, in the opinion of the Court, are liable, if plaintiff can maintain his action against part of defendants only, and plaintiff to have leave to discontinue as to the residue by paying them their costs, if the Court will grant leave under the provisions of the statute of 1835, to discontinue against one or more defendants after the testimony

in the action is closed to the jury, and before it is submitted to them.

W. G. Crosby for the plaintiff.

1. The purchase of the store was made by the direction of the managers, who acted within the scope of the authority given them, "whose duty it shall be to provide a store for the company." They had power to purchase or to hire a store, as they deemed most for the interest of the company.

2. But if they had not authority to purchase, the company have ratified their acts, by taking up the first note, when it fell due; by assessing on the members admitted after the purchase their share of the purchase money for the store; by causing their deed to be recorded; and by occupying the premises. Paley on Agency, c. 3, part 1, § 2; *Herring* v. *Polley*, 8 Mass. R. 119; *Pratt* v. *Putnam*, 13 Mass. R. 361; *Amory* v. *Hamilton*, 17 Mass. R. 109; *Lent* v. *Padelford*, 10 Mass. R. 236.

3. They are bound as partners by the acts of their managers. The assent of the managing committee is binding on the whole company. *Odiorne* v. *Maxcy*, 13 Mass. R. 178, and 15 Mass. R. 39; *Woodward* v. *Winship*, 12 Pick. 430. And their ratification binds the partnership, even if the act was under seal. *Cady* v. *Shepard*, 11 Pick. 400; Collyer on Part. 259, note 95, and cases cited.

4. The deed passed the property to all the individuals composing the firm of Whitney, Watson & Co. at the day of its date, and who those individuals were might be obtained by extrinsic evidence. *Shaw* v. *Loud*, 12 Mass. R. 447; *Thomas* v. *Marshfield*, 10 Pick. 364; *Hall* v. *Leonard*, 1 Pick. 31; 4 Cruise, 314; 2 N. H. R. 310; *Sewall* v. *Cargill*, 3 Shep. 414. But if the deed did not convey the premises to all the company, it did to those named, and those who were present. That would constitute a sufficient consideration for the whole company. And they might be considered as holding the property in trust for all the partners. Collyer, 79, 99; Gow on Part. 49.

5. The board of managers were the company, being invested with absolute power to direct and control its concerns, and a note given by their direction is the note of the company. *Boardman* v. *Gore*, 15 Mass. R. 339; *Etheridge* v. *Binney*, 9 Pick. 272; *Man. & Mech. Bank* v. *Winship*, 5 Pick. 11; *Chazournes* v. *Edwards*, 3 Pick. 5; Gow, 66; 1 Montagu, 28. Those who came in as partners afterwards on the same terms as the others, adopted this debt and made it their own. Gow, 346; *Locke* v. *Hall*, 9 Greenl. 134.

6. If all are not liable, the Court may permit an amendment by striking out the names of such as are not liable. St. 1835, c. 178.

Kelly argued for the defendants, contending that the action could not be sustained for want of consideration. The plaintiff knew all the facts, and therefore we are entitled to the same defence as if the suit had been brought by the payee. The company had no right to deal in real estate. The object was merely to trade, not to purchase land. Not being within the original design of the parties, none are bound by the notes, excepting such as give their personal assent. Coll. on Part. 113.

Nothing passed to the company by the deed, for there are no grantees who can be identified. *Jackson* v. *Cory*, 8 Johns. 385; *Hornbeck* v. *Westbrook*, 9 Johns. 73; *Boutelle* v. *Cowdin*, 9 Mass. R. 254; *Barker* v. *Wood*, ib. 419; *Hall* v. *Leonard*, 1 Pick. 27; 2 Conn. R. 287. Not being an incorporated company, nothing passes to any one by a deed to a partnership name. The names Whitney and Watson compose but a part of the business name of the company. And besides, if they are to be understood as the names of persons, there is nothing to distinguish them from any other persons bearing the same general names.

The managers had no power to make a purchase of real estate. They were a company formed for the purpose of obtaining goods for themselves and others upon reasonable terms for a limited time. The company, as such, have never acted upon the subject of purchasing the store, or giving the notes, and therefore, as a company, could not have ratified any con-

tract of the managers. But two were consulted as individuals, and one of them dissented unconditionally, and the other only agreed to it on a condition which has never been performed.

If however the deed could convey to the company, it must be only to such as were members at the time, and could not extend to such as came in afterwards.

It is not competent for the Court to permit some of the parties to be stricken out after a continuance and after a joinder in issue. The proof must be as alleged, or the variance will be fatal.

The occupation of the store amounts to nothing, because the case does not show, that any, but those who were present at the time the deed was taken, knew that it was pretended to be purchased on account of the company.

The deed could not be admitted as legal evidence for want of an acknowledgement. The acknowledgement before one of the alleged grantees is merely void.

The opinion of the Court was by

WESTON C. J. — The association or copartnership, for the establishment of a store of English and West India goods in Thorndike, was to continue for the period of nine years, unless sooner terminated by a majority of the votes. They were to operate upon a capital of ten thousand dollars. By the fourth article of their constitution, it was made the duty of the managers to provide a store for the company. How that duty was to be performed is not pointed out. It is a matter then submitted to their reasonable discretion, which, in our judgment, they were at liberty to exercise, either by buying, building or hiring a store. And under that term may be embraced a lot upon which the store might be placed, with convenient accommodation around it. We do not understand, that the store and the land about it, stated in the case, exceeds what might be necessary for this purpose. And in transacting the businsss confided to them, we doubt not they had authority, through their agent, to pledge the credit of the company. Having power to purchase a store, they had a right to empower

their agent to give notes to secure the payment of the consideration.

It is insisted however, that there is a want or failure of consideration for the note in question, the deed for which it was given, being void from the uncertainty of the grantees, and because the acknowledgement was taken and certified by a magistrate, who was a party interested. With regard to the latter objection, it is at most a void acknowledgement, leaving the deed operative between the parties, and therefore a sufficient consideration for the note.

The grantees in the deed were Whitney, Watson and Company. Who Whitney and Watson were is well known, and is proved in the case. If the other persons embraced under the general term, company, could not take as grantees, Whitney and Watson, who were named, could and they would hold for themselves and in trust for those associated with them. And this is sufficient to give operation to the conveyance. But the other persons, composing the company, could be easily ascertained and identified. Their names were to be found on their written constitution, which was signed by the members.

With regard to the persons, liable as defendants, besides Whitney and Watson, who are named, they are to be ascertained, as in other cases, by proving who constituted the company at the time. And we are of opinion, that it embraced all, who had then signed their constitution. Four of these had not then been accepted by a formal vote; yet we think when such a vote passed, they were established as members, from the time of their respective signatures.

Five of the defendants, namely, Collins Pattee, David Pattee, Daniel Pierce, John Fogg and Ezra Manter, did not become members of the company, until after the note was given. These cannot be holden as promisors upon the note. They were therefore improperly joined as defendants. But it is not too late to give the plaintiff permission to amend, by striking out their names, under the statute of 1835, c. 178, § 4. And he has leave to amend accordingly, upon condition, that he pay to each of those defendants his costs, to be taxed

severally. This being done judgment is to be rendered for the plaintiff against the other defendants.

JOHN WILSON *versus* JOHN RUSS.

Payment of a debt by the judgment debtor to an officer having an execution against him in force, discharges the debtor; but proof of such payment to the officer does not raise a liability on the part of the attorney to pay the debt to the creditor. The officer must have paid the money to the attorney before such liability is raised against him.

If an attorney, holding a note in his own favor against a client, puts it in suit, and it be shown that the attorney received a sum of money for the client, it cannot be allowed to the defendant in set-off, unless a set-off has been filed, or unless it be proved, that the money was received in payment of the note.

An attorney is bound to execute business in his profession entrusted to his care with a reasonable degree of care, skill and despatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable. But if he act with good faith, to the best of his skill, and with an ordinary degree of attention, he is not responsible for the loss of demands left with him for collection.

THE facts in this case are stated in the opinion of the Court. After the evidence had all been exhibited to the jury, the counsel for the defendant requested the Judge to instruct the jury: —

1. That if any of the debts named in the schedule had, in the opinion of the jury, been collected by either member of the firm prior to the bringing of the action, whether contained in the account filed in offset, or not, it would be their duty to apply the amount, as far as received, to the payment of the note, unless the plaintiff should show, that the money had been withdrawn by the defendant, or a different disposition had been made of it, by his books or docket, or otherwise.

2. If these debts had been converted into executions and delivered by said firm to officers for collection who had collected them, the jury were authorized to believe that the money was in fact paid over to them and to no one else, in the

absence of evidence to the contrary, and that the non-production of the books and docket of the firm was a circumstance in favor of that supposition.

These requests were not complied with, and the instructions were given which are found stated in the opinion of the Court.

J. Williamson argued for the defendant, contending that the instructions requested should have been given, and that those given were erroneous; and cited *Dearborn* v. *Dearborn*, 15 Mass. R. 316.

Wilson, pro se.

The opinion of the Court was by

Emery J. — The suit in this case was upon a note, dated Feb. 22d, 1822, to the late firm of Wilson & Porter, for $120, payable in six months from date with interest. An account in offset was filed on account of moneys collected of sundry individuals, and the defendant produced a schedule of demands dated March 1st, 1822, signed by the name of said firm in favor of the defendant for collection.

It did not appear that any demand had ever been made on either of said partners to account for these debts.

The case comes before us on exceptions to the instructions of the Judge before whom the trial was had in this Court, when the jury returned a verdict for the whole amount of the note for plaintiff. The defendant attempted to prove by the testimony of one Webb and one Hurd that payments had been made by these witnesses to Porter of certain sums. Webb stated the payment by him to be exactly $20 debt in favor of Russ and no cost. The effect of this proof was attempted to be repelled by the production of the execution which was unpaid, and left to the jury.

Hurd testified to the payment of his debt in favor of defendant to Porter of from $30 to $50 in lumber, and Porter told Hurd to call and settle *with him* but *he did not.*

These two demands were not contained in the account in offset, but were embraced in the schedule.

It was sworn by Benjamin Lilly, that 15 or 20 years ago he paid an execution of the defendant of $40 with costs and fees to one Freeman, a deputy sheriff—and he thought the execution issued from the office of Wilson & Porter.

Nath'l Harford testified to the payment about ten years ago, on execution to Josiah Stetson, a deputy sheriff, a note which defendant left in the office of Wilson & Porter. And it was proved that Robert Houston, who died 10 or 12 years ago, was until the latter part of his life, able to pay ten or twelve dollars.

Arvida Hayford testified that Perkins & Buck, who moved away from his neighborhood fourteen or fifteen years ago, had a pair of steers sold at auction to pay an execution which he understood was in favor of defendant; that it was fifteen or twenty years since.

The plaintiff had been notified to produce the books and dockets of said firm at the trial. They were not produced, the plaintiff alleging that he had them not, but that they were probably in possession of his late partner, William Stevens.

The Judge instructed the jury, "that the items in offset were not proved, unless they believed that the money was actually paid by the officers having the executions, to them, the said firm, or one of them, and that if they believed from the evidence that any of the debts in the schedule had been paid to the firm, they would not allow them towards the note unless they were satisfied that they had been received in payment of the note, or it had been agreed that they should be so applied. That the testimony proving that executions had been obtained and put into the hands of officers, and that the money had been paid to such officers, was not sufficient of itself to prove a payment to either of the firm, as the defendant might himself have legally received the money from the officers, or it might not have been collected from them."

The general rule with regard to the application of payments is, that when a person owes money upon several distinct accounts, he has a right to direct his payments to be applied to either as he pleases. If he pays money on his accounts gen-

erally, without appropriating it, the creditor may apply it as he pleases; if neither the debtor nor creditor make any specific application of the money so paid, the law will appropriate it according to the justice and equity of the case. 1 Mason, 338; 5 Mason, 85.

Payment to the plaintiff's attorney employed to collect the debt is as effectual as payment to the plaintiff himself.

So payment to the officer having the execution and while it is in force discharges the debtor. But mere payment to the officer by no means raises an obligation on the part of the attorney to pay the debt to the plaintiff. Something more must occur. The officer must have paid the money over to the attorney before such liability is to be raised against him.

The attorney is bound to execute business in his profession entrusted to his care, with a reasonable degree of care, skill, and despatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable; but if he act with good faith, to the best of his skill, and with an ordinary degree of attention, he will not be responsible. The consequences attendant on the hasty neglect of an attorney in making a writ of attachment, are exhibited in *Varnum* v. *Martin*, 15 Pick. 440.

In one case, it has been held that an attorney at law, who collects money and neglects or refuses to pay it over to his client until sued for it, is entitled to no compensation for his professional services. *Bredin* v. *Ringland*, 4 Watts, 420.

This is not a suit on an attorney's bill, where costs were incurred through inadvertency and want of proper caution on the part of the attorney, where it would be a good defence to show such facts. But this is on a note of hand, payable on time with interest, and all the facts in connexion with the subject seem to have been presented to the consideration of the jury. In the case cited by the defendant's counsel, as to the obligation of the attorney to pursue the bail without fresh instructions, there appears to be a propriety, because it is the pursuit of judicial process, falling more directly under an attorney's cognizance.

In regard to the collection of executions, creditors frequently interfere, and if they do not prejudice the attorney's lien for his costs, there can be no objection to it. But the legal doctrine as to the necessity of specific appropriation of the payment of a sum of money to a particular subject, is not changed in consequence of the relation of attorney and client. The very fact that there must have been accruing costs on the collection of the demands in the schedule, would raise a belief that such costs were first to be paid.

Exceptions overruled.

ROBERT JAMESON *versus* JOHN BALMER.

Though there may be a want of accuracy, or indeed a repugnance, in some part of the language of a deed of land, the intention of the parties is to be gathered from the whole language used.

Where the owner of a farm conveyed a portion thereof to A. J. and O. C. J., and afterwards conveyed the residue to A. J. and subsequently acquired the title conveyed by him to A. J. by both deeds, and then died; and his administrator made a sale of real estate, under a license from Court, for the payment of debts, describing in his deed the land conveyed as "being one half of the farm formerly conveyed by said deceased to A. J. and O. C. J."; *it was held,* that one half of the whole farm passed by the deed of the administrator.

WRIT of entry, demanding fifteen acres of land in Camden. To prove title in himself, the demandant introduced the following deeds. Abraham Jones to Benjamin Jones, of the fifteen acres demanded in this suit; Benjamin Jones to Abraham Jones, conveying back the same fifteen acres; Abraham Jones to Oliver C. Jones and Abraham Jones, Jr.; and Abraham Jones to Abraham Jones, Jr. Abraham Jones, Jr. was a son of Abraham Jones, Sen., and died unmarried and without issue before the death of his father. Polly Jones, administratrix of the estate of Abraham Jones, Sen., obtained license, and made sale of the real estate for the payment of debts, and made a deed thereof to the highest bidder, Abel Walker, whose title the demandant has. The widow of Benjamin

Jones, Sen. made application to have her dower assigned, and before the assignment was made, partition was made of the land held by her late husband as a tenant in common. The substance of these deeds and also of the assignment of dower, and partition, is stated in the opinion of the Court. The tenant introduced no evidence of title in himself.

SHEPLEY J., presiding at the trial, instructed the jury, that the demandant had by these deeds, and the proof, established a title in himself, unless they should find that Abraham Jones, Sen. was at the time of his death disseized, the defendant offering no evidence of title.

If these instructions were erroneous, the verdict, which was for the demandant, was to be set aside.

Thayer, for the defendant, contended that the deed from the administratrix of Abraham Jones, Sen. to Walker, under whom the demandant claimed, was void for uncertainty, and that therefore nothing passed by it.

But if any thing passed by it, it was the undivided share which was holden by the intestate, as tenant in common with O. C. Jones, of which the land now claimed is no part. The lot demanded is excluded by the description in the deed.

By the terms of the original deed to B. Jones, he could make no conveyance, nor could his heirs, during the lifetime of his father, and therefore it came to those who were his heirs at law after his father's decease, and of course, it was not subject to be sold to pay the debts of the father.

H. C. Lowell argued for the demandant, and contended that one half of lot No. 8, one half of the whole farm, was conveyed by the deed of the administratrix to Walker. The whole of the real estate of the intestate was intended to be conveyed.

It is the object of the law to uphold, rather then to defeat conveyances, though some portions of the description should be erroneous. *Wing* v. *Burgis*, 13 Maine R. 111; 4 Cruise's Dig. 405; *Bridge* v. *Wellington*, 1 Mass. R. 227. And if there be any uncertainty or ambiguity as to that intention, the

words of the deed shall be taken as the grantor's words, and the deed is to be construed most strongly against him, and in favor of the grantee. *Tufts* v. *Cutler*, 3 Pick. 272; Hill. Abr. 335. The whole description should be taken together, in giving a construction to a deed. *Vose* v. *Handy*, 2 Greenl. 322; *Worthington* v. *Hylyer*, 4 Mass. R. 196. The word *farm*, when used in a deed, has a legal and technical meaning, and includes all the lands in any way connected, or at any time used therewith. *Keith* v. *Reynolds*, 3 Greenl. 393; *Cate* v. *Thayer*, ib. 71; Hill. Abr. 347. Where one who has held his *farm* by several deeds of separate parcels, made by the same grantor at different times, makes his own deed to a third person, using language sufficiently indicating the whole farm, and then adding that the premises are the same which he purchased by deed of a particular date, and referring to one only of his title deeds, the whole farm shall pass by his conveyance. *Drinkwater* v. *Sawyer*, 7 Greenl. 366; *Willard* v. *Moulton*, 4 Greenl. 14; *Child* v. *Fickett*, ib. 471. The intestate in his lifetime had conveyed to his sons, Oliver C. and Abraham Jones, Jr. by two deeds, his whole farm; and the demandant is entitled to recover one half of that farm.

The opinion of the Court was by

Emery J. — The propriety of the Judge's instruction to the jury in the present case, it is said, is to be determined by the construction which should be given to the deeds which are made part of the case.

We must understand by the verdict that Abraham Jones, at the time of his death, was seized of the land afterward conveyed by Polly Jones, adm'x of his estate, to Abel Walker, and that the defendant offered no evidence of title.

Though there may be a want of accuracy, or indeed a repugnance in some parts of the language of a deed, we must gather the intention of the parties from the whole descriptive language used. *Keith* v. *Reynolds*, 3 Greenl. 393. On the 14th day of October, 1809, Abraham Jones, for $150, conveyed to Benjamin Jones, on condition that said Benjamin is not to sell or

convey the premises or any part thereof to any person or persons during the natural life of said Abraham, "a tract of land in Camden, beginning at the southwesterly corner of lot No. 8 in Fales' survey of Camden, and running easterly by land of Josiah Gregory to the largest brook, thence upon an angle right across said lot till it makes fifteen acres upon the southwesterly corner of said lot No. 8."

On the 5th of September, 1815, said Abraham Jones, in consideration of a bond signed by Oliver C. Jones and Abraham Jones, Jr. conditioned for the support of himself and his wife, Mary Jones, during the life of each of them, and ten dollars paid by his said sons Oliver C. Jones and Abraham Jones, Jr. quitclaimed to them, their heirs and assigns, "a certain lot of land lying in Camden, excepting therefrom six acres and twenty rods of land deeded to Mr. McLoon and now in possession of James Paul, and fifteen acres deeded to my son, Benjamin Jones, said lot of land, being the farm on which I now live." "Also one other lot of land lying in Camden, aforesaid being lot No. 9, in the first division of land in said Camden, and the same lot of land which I purchased of James Paul in February last, subject to and reserving the right which said Paul has of redeeming said lot numbered nine, according to the verbal agreement made between me and the said Paul at the time I purchased the same of him."

On the first day of January, 1818, Benjamin Jones re-conveyed to Abraham Jones the fifteen acres which had been conveyed to said Benjamin on the 14th of October, 1809. On the 19th of October, 1818, said Abraham, senior, conveyed to said Abraham, Jr. the same fifteen acres, in fee. But his said son, Abraham, Jr. in the lifetime of his father Abraham, died without issue. By that event, the father became entitled to all the estate which belonged to Abraham, Jr. and was tenant in common with Oliver C. Jones of the estate conveyed to him and Abraham, Jr. on the 5th of September, 1815, and sole owner of the 15 acres which had been excepted from the conveyance to the two sons in the deed of the fifth of September, 1815.

After old Abraham's death, his wife, by a warrant from the Judge of Probate, dated June 8, 1825, had her dower in her husband's estate set off to her by three discreet and disinterested freeholders on the tenth of November, 1825. These commissioners after dividing property holden in common with Oliver C. Jones, a part of lot No 8, viz. about 85 acres thereof, and setting off to him a piece of land on the northwesterly side of the road and on the north-easterly side of said lot, 18 rods in width, and from said road to the northwesterly end of said lot, and setting off to said Jones on the northwesterly side of said road, and on the northeasterly side of said lot a piece of land, with a house thereon, 23 rods in width, and to run from said road to the shore, and from the remaining part of said tract of land, set off to the said Polly Jones, the widow named in the commission, one equal third part of the same in value, which said third part is described as follows: beginning at a stake and stones on the southeasterly side of the county road at land of David Clough, thence southeasterly by said Clough's land 100 rods to a stake and stones, thence northeasterly 15 rods to a stake and stones, thence northwesterly in a line parallel with the line first mentioned about 105 rods to a stake and stones at the road aforesaid, thence southwesterly by said road to the bounds first mentioned, and containing nine and one half acres, which said 9½ acres were considered by the commissioners to be one equal third part in value of all the real estate shown to them of said Abraham Jones deceased and subject to dower.

This assignment of dower was allowed and accepted by the Judge of probate, at a court of probate on the eighteenth of January, 1826.

The said Polly Jones, Adm'x, afterward having obtained license to sell and convey the real estate of said deceased Abraham Jones, to the amount of two hundred and sixteen dollars, on the 22d day of December, 1827, sold and conveyed to Abel Walker, for one hundred and ninety-one dollars, he being the highest bidder therefor, the estate "being one half of the farm formerly conveyed by said deceased to Abraham

Jones and Oliver C. Jones; the half hereby conveyed is bounded on the west by land of David Clough, by land of the heirs of said Oliver on the east, and southerly by the sea shore, reserving the widow's dower."

These recitals present the situation of the parties, and of the property in controversy. And from the whole, we may justly deduce the conclusion that the tract in question was sold to Walker, from whom it is understood that the plaintiff derives his title.

It is objected, that the deed of the administratrix is void for uncertainty in its boundaries. There might possibly be some ground for this objection, if the boundaries of the farm were incapable of being ascertained. We are not apprised that difficulties are pretended on that subject. If so, it is very clear that the half of it is equally susceptible of being found. And by the terms of the deed to Walker, we are satisfied, that according to the cases, *Cate* v. *Thayer*, 3 Greenl. 71, *Keith* v. *Reynolds*, 3 Greenl. 393, *Willard & al.* v. *Moulton*, 4 Greenl. 14, *Child & ux.* v. *Ficket*, 4 Greenl. 471, and *Drinkwater* v. *Sawyer*, 7 Greenl. 366, we cannot decide otherwise than that, by the deeds and proofs, the plaintiff has established a title in himself to the premises demanded.

Judgment must therefore be entered on the verdict.

JOHN HANLY, Executor, *& al. versus* NOAH SPRAGUE *& al.*

Where one of the parties was stricken out of a bill in equity by amendment, and afterwards released all his interest in the subject matter of the bill to the other plaintiffs, who were then minors, and the guardian of the minors accepted the release, *it was held,* that such person was a competent witness.

If a person receives land to hold in trust for another, if he intends to hold the property and disclaim the trust, it is a fraud upon him for whose use it was received, from the effect of which a court of equity will grant relief.

And if the trustee convey the land to another, who does not pay an adequate consideration therefor, if the latter be not equally liable, he has no pretension to retain more than is necessary for his own indemnity.

BILL in equity, by John Hanly, executor of the will of Noah Sprague, deceased, and Danforth Sprague, Charles Sprague, and Joseph Sprague, minor children of said deceased, by said Hanly, their next friend and guardian, against Noah Sprague and John Davis. The hearing was on bill, answers, and proof. The bill alleged, that the estate of said deceased belonged to said minor children and the creditors of said deceased; that the deceased, in 1831, was seized of a farm called the Benzy farm, of the value of $425, and of another farm of the value of $600, both of which had been previously mortgaged by him to W. Battie, to secure the payment of the sum of $150,94; that the testator being unable without inconvenience to pay the debt to Battie, proposed to his son, Hiram Sprague, in 1833, that if he would pay the debt and discharge the mortgage, he should have the Benzy farm at $425, and should pay the difference to the testator, which proposition Hiram accepted; that afterwards Hiram found himself unable to comply with his agreement with his father, and proposed to his brother Noah, one of the defendants, "that he should take the place of Hiram as to this contract, if his father should agree thereto;" that the father did agree thereto; and that "the defendant, Noah, assented thereto, and agreed with said testator, that he would fulfil all the stipulations contained in the agreement of the said Hiram, and among other things that he would pay off said mortgage to said Battie, and that he would take the Benzy farm at $425, and account to the testator for the balance, and

that the residue of the real estate, with the buildings thereon, should belong to and be the property of the testator;" that Noah did pay the debt, being $150,94, and took an assignment of the mortgage to himself; that afterwards the equity of the testator to redeem the mortgage was sold on execution for the sum of $60, and redeemed by the defendant, Noah Sprague, at his father's request, out of the balance due for the Benzy farm; that the defendant, Noah Sprague, in violation of his agreement, afterwards, in 1836, fraudulently assigned the mortgage and conveyed the whole of the estate to the defendant, Davis, he, the said Davis, then having full knowledge of all the facts and trusts, and the terms upon which the said Noah was to pay the mortgage, and paying no valuable consideration therefor, but merely giving his note for $190, which was put into the hands of a brother-in-law of Davis, to be kept for him; and that both defendants refuse to convey to the plaintiffs, or to any of them, any part of the real estate.

The substance of the answers and proof sufficiently appears in the opinion of the Court. The statute of frauds was not interposed as a defence by answer or plea.

The deposition of Nancy Martin, widow of the testator, to whom a life estate had been given in the will, and who was originally a plaintiff, and whose name was struck out of the bill on her marriage with Martin, was offered in evidence by the plaintiffs, she, with her husband, having previously executed to her children, the minor plaintiffs, a release of all her interest in the estate, which had been accepted by their guardian. Hiram Sprague's deposition was also offered by the plaintiffs, he having previously executed a similar release, which had been accepted by the guardian. Both these depositions were objected to by the defendants, on the ground that the deponents were interested.

F. Allen argued for the plaintiffs, and cited *Gardiner Bank* v. *Wheaton*, 8 Greenl. 373; *Hadden* v. *Spader*, 20 Johns. 554; *Spader* v. *Davis*, 5 Johns. Ch. R. 280; *Hendricks* v. *Robinson*, 2 Johns. Ch. R. 283; *McDermutt* v. *Strong*, 4

Johns. Ch. R. 687; 1 Mad. 213; 14 Johns. 493; 5 Mason, 144; 2 Johns. Ch. R. 35; 7 Johns. Ch. R. 557.

J. S. Abbott argued for the defendants, and cited *Schillinger* v. *McCann*, 6 Greenl. 364; *Elder* v. *Elder*, 1 Fairf. 80.

The opinion of the Court was by

WESTON C. J. — The objection arising from the coverture of Nancy Martin, formerly Nancy Sprague, has been removed by an amendment of the bill. She and her husband have released and assigned her interest, and his in her right, to the other plaintiffs. Its acceptance by the guardian was sufficient to give efficacy to the instrument. It might prove beneficial to the wards but could in no event injure them. It being subsequent to the right she acquired from the creditors, that also passed by the assignment. She was under no certain liability to pay costs, which depend on the discretion of the Court. Besides, the guardian, receiving her release, is under an equitable obligation to indemnify her for any expense, for which she might become liable in the prosecution. No question, as to the mesne profits, will be settled by this cause. Nor has she in any other form, any direct interest in the estate, sought to be recovered by her children. And we are of opinion, that the release, executed by Hiram Sprague, divested him of all interest, as legatee or otherwise, in the subject matter of this suit.

The agreement originally made between Noah Sprague, the testator, and Hiram, his son, as charged in the bill, is proved by the deposition of Hiram; and the defendant, Noah Sprague, the younger, admits in his answer, that before he became interested, he was apprized by Hiram of the bargain between him and his father. That he advanced the money due upon the mortgage, upon the same terms, he does not directly admit; and he denies that he made any agreement with his father, to hold any part of the property in trust for him. And yet the implication is very strong from the answer, that he was substituted for Hiram, and that he must have been aware, that both Hiram and his father so understood it. He says he was

requested by Hiram to take his place, and that after much solicitation, he did agree to obtain the money, and pay the amount due on the mortgage. Then follows a denial of any affirmative agreement, to hold any part of the property in trust. But he does not say, that he refused to take Hiram's place, or that he notified him or his father, that he was acting only with a view to his own interest.

If the defendant, by any mental reservation, intended to disappoint the expectations of his father, of which he was fully apprized, it was a course of proceeding, which cannot be justified. It further appears, from the positive testimony of Hiram Sprague, that Noah agreed with his father, in his presence, to take the property upon the same terms, that had been agreed between him and Hiram. Nancy Martin deposes, that Noah, the defendant, expressly declared to her, that such was the fact. And the conversations, to which she deposes, between him and his father, prove the claim of the father on the one hand, and its recognition on the other. Upon this point, the answer is contradicted by the positive testimony of two witnesses. If the defendant intended to hold the property, and to disclaim the trust, it was a fraud upon the father, from the effect of which those who represent him are well entitled to be relieved.

But in our judgment, it is deducible from the answer, that Noah, the defendant, took the place of Hiram, and is therefore fairly chargeable with the same trusts. The defendant, Davis, not being a purchaser for an adequate consideration, is equally liable, having at any rate no pretension to retain more than is necessary for his own indemnity. Hiram was to have the Benzy place to his own use; and the equity of the case does not require, that the title of Davis to this part of the property should be disturbed. That is of greater value than the consideration paid by him. Upon a view of the whole case, we are not satisfied, that Noah Sprague, the defendant, has verified claims, which ought equitably to defeat or impair the right of the plaintiffs to have the other part of the estate conveyed to them.

And it is ordered and decreed, that the defendant, John Davis, convey, by a good and sufficient deed, to the plaintiffs, Danforth Sprague, Charles Sprague, and Joseph Sprague, their heirs and assigns, the estate described in the bill, other than the Benzy farm, and that the defendant, Noah Sprague, also release to the same plaintiffs, all his right, title and interest in said estate.

WILLIAM CUNNINGHAM *versus* JOSEPH TURNER *& al.*

In an action upon a poor debtor's bond, where the justices have examined the notification to the creditor, and have found it to be in conformity with the law, their decision upon this point is conclusive; and it is not competent for the plaintiff to go behind their certificate, and raise subsequently any question as to the sufficiency of the notice, for the purpose of showing that the oath was improperly administered.

DEBT on a poor debtor's bond.

Two justices of the quorum certified, that the said Turner presented himself, and we the said justices, having examined the notification and return thereon, and having found the same regular and in due form, have proceeded in the examination of said Turner in the way and manner by statute provided, and upon the whole examination, being satisfied that said Turner's disclosure is true, and that he is entitled to the benefit of the act aforesaid, have proceeded to administer to him the oath by statute provided, and have made out and delivered to him a certificate thereof under our hands and seals, directed to the gaoler of said county, "according to the form of the statute in such case made and provided."

These proceedings were read in evidence at the trial, and the plaintiff then proposed to introduce evidence tending to show, that at the time of administering the oath, a surety on the bond had in his hands and possession, real estate belonging to the principal. To the admission of this evidence the defendants objected, but the Judge presiding at the trial overruled the objection, and admitted the testimony.

After the evidence had been closed, the cause was taken from the jury by consent of parties, who agreed, that if in the opinion of the Court the ruling was correct, the defendants were to be defaulted, if the defendants were liable upon the facts. But if in the opinion of the Court, the ruling was not correct, or that upon the other evidence the action could not be maintained, the plaintiff was to become nonsuit.

W. Kelley, argued for the plaintiff.

W. G. Crosby, for the defendants, cited 13 Serg. & R. 254; *Agry* v. *Betts*, 3 Fairf. 415; *Haskell* v. *Haven*, 3 Pick. 404; *Black* v. *Ballard*, 13 Maine R. 239; *Parkman* v. *Crosby*, 16 Pick. 302; 4 Cranch, 421; *Livermore* v. *Boswell*, 4 Mass. R. 438.

By the Court. — We have decided in the case of *Cary* v. *Osgood & al.* 18 Maine R. 152, that where the justices have examined the notification to the creditor, and have found it to be in conformity with the law, their decision upon this point is conclusive; and that it is not competent for the plaintiff to go behind their certificate, and raise subsequently any question as to the sufficiency of the notice. The certificate of the justices in this case is, that the principal caused the creditor to be notified according to law. Having thereupon administered to him the oath, the condition of the bond was performed, and the evidence on the part of the plaintiff which was objected to, was not legally admissible.

Judgment for the defendants.

ASENATH GAGE *versus* JAMES JOHNSON *& al.*

In this State, it is sufficient to maintain an action on an indorsed note, if the nominal plaintiff has assented to the suit, and it has been authorized by the party in interest.

An administrator may maintain an action in his own name on such note, being the property of the intestate at the time of his death, without declaring as administrator.

And if the action be brought after the decease of the intestate, and prior to the appointment of an administrator, the taking upon himself that trust by the plaintiff, by relation, legalizes all his acts relative to the goods and credits committed to him from the decease of the intestate, and he may proceed with the suit.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

The parties agreed upon a statement of the facts. Assumpsit upon a note to John Gage or bearer, the writ bearing date Sept. 5, 1838. After the making of the note, John Gage died. After his death, the widow brought this action in her own name, declaring on it as bearer thereof. After the action was brought, the plaintiff took out administration on the estate of John Gage, and on Nov. 7, 1838, returned an inventory in which the note in suit was returned by her as being the property of the estate. If the plaintiff was entitled to maintain the action, the defendant was to be defaulted, and if not, the plaintiff was to become nonsuit.

The presiding Judge was of opinion that the action was maintainable, and ruled that the defendant should be defaulted. To this the defendants excepted.

Hubbard, for the plaintiff, cited *Marr* v. *Plummer*, 3 Greenl. 73; *Barrett* v. *Barrett*, 8 Greenl. 353; *Brigham* v. *Marean*, 7 Pick. 40; *Bank of Chenango* v. *Hyde*, 4 Cowen, 567; and relied on these cases as conclusive in his favor.

Kelly, for the defendant, after remarking that the return of this note as the property of the intestate by the present plaintiff, his widow, in her inventory, was proof positive that she individually had no interest in the note, contended that she could not, under the circumstances, maintain this action. She must have an interest in the note to maintain the suit. *Brad-*

ford v. *Bucknam*, 3 Fairf. 15; *Bragg* v. *Greenleaf*, 14 Maine R. 395; Story's Eq. Pl. 216, 389, 391, 564.

She has no authority to bring the suit from having the note in her hands. It has been repeatedly decided, that even an administrator, rightfully appointed in one State, cannot maintain an action in another State. *Stearns* v. *Burnham*, 5 Greenl. 261; *Goodwin* v. *Jones*, 3 Mass. R. 514; *Langdon* v. *Potter*, 11 Mass. R. 313.

Payment of a note belonging to an estate, to any one but the administrator, is no bar to an action brought by him. 1 Com. on Con. 523; 2 Com. on Con. 43; Bull. N. P. 133; 1 Dane, 96, 179, 558; 3 Bac. Abr. 50; *Wyer* v. *Andrews*, 13 Maine R. 168.

The opinion of the Court was by

WESTON C. J. — Authorities have been cited, and others might be found, tending to establish the position, that to maintain an action upon a bill of exchange, or a negotiable note, the plaintiff must have some interest therein; and if this is disproved, the action cannot be maintained. But the law has been otherwise understood in Massachusetts and in this State. And it has been held sufficient, if the nominal plaintiff has assented to the suit, and it has been authorized by the party in interest. *Brigham* v. *Marean*, 7 Pick. 40; *Marr* v. *Plummer*, 3 Greenl. 73.

The plaintiff being in fact the bearer of the note, having a right to control it, and having an interest in it, as administratrix, might, upon the authority of those cases, cause an action to be brought upon it, in the name of any person who would give his consent thereto. It results, that if she thought proper, she might sue in her own name, as well as in her capacity of administratrix. When the suit was brought, she had not taken out letters of administration. But she has since; and this, by relation, legalizes all her acts, in relation to the goods and credits committed to her, from the decease of the intestate. *Rattoon* v. *Overacker*, 8 Johns. 126; *Shillaber* v. *Wyman*, 15 Mass. R. 322, and the note appended to that case.

Exceptions overruled.

SAMUEL FLETCHER *versus* INHABITANTS OF LINCOLNVILLE.

A school district meeting may be called legally by the selectmen of the town on the written application of three or more qualified voters, who then resided within the district, although they are not described as such in the application.

Where the selectmen issue their warrant to one of the applicants, directing him to call a meeting "*at the schoolhouse in said district*," and he returns on the warrant, that he had posted up notices for the purpose, "*one at the schoolhouse and one at the grist mill, both in said district*," the return furnishes sufficient evidence, that the notices were posted, as to place, as the St. 1834, c. 129, § 11, requires, "on the district schoolhouse and one other public place within the limits of said district."

The notice is given a sufficient time before the meeting, if posted up on the sixteenth, when the meeting was to be on the twenty-fourth of the month.

If a person be chosen as agent of a school district by the qualified voters thereof, assembled together, but not at a district meeting legally called, such person is not agent of the district.

THIS action was assumpsit to recover forty-two dollars for instructing a common school, in District No. 8, in Lincolnville. The cause was opened to the jury, and when the evidence had been ascertained, the facts were agreed.

The plaintiff performed services as charged, and the inquiry was, whether the defendants were liable. On Nov. 15, 1838, "Isaac Hills and three others, all legal voters and freeholders in said district, applied in writing to the selectmen of the town to issue a warrant" to call a meeting of the legal voters in said district, to choose a clerk, agent, &c.; but the application did not state, that they were freeholders within the district. The warrant was issued by the selectmen on the next day, under their hands and seals, directing Hills to notify and warn the meeting on Nov. 24, at 6 o'clock, P. M. "at the schoolhouse in said district;" Hills posted up the notices for that purpose, on the same day, "one at the schoolhouse and one at the grist mill, both in said district;" the voters met, organized their meeting, chose Daniel Calderwood, clerk, and Thomas Kendall, agent. Kendall was duly sworn, and afterwards employed the plaintiff to keep the school during the time he has charged for his services.

It was also agreed, that on May 14, 1838, at a meeting of legal voters of the district, Charles Richards was chosen school agent, and entered upon the duties of the office, employed an instructress of the summer school, and superintended that school, but he was not sworn until Nov. 16, 1838. The meeting of May 14, was called by said Thomas Kendall, as agent of the district, but it did not appear by the records or otherwise, that any written request was made to him to call the meeting, nor that any notices for the meeting were posted up. At this meeting in May, Charles Shepherd was chosen clerk, and was duly sworn, but was not present at the meeting on Nov. 24.

At an informal meeting of the inhabitants of the district, Nov. 14, Richards was present and remarked, that he did not consider himself as agent for the district, said he had not been sworn, and requested them to take measures to call a legal meeting to choose a new school agent, but before the meeting on Nov. 24, he notified Kendall of having taken the oath on the 16th.

At the annual town meeting of the town, in April, 1838, the town voted that each school district should choose its own agent. At the close of the statement, it is said, "the plaintiff introduced said Thomas Kendall as a witness, who was sworn, and testified that he posted up only one notice of the meeting which was holden May 14, 1838."

If, in the opinion of the Court, the action could be maintained, the defendants were to be defaulted; and if it could not be, the plaintiff was to become nonsuit.

Kelly, for the plaintiff, contended that the plaintiff had a legal right to recover for the services he had rendered. The agent who employed him was chosen at a meeting called in all respects in conformity with the provisions of the St. 1834, c. 129, § 3, 11.

Richards could not legally interfere as agent. The meeting at which he is said to have been chosen, was not called according to law, as no application was made for it, and but one notice was posted up, when the law requires two. The statute

requires that the agent should be sworn, and Richards had never taken the oath until after a new warrant was issued to call a meeting for the choice of agent. His conduct amounted to a resignation of the office, if he had ever been chosen to it.

All the legal requisites to make the choice of an officer legal must appear of record. 7 Greenl. 426; 4 Greenl. 44; 14 Mass. R. 315; 5 Pick. 323.

W. G. Crosby, for the defendants.

He who attempts to charge a corporation on a contract, must prove a contract legally made. 4 Greenl. 46. The plaintiff, to recover, must prove that the agent was legally chosen; and to be legally chosen, the meeting at which he was chosen must have been legal. The statute requires, that the application should be made by three or more qualified voters residing within the district. The application does not state that they were then residing within the limits of the district, or that they were qualified to vote.

No legal notice was given of the district meeting. The return is the only admissible evidence of notice, and does not show that the *mill* was a public place. Nor does it appear from the return, that seven days' notice had been given. Nor does it appear that any notice was given of the purposes of the meeting. 12 Pick. 206; 14 Mass. R. 315.

Kendall was not duly elected agent, because there had already been an agent elected for the year, which had not then expired.

The opinion of the Court was by

Weston C. J. — If Thomas Kendall, who employed the plaintiff, was legally the school agent in district number eight, in the town of Lincolnville, the action is maintained. The mode of calling district meetings, is prescribed by the statute of 1834, c. 129, § 11. The meeting at which Kendall was chosen, was upon the written application of four individuals to the selectmen of the town. It is objected, that it does not appear, that they were qualified voters, residing within the district. If that fact is not to be presumed, from the official ac-

tion of the selectmen, which followed, it is established by the agreement of the parties; and if the fact existed, the warrant is justified. By the schoolhouse, in the return of the applicant, to whom the warrant was directed, must be understood the schoolhouse of that district, or in other words, the district schoolhouse. The grist mill in that district, must to a common intent, be taken to have been a place to which the citizens had occasion to resort; and therefore a public place, within the fair meaning of the statute. It being certified, under the date of the sixteenth of November, that copies of the application and warrant had then been posted for the meeting on the twenty-fourth of the same month, it does appear that this was done seven days before the meeting. All the objections therefore taken to the regularity of this meeting, are overruled.

It is insisted however, that Kendall was not duly elected at that meeting to the office of agent, the place having been filled by the election of Richards, on the fourteenth of May preceding. Without adverting to other objections raised to the official character of Richards, it is a sufficient answer to his pretensions, that the meeting, at which he was elected, does not appear to have been called in pursuance of law.

Judgment for the plaintiff.

JEREMIAH WARREN *versus* THE INHABITANTS OF ISLESBOROUGH.

No person can maintain an action against a town for supplies furnished to a pauper, but the one who gave the notice to the overseers.

If a notice has been given by one furnishing relief to a pauper, and supplies have been furnished by the overseers, believed by them to be sufficient, a new notice is essential to a recovery of the town for supplies furnished afterwards.

There seems to be no limitation to the claim of an individual against a town for the support of a pauper, but that of the general statute, although there is a special one to an action by one town against another.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit for supplies furnished by the plaintiff (an inhabitant of Islesborough,) to one Rebecca Thomas, residing in that town, and having her legal settlement therein.

On the trial in the District Court, much testimony was introduced on each side. Thereupon the defendants contended that no notice was ever given by the plaintiff to them, that the pauper was in need of support, and that when notice was given by another person, the overseers made suitable provision; and requested the Judge to instruct the jury, that no person could maintain an action against a town for supplies furnished a pauper, excepting the person who gave the notice to the overseers; and also, that if the overseers on receiving notice made provision for the pauper, which they in good faith believed, and had reason to believe, would be sufficient to relieve her necessities, that a new notice was necessary to charge the town for subsequent supplies, although the provision made by the overseers in fact proved to be insufficient.

The Judge declined to give such instructions, and did instruct the jury, that after notice a sort of general credit was given to the pauper at the expense of the town, and that any inhabitant of the town might recover for supplies furnished, which were suitable to the condition of the pauper; and also, that upon receiving notice, it was the duty of the overseers to see that all supplies were furnished which the pauper's necessities might require; and though they made provisions which in good faith they believed to be sufficient, if they proved to be insufficient in point of fact, any inhabitant of the town might supply the pauper without any new notice, and the town would be liable to pay the amount thus furnished; but if the overseers had relieved her necessities, and she again became necessitous and fell into distress, a new notice must be given to the overseers, and they must neglect to furnish her, before any one furnishing could recover for it of the town. Verdict for the plaintiff. The defendants excepted.

W. Kelley, for the defendants, contended that no one, but the person calling upon the town and notifying the overseers of the poor, can maintain an action against the town for sup-

porting one of their paupers, without an express contract. The person thus seeking to recover of the town must also himself be an inhabitant thereof at the time.

When complaint was made, and the overseers had furnished relief in such manner as they esteemed sufficient, the individual, who had complained, must give a new notice to the overseers before he could recover of the town, if the provision made proved insufficient. And there is still greater reason why notice should be given by another person, who had never supported the pauper.

The instruction was wrong in both respects. *Mitchell* v. *Cornville*, 12 Mass. R. 333; *Watson* v. *Cambridge*, 15 Mass. R. 286; *New Salem* v. *Wendell*, 2 Pick. 341; *Worden* v. *Leyden*, 10 Pick. 24.

W. G. Crosby, for the plaintiff, argued, that the St. 1821, c. 122, § 18, is very general, that "every town shall be holden to pay any expense which shall necessarily be incurred for the relief of any pauper, by any inhabitant, not liable for his support, after notice;" that it is wholly immaterial how, or by whom, the prerequisite notice to the overseers should be given; and that it is of no importance to the town who furnishes the supplies, if their officers neglect it, for the town will be holden to pay only what is necessarily furnished, and that they are bound to do themselves. The instruction in this respect was correct.

By the statute, towns are made liable to pay any expense necessarily incurred by an inhabitant in the support of a pauper after notice and request, until provision shall be made by the selectmen. Whether this was necessarily incurred is a question of fact to be settled by the jury; and it would not have been incurred necessarily, if provision had been made by the town. The intention of the overseers to do a thing is of no avail, if it be not done The jury must be understood to have found, that the pauper was not relieved. As soon as notice is given to the overseers, that a pauper is in want, the town becomes chargeable, and that charge continues so long as the want continues.

The opinion of the Court was by

EMERY J. — How often, and from whom, must the overseers of the poor receive notice of the distress and need of immediate relief of a pauper, to authorize any inhabitant of a town, upon the neglect of the overseers, to make supplies, and by that means render the town chargeable for the expenses of the relief furnished by the individual? It certainly is an interesting question.

By St. 1821, c. 122, § 3, every town in the State is holden to relieve and support *all poor and indigent persons lawfully settled therein*, whenever they shall stand in need thereof. By the 11th section, it is the duty of the overseers of the poor, in their respective towns, to provide for the immediate comfort and relief of *all persons residing or found therein, not belonging thereto*, but having lawful settlements in other towns, *when they fall into distress*, and stand in need of immediate relief, and until they shall be removed to the places of their lawful settlements. By the 18th section, it is made the duty of said overseers to relieve and support, and in case of their decease, decently bury all poor persons residing or found in their towns, having no lawful settlement within the State, when they shall stand in need, to be paid out of the respective town treasuries, if not recovered of relations. And every town shall be holden to pay any expense which shall be *necessarily incurred* for the relief of any pauper, by *any inhabitant*, not liable by law for his or her support, *after notice and request made to the overseers of the said town*, and until provision shall be made by them.

The case cited, *Worden* v. *Leyden*, 10 Pick. 24, decides that the promise of one overseer of the poor, to one furnishing relief to paupers whom he knew were placed by the overseers under contract with another person to be supported, "was not sufficient evidence of a contract express or implied to go to the jury, and that if there was any inhumanity on the part of the third person so employed to keep the paupers, notice should have been given to the overseers, and if they had neglected to correct the misconduct complained of, or to provide other suit-

able support for the paupers, an individual might be warranted in providing for their relief at the expense of the town, in the same manner as if no provision had been made for them, after due notice to the overseers. St. 1793, c. 59, § 13." Of this portion of that section, our provision in the 18th section of our own statute, is an exact transcript, leaving out the word, district.

In *Lee* v. *Deerfield*, 3 N. H. R. 290, where, by their statute of Feb. 8, 1791, selectmen are made overseers of the poor, it was held, that "when one of the selectmen of a town orders supplies to be furnished to a person entitled to relief, the assent of the other selectmen is to be presumed, because it is their duty to assent. It would be extremely inconvenient, if no supplies could be furnished to paupers, without the express consent of a majority of the selectmen, while no inconvenience can result from holding, that proper supplies, furnished on proper occasions, by order of one of the selectmen, shall bind the town in the same manner as if furnished by the express order of all the selectmen."

In the action, *New Salem* v. *Wendell*, 2 Pick. 341, it was held to constitute a good defence to the action, that at the time when the expense was incurred, there was a place provided for the pauper's support in Wendell, where her settlement was, that the place was so near that she might walk to it without difficulty, and that all this was known to the plaintiffs, to the person who supplied the pauper in Salem, and to the pauper herself.

In the case, *Watson* v. *Cambridge*, 15 Mass. R. 286, it was held, that notice to the overseers of the poor need not be in writing. On general notice, the overseers may satisfy themselves on the points for them to know. And it is no objection to the action, that more than two years elapsed after the notice was given, before the action was brought, and that a bond given for the support of the pauper to the administrator of the estate of her former master, she having been his slave, did not prevent her being regarded as a pauper. There seems to be no limitation but that of the general statute, to the individ-

ual's claim, though there would be to an action by the town. *Inhab. of Readfield* v. *Inhab. of Dresden*, 12 Mass. R. 317.

The case, *Mitchell* v. *Inhab. of Cornville*, 12 Mass. R. 333, confines the action to an inhabitant against the town in which the pauper supplied may be resident, and does not authorize the persons supplying to sustain an action against the town where the pauper may be lawfully settled, and out of which the supplies were made.

It has been held, that when due notice has been given to a town that a pauper has become chargeable, and the town notified has made due provision for the pauper, and he again needs assistance, new notice must be given of the fact. 12 Mass. R. 316; 14 Mass. R. 186. And in this Court, in *Green* v. *Taunton*, 1 Greenl. 228, it was decided that new notice is necessary so that the town may elect whether they will support the pauper in another town, or remove him to their own.

We have thus in review all the cases which were cited on the argument, together with some others. And it is insisted by the plaintiff, that the construction ought to be liberal, so that if the town officers neglect their duty, it is no matter who gives the notice, any inhabitant affording relief should maintain his suit for remuneration.

The defendants are unprepared to yield to such a latitudinarian construction, and urge that none but the notifying individual can sue. They profess to be dissatisfied also with the instructions of the Judge in the District Court, that though the overseers made provisions which in good faith they believed to be sufficient, if they proved to be insufficient in point of fact, any inhabitant of the town might supply the pauper without any new notice, and the town would be liable to pay the amount thus furnished. The Judge had before directed the jury that after notice, "a sort of general credit was given to the pauper at the expense of the town, and any inhabitant of the town might recover for supplies furnished *which were suitable to the condition* of the pauper."

We find it most evidently the design of the Legislature to provide an efficient organization of a body of men under oath

to perform the office of relieving the distressed and such as stand in need of immediate relief. We must presume that they are selected in each town with regard to the kindness of their hearts, their active benevolence and their prudent attention to the best method of mitigating the ills of poverty, and with the high responsibility under which they act, that they execute their office with integrity. It is the duty of courts therefore to expect decisive proof of a breach of this trust. Much must be left to the presumed just judgment of the overseers, as to the extent of the supplies to be furnished, on the one hand to guard against encouragement of idleness and waste, and on the other hand to secure relief to suffering humanity. The courts too have deemed it essential that regular notice should be given to the overseers of any new cause for their interference, and that the claim for indemnity should come from the person entitled to prosecute for it. And we think it fairly deducible *that the person*, who makes a supply, *with a view to remuneration from the town*, should first give notice to the overseers, and that such person only shall sustain an action against the town. We are not prepared to adopt the direction of the Judge that "after notice a sort of general credit was given to the pauper at the expense of the town." We believe that a doctrine like this would be of mischievous tendency, and open the door to speculation on supposed omissions of overseers, which would be at once corrected *upon direct notice* of an unexpected demand for extended supply, *given by a person ready* to make it, on subsequent neglect of the overseers. The tendency too would be to involve the towns in expensive law suits, with no necessary call for them.

It may be questionable whether "supplies furnished which were *suitable* to the condition of the pauper" be or be not precisely those contemplated by the statute, when it says, "every town shall be holden to pay any expense which shall be *necessarily incurred for the relief* of any pauper." We are not disposed to make a narrow construction however, when the proper call exists for relief, after direct notice of necessary

aid required, has been given to the overseers, and they have neglected their duty. But upon what is now before us, we are satisfied that the exceptions must be sustained.

Verdict set aside and a new trial granted.

THEODORE HOPKINS *versus* MOSES HERSEY.

A judgment in trover without satisfaction against one trespasser, is no bar to an action against another person for a distinct trespass upon the same property, committed at a different period and not jointly, although a writ of execution may have issued upon the judgment.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Trover for a pair of oxen. The parties agreed upon a statement of the facts.

The plaintiff was owner of the oxen and leased them to William Barton and Levi Annis; William Barton sold them to Joseph Barton, Joseph Barton to Justus Hersey, Justus Hersey to the defendant, and the defendant to John Chapman. All these sales were made prior to the commencement of this action. William Barton had no authority to sell the oxen, and the plaintiff has never assented to that or any subsequent sale of them, and never parted with his property in them, unless by operation of law from the further facts to be stated.

This suit was commenced April 5, 1838. The plaintiff brought an action of trover for the oxen against Chapman, who had purchased them of the defendant and then claimed to be the owner of them, and at the October Term of the Court of Common Pleas, 1837, recovered judgment against him for the value of the oxen. After the commencement of this suit, June 20, 1838, an execution was issued on that judgment, and delivered to an officer for collection who returned it in no part satisfied, and the judgment has never been satisfied or discharged. The defendant commenced a suit against Joseph Barton to recover the money paid for the oxen by the

defendant; then the defendant told Barton he would discharge the suit, if he would settle with Chapman and pay him, and thereupon Barton did settle with Chapman, and the defendant discharged Barton. The suit against Barton was brought after the plaintiff had claimed the oxen, and after he had recovered judgment against Chapman. The demand on the defendant was made after his sale to Chapman.

If the Court should be of opinion, that the plaintiff was not entitled to maintain his suit, he was to become nonsuit, but if entitled to recover, the defendant was to be defaulted.

The district Judge decided, that the action was maintained; and, as the law then was, the case could not be carried to this Court by appeal, the defendant filed exceptions.

W. Kelly, for the plaintiff, said that the question submitted in this case was, whether the plaintiff had lost his remedy by bringing an action of trover against another trespasser, and recovering judgment against him, without satisfaction, the trespasses being several and not done in concert. There is a decision in this State, 5 Greenl. 147, intimating that a judgment and execution issued thereon would be a bar. Here no execution had issued, when the suit was brought. This case does not therefore fall within that decision. The decision however was founded on an English decision, which has since been overruled. The weight of authority is decidedly in favor of the position, that a judgment for damages against one trespasser, without satisfaction, is no bar to a suit for a distinct trespass to the same property by another trespasser.

Selling the oxen was a conversion, and no demand was necessary.

W. G. Crosby, for the defendant, contended that a judgment in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff against another person for taking the same property. *White* v. *Philbrick*, 5 Greenl. 147, and cases cited in the opinion of the Court. 3 Stark. Ev. 1507.

There was no tortious taking in this case, and the demand on the defendant and his refusal, were no evidence of a con-

version, because the property was not then in his possession. 1 Camp. 439; 3 Stark. Ev. 1497.

The case shows that the plaintiff leased the oxen to Barton and Annis, but does not say for what time. The oxen then were rightfully in their possession, and the plaintiff had no right to the possession of them until a demand. At the time the defendant sold them, the plaintiff had done no act which revested the possession in him, and the demand on the defendant after he sold them was a mere nullity. *Vincent* v. *Cornel*, 13 Pick. 294.

The opinion of the Court was by

Weston C. J. — Whether a recovery, by judgment in trespass or trover, of the value of a chattel, does by implication of law amount to a transfer of title to the defendant, or those who held under him, without payment or satisfaction of the judgment, is a question, in regard to which there is a conflict of authority. *Brown* v. *Wotton*, Cro. James, 73; *Adam* v. *Brougton*, 2 Strange, 278; *Murrell* v. *Johnson*, 1 Hen. & Munf. 450, and *Floyd* v. *Browne*, 1 Rawle, 121, establish the position, that a change of title is effected by the judgment, without satisfaction. And the law is so laid down in 1 Chitty's Pl. 76, and in 3 Dane, c. 77, art. 1, § 2. That satisfaction of the judgment, is what constitutes a bar of another action, is deducible from *Moreton's* case, Cro. Eliz. 30, from *Curtis* v. *Groat*, 6 Johns. 168; *Osterhout* v. *Roberts*, 8 Cowen, 43, and *Sanderson* v. *Caldwell*, 2 Aiken, 195. And this opinion is sustained by Sergeant Williams in his notes, 2 Saund. 148, b. And in the Touchstone it is said, that if one recovers damages of a trespasser for taking his goods, the law gives him the property of the goods "because he hath paid for them," Shep. Touch. title Gift. Chancellor Kent holds it to be the more authoritative and reasonable opinion, that a collateral concurrent remedy is not barred, until satisfaction is obtained; although he admits that it yet remains an unsettled and vexed question. 2 Kent's Com. 387.

The subject is discussed at some length in *White* v. *Philbrick*, 5 Greenl. 147. It was there decided that a judgment in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff against another person, for the same taking, which was the foundation of the action of trover. This was decided upon the ground, that although co-trespassers are severally liable to the action of the party injured, yet when he obtains judgment against one of them, and *sues out execution*, this is an election *de melioribus damnis*, and bars him from proceeding against the others. Kent C. J. in *Livingston* v. *Bishop*, 1 Johns. 290, intimates that such might be the effect of suing out execution, as does Thompson J. in *Thomas* v. *Rumsey*, 6 Johns. 26.

In the case of *Osterhout* v. *Roberts*, before cited, although the Court hold that it is satisfaction of the judgment which transfers the property, they approve of the intimation in 1 Johns. 290, that a several judgment against one joint trespasser is no bar to a recovery of judgment against another; but if the plaintiff has made his election, by suing out execution, he shall not proceed against another. But in that case the Court say further, "this does not impair, or in the least interfere with the principle, that when a recovery is had against a party, not a joint trespasser, either in an action of trespass or trover, nothing short of satisfaction will change the property of the article, for which damages are sought to be recovered." In *White* v. *Philbrick*, the defendant was a co-trespasser with him against whom the former judgment was rendered, and the decision there is limited to co-trespassers.

In this case, the several persons, who interfered with the plaintiff's property, as appears by the exceptions, did so successively, at different periods, not jointly at the same period. The defendant, when he purchased and took possession of the plaintiff's oxen, without right, became thereby liable to be charged in trover by the plaintiff. So did Chapman, who afterwards purchased and received them of the defendant.

And we are of opinion, that the judgment, in favor of the plaintiff against Chapman, although a writ of execution has issued thereon, is no bar to the present action.

Exceptions overruled.

JOHN DICKEY, JR. *versus* JAMES LINSCOTT.

In a contract for the performance of personal manual labor for a stipulated time, requiring strength and health, it must be understood to be subject to the implied condition, that strength and health remain. An actual inability to perform the labor, arising from sickness, at the commencement of the time, although it may not continue during the whole term contracted for, excuses performance.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit to recover damages for a breach of a parol contract to labor for the plaintiff.

The plaintiff called a witness, who testified that on Nov. 30, 1838, he was present at a meeting of the parties, when it was agreed between them, that the defendant should come to work for the plantiff in two weeks from that time, and work for him seven months, which it was calculated would bring it to the next haying time, and that the plaintiff should pay him therefor at the rate of thirteen dollars per month. The defendant did not come at the time fixed upon, or any other time, to work for the plaintiff. There was testimony relative to the amount of damages. The defendant then introduced testimony tending to show, that no contract was completed, but only talked of, and that at the time when he was to commence work for the plaintiff, and from that time until the first of the then next April, he was sick and unable to work. Upon this point there was much contradictory testimony, and the question whether he was sick and unable to work, or not, was submitted to the jury, the defendant contending that by such sickness and inability, he was discharged from the contract, if the jury should be satisfied any had been made, by the act of God. There

was evidence tending to prove, that about Dec. 10, the defendant set out to go to work for the plaintiff, but did not go, because he was informed that the plaintiff had hired another man, and told the persons to say to the plaintiff, that if he would come or send to Palermo, the place of defendant's residence, a distance of eighteen miles, the defendant would go and work with him, if he had not hired another man; and that the plaintiff did go for that purpose. There was also testimony tending to show, that the defendant was unable to work at this time, and offered to procure another man, if the plaintiff would secure the payment, and that the plaintiff refused to give security. There was testimony, that the defendant was able to labor as early as the first of May, and did actually work at high wages in the month of June.

The counsel for the plaintiff contended, that if the jury should be satisfied, that the defendant was prevented by the act of God from laboring as he had agreed, still the plaintiff was entitled to recover some damages, if they believed that the defendant sent to the plaintiff the message to come after him, and that the message was delivered, and that the plaintiff did thereupon go for the defendant, although the defendant was at the time unable to work; and also, that it was the duty of the defendant, as soon as he regained his health so as to be able to work, if it was within the seven months, to tender his services to the plaintiff, and that by neglecting so to do, his sickness during a portion of the time did not constitute a bar to the action; and that it was his duty to have given notice to the plaintiff of his inability to commence work at the time agreed upon.

The Judge declined to give this precise instruction, but did instruct the jury, that if they were satisfied that the contract alleged was made by the defendant and completed by him, the plaintiff would be entitled to recover of him such damages as from the evidence they should be satisfied, he had sustained from the violation, unless he was excused from its performance by the act of God; and that so far as they should be satisfied that the defendant had been disabled from performing the con-

tract, if made, by sickness, to that extent he would by law be excused from performance.

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

W. G. Crosby, for the plaintiff, complained of the instruction given in the District Court for two reasons.

1. It was no answer, and had no application to the point raised.

2. The instruction given was erroneous in law.

He cited 3 Burr. 1637; 3 M. & Selw. 267; 6 D. & E. 750; 3 East, 233; 3 Dane, 601, § 4; 8 D. & E. 259; Chitty on Con. 273; *Train* v. *Gold*, 5 Pick. 384.

W. Kelly, for the defendant, said that the Judge did right in refusing to give the instruction requested. A contract to work seven months is an entire contract, and to be performed fully, or in no part. *Stark* v. *Parker*, 2 Pick. 267.

The instruction given was too favorable for the plaintiff. He was allowed by it to recover for any damages sustained by the omission of the defendant to work during any part of the seven months, if not prevented by the act of God. But if the defendant was unable through sickness to work at the time he was to commence his labor, he was excused from the performance of any part of it.

The opinion of the Court was by

Weston C. J. — It is contended, that the sickness of the defendant, which was the act of God, and his consequent inability to fulfil his contract, does not defeat the right of the plaintiff, to recover damages for the breach. Cases have been cited where, upon express covenants, the performance of which had become impossible, without any fault in the covenanters, they were nevertheless held answerable in damages. These were doubtless all justified, under their peculiar circumstances. But in a contract for the performance of personal manual labor, requiring health and strength, we think it must be understood to be subject to the implied condition, that health and

strength remain. If by the act of God, one half or three fourths of the strength of the contracting party is taken away, performance to the extent of his remaining ability, would be hardly thought to entitle him to the compensation for which he may have stipulated, while an able bodied man. There may be cases where the hazard of health is assumed by the employer. This might be regulated by known and settled usage. Generally, however, the right to wages depends upon the actual performance of labor. On the other hand it is not expected, that the laboring party should be subjected to any other loss, where his inability arises from the visitation of Providence.

The Judge instructed the jury, that this would excuse performance; and it does not appear, that the counsel for the plaintiff contended at the trial for any other doctrine. He insisted, however, that he was entitled to damage, for his fruitless journey to Palermo, on the invitation of the defendant. It is a sufficient answer to this claim, if otherwise available, that it is not sued for in this action. It seems from the evidence, that the defendant might have labored a month or two the latter part of the stipulated period. But the contract was entire, beginning at a time when the days are shortest, and covering principally the season when the earth cannot be cultivated. The wages were to be at a certain monthly rate. The contract failing without the fault of the defendant, it would be neither just nor equitable, to hold him obliged to labor for the plaintiff, at the monthly wages stipulated, when the days were longest, and labor in husbandry most valuable. The plaintiff was not obliged to accept such a partial performance. He had a right to secure the services of another man, and might have had as many laborers as it was for his interest to employ. And in our judgment, the court below was justified in withholding the instructions requested.

Exceptions overruled.

William Starrett *versus* John Barber, Jr. *& al.*

Where a note was made by one as principal, and others as sureties, payable to a person from whom it was then expected that money might be received therefor, but who declined to furnish it, and the sureties consented that the note might be passed to any one who would advance the money, it is available against them for the benefit of such person, in an action in the name of the payee with his assent.

Where property is put into the hands of the payee of a note by the principal promisor as collateral security therefor, it is received by him under an implied obligation to account for the proceeds. And whatever expense is necessarily incurred by him in asserting his title, or in rendering it available, is a fair charge upon the property, and the balance only is to be applied to the payment of what is due.

And if in a suit in relation to such property by the payee of the note, he calls the principal promisor as a witness, and releases him from the warranty of title to the property, implied in the bill of sale, such release does not discharge the principal or sureties.

Where money is paid, the right of appropriation belongs to the debtor; but if he makes no appropriation, it belongs to the creditor to determine to what debt a payment shall be applied, to be exercised within a reasonable time after payment.

If the creditor holds two notes, and an unappropriated payment is made amounting to enough to pay one of them, his bringing a suit on one of the notes is an election to appropriate the money to the payment of the other.

Exceptions from the Eastern District Court, Chandler J. presiding.

Assumpsit upon a promissory note given to William Starrett by John Barber, Jr. as principal, and the other two defendants, Lothrop and Woodman, as sureties. The note was introduced in evidence, and the plaintiff there rested his case.

The defendants then called a witness, who testified that after the commencement of this suit, on inquiry about the note, Starrett told him, that he, Starrett, had not and never had any interest in the note, and that Aaron Davis was prosecuting this suit to recover the amount thereof, which had been loaned to Barber on the note; that Barber wished to obtain a loan of money, and for that purpose, the note in suit to Starrett, and another payable at a different time, were made, under the expectation of receiving the money of him, but Starrett did not

furnish it; that he afterwards applied to Davis, who loaned the money, and received the notes, and as security therefor a bill of sale made by Barber to him of a certain quantity of logs; that a controversy arose about the logs, and a suit was brought by Davis therefor, wherein he finally prevailed, and recovered a sum of money, but not to the amount of both notes, after deducting the expenses, but more than sufficient to pay either; that at the time the bill of sale was made, and the notes delivered over to Davis, it was agreed between him and Barber, that if he realized more from the notes and logs than the sum loaned, he should pay the balance to Barber; and that at the time of the trial of the action respecting the logs, Davis called Barber as a witness, and that on his being objected to as interested, the plaintiff released Barber, and he was permitted to testify. The terms of this release do not appear.

The defendants contended, that as it appeared in evidence that William Starrett had not and never had any interest in the note in suit, the action could not be maintained in his name.

Upon this point, the Judge instructed the jury, that if they were satisfied from the evidence that Starrett knew of and assented to the bringing of the action in his name, the action was maintainable, although he might not ever have had any interest in the note.

The defendants then contended, that Barber could not bind the other defendants, excepting according to the tenor thereof, and therefore was not authorized to dispose of the note to any other person than Starrett, in the absence of any testimony showing the assent of the sureties to the transfer of the note to Davis.

Upon this point, the jury were instructed, that if they were satisfied from the evidence, that it was the understanding between Barber and the sureties at the time of the making of the note, that it was to be thrown into the market, and used generally for the purpose of raising money, Barber had a right to dispose of it to whom he chose, or could procure the money from, and the sureties were bound by the transfer.

The defendants further contended, that inasmuch as Davis had received from the sale of the personal property more than sufficient to pay the amount of the notes, the defendants were entitled to have the same appropriated to the payment of the notes.

Upon this point, the Judge instructed the jury, that as to the expense of recovering and taking care of the property to make it available for the purpose for which it was pledged, Davis was entitled to an indemnity from the property thus secured to him, and that the jury might cast interest on the sum loaned to the time of the first payment, deduct therefrom (principal and interest,) the amount paid, cast interest on the balance to the time of the next payment, which deduct from principal and interest added, and return a verdict for the balance, if any, they found to be due, after deducting the amount realized from the pledged property, less the expense incurred by Davis in taking care of and preserving the property.

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

W. G. Crosby, for the defendants, admitted that the first objection was untenable.

The second request for instructions should have been granted. *Allen* v. *Ayers*, 3 Pick. 298.

But the Judge erred in declining to give the instruction requested on the third point, and in giving such as he did.

The general rule of law is, that where the payment made is capable of different applications, the party who pays the money has the power to apply it as he chooses; but if he does not apply it, the party who receives it may make the application. 2 Pothier on Obl. 45; 1 Wash. C. C. R. 133. This application may be made by the person paying at any time before the appropriation is made by the party receiving it. 7 Wheat. 20; 2 N. H. R. 196.

The release to one discharges the whole. *Walker* v. *McCulloch*, 4 Greenl. 421.

Williamson, for the plaintiff, considered that the money was appropriated to the payment of one note by the plaintiff, and the balance only is claimed. The right to do this is admitted. The expenses of the suit were to be deducted on every principle of justice and equity.

The release to Barber was a mere release of his liability on the bill of sale of the logs claimed in that suit, and was in no respect a release of his liability on the note. *Bank of Chenango* v. *Hyde*, 4 Cowen, 567.

The opinion of the Court was by

Weston C. J. — The counsel for the defendants waives his objection, taken at the trial, of a want of interest in the nominal plaintiff. If the sureties consented, that the note might be passed to any one, who would advance the money, which the jury have found, it was available against them, although not taken by the payee, named in the instrument.

The property put into the hands of the plaintiff, by the principal debtor as collateral security, was received by him under an implied obligation to account for the proceeds. Whatever expense was necessarily incurred by him in asserting his title, or in rendering it available, would be a fair charge upon the property. Whatever he realized and no more, if he conducted faithfully, he was bound to apply to the payment of what was due to him from the defendants.

It is said that the release given to Barber, extinguished any further claim, on the part of the plaintiff. The controversy in relation to which the release was executed, was in reference to the title of the plaintiff to the logs, which formed the principal part of his collateral security. It discharged Barber from the warranty of title, implied in his bill of sale. The utmost extent to which it could be carried is, that it should be the same thing to Barber, whether the title under him was sustained or not; and that he would account with him for the logs, whatever might be the termination of that suit. This would remove any interest which Barber had in the result, which was the

object of the release. And it ought not to be construed to extend further.

A question is raised as to the right of appropriation of the money received. This belongs to the debtor. But if he makes no appropriation, it will generally be in the power of the creditor to determine to what debt a payment shall be applied. *Simson* v. *Ingraham*, 2 Barn. & Cress. 65; *Hilton* v. *Burley*, 2 N. H. R. 193. In *Harker* v. *Conrad*, 12 Serg. & Rawle, 301, the same general doctrine is recognized. But in the last case it was held, that the right of appropriation by the creditor should be exercised within a reasonable time after payment, and by the performance of some act, which indicates an intention to appropriate. The plaintiff did not obtain execution on his judgment in his suit for the logs until July term, 1837. It was returnable at the December term following. When the money was collected does not appear. Assuming that it was realized on the return day of the original execution, an action was instituted on the note now in suit, in somewhat less than three months afterwards. This may be regarded as an election to apply the payment to the extinguishment of the other note, and a claim to recover what was unpaid on the note in suit. The debtor had made no appropriation. The election of the defendant to claim this as a subsisting note, not wholly paid, was virtually an appropriation of the moneys received, as far as necessary to the payment of the other. The suit was a sufficient indication of his intention, which we think was manifested within a reasonable time; especially as the delay occasioned no injury or prejudice to the creditor. We sustain the opinion of the presiding Judge, as in accordance both with the law and justice of the case.

Exceptions overruled.

EDWIN CHICK *versus* HENRY S. TREVETT *& als.*

The performance of labor for an association, is a good consideration for an express promise in writing to pay therefor, made by one of the members.

The defendants, being members of an unincorporated association for building a parsonage house, made to the plaintiff an instrument in these terms: "*For value received of E. C. we, the trustees of the M. E. Society for building a parsonage house on the F. circuit, promise to pay him or order fifty-one dollars and seventy-seven cents and interest in one year from date.*

"H. S. T. } *Trustees*
"W. H. } *of*
"R. T. } *said House.*"

It was held, that they were personally liable, there having been no plea in abatement, that others should have been joined.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit upon an instrument made by the defendants in these terms: —

"Frankfort, Dec. 25, 1837.

"For value received of Edwin Chick we the trustees of the M. E. Society, for building a parsonage house on Frankfort circuit, promise to pay him or order fifty-one dollars and seventy-seven cents and interest in one year from date.

"HENRY S. TREVETT, } *Trustees*
"WILLIAM HOLMES, } *of*
"RICHARD TREVETT, } *said House.*"

The parties agreed upon a statement of facts.

The defendants signed the paper declared on, having with others in that neighborhood, voluntarily associated together for the purpose of building a parsonage house at the place and for the purposes mentioned in the instrument. They "were not incorporated nor recognized in law as an incorporated society." The house was built by the association. Work and labor were performed upon the house by the plaintiff as a house carpenter, "for which this memorandum in writing signed by said Trevett *& als.* was given as evidence of his claim therefor."

If the action could be maintained, and in its present form,

the defendants were to be defaulted; and if not, the plaintiff was to become nonsuit.

The Judge ruled, that the action could be maintained, and the defendants filed exceptions.

Kelly, for the plaintiff, argued that the defendants had promised in their own names, and signed the note in their own names, and for the benefit of a mere voluntary association of which they were members. The designation of trustees can make no difference. They do not act as public agents, but for themselves, and are personally liable. There is much apparent conflict in the cases in relation to the liability of agents. They may be reconciled by keeping this principle in view. When the persons signing are acting merely as the agents of others, having no personal interest, they have been holden not to be liable. But when they have themselves an interest, and are parties with others, they are personally responsible. By referring to the cases commonly cited on this subject, it will be seen that they may all be reconciled upon this principle. *Andrews* v. *Estes*, 2 Fairf. 267; *Clap* v. *Day*, 2 Greenl. 305; Story's Eq. Pl. 118; *Tippets* v. *Walker*, 4 Mass. R. 595; *Sumner* v. *Williams*, 8 Mass. R. 162; *Thatcher* v. *Dinsmore*, 5 Mass. R. 299; *Tucker* v. *Bass*, 5 Mass. R. 164; *Forster* v. *Fuller*, 6 Mass. R. 58.

No action would lie against the defendants for assuming to be agents, because they were agents.

Pierce, for the defendants, contended that the action could not be maintained, because no consideration passed to the defendants.

Because the defendants cannot be holden personally in this action. *Andrews* v. *Estes*, 2 Fairf. 267.

And because this is not the right form of action. A special action on the case, if any, should have been brought against the defendants. *Ballou* v. *Talbot*, 16 Mass. R. 461.

The opinion of the Court was by

Weston C. J. — One objection taken to the liability of the defendants on the note, is the alleged want of consid-

eration. It is not necessary that this should enure to their benefit. A loss or damage to the promisee, is as good a legal consideration, as a benefit to the promisor. They promised to pay the plaintiff, for labor performed or to be performed, for the association. This was a loss to the plaintiff amply sufficient to sustain their promise, if they had not been members of the association.

It is further insisted, that as they signed as trustees, their personal liability is excluded. If this designation indicates a mere agency, and they had authority from their principals, they are not personally bound. And if in such case, they had acted without authority, the apt remedy would have been an action on the case. *Ballou* v. *Talbot*, 16 Mass. R. 461. But the use of the term, trustees, indicates rather that the legal interest is in them, than that they act as mere agents. And if it is to be understood, that they represented a body of men who had voluntarily associated to build a meeting-house, the case finds, that the defendants were members of that body. In such case, they are properly made defendants, if the other members of the association might also have been joined. If they would have taken advantage of this objection, they should have pleaded in abatement.

Exceptions overruled.

Joseph French *versus* Abiel McAllister & *al.*

If, to authorize an arrest of the body under the poor debtor acts of 1835 and 1836, it be certified upon the writ that the creditor made oath, "*that the debtor was about to depart and establish his residence beyond the limits of this State, with property or means more than sufficient for his immediate support,*" it must be regarded as equivalent to an oath, that he was to take with him such property or means, in the language of the poor debtor acts.

If one of the conditions of a poor debtor's bond be, "*and further do and perform all that is required in and by the acts in such case made and provided,*" this imposes the condition that he should abide the order of the justices before whom he should make his disclosure.

Where the justices of the peace and of the quorum, before whom a debtor, having been arrested upon a writ, and having given bond, had made a disclosure after judgment was rendered in the suit, made their order on Jan. 4, 1839, that the debtor might go at large upon the bond until the creditor should make his election to levy his execution upon the body of the debtor, or upon the property disclosed; and where the creditor had within thirty days of that time given the execution to the same officer who had made the arrest, and the officer had made his return, dated Feb. 5, 1839, thirty-two days after the order of the justices was made, "*that he had notified the bail of the debtor upon the original writ to deliver up his body, the creditor having elected to take the same within thirty days next after Jan.* 4, 1839, *but they have neglected so to do,*" and that he could find neither the property nor the body of the debtor within his precinct; in a suit upon the bond, *it was held*: —

That if the creditor should within thirty days elect to take the body of the debtor, it should be forthcoming to be imprisoned:

That it is fairly deducible from the statutes that the election to take the body should be made within thirty days, although it may not be necessary to give notice to the sureties on the bond to produce the body of the principal within that time, if the execution remain in force:

That such bond is subject to chancery:

And that where no extenuating circumstances appear, the measure of damages would be the amount of the execution, interest, and costs.

Exceptions from the Eastern District Court, Chandler J. presiding.

Debt upon a bond given to the plaintiff by A. McAllister, as principal, and J. C. and T. McAllister, as sureties, dated June 6, 1838, with the condition, "that whereas the said Abiel was on said 6th day of June, arrested at the suit of said French by force of a writ of attachment bearing date the fifth day of June, 1838, returnable to the S. J. Court on the first Tuesday

of July, 1838, now if the said Abiel shall within fifteen days after final judgment against him in that suit, notify the said French to attend to the making of such disclosure and the taking of the oath provided in and by the act for the relief of poor debtors, and further do and perform all that is required in and by the acts in such cases made and provided, then said bond is to be void."

The parties agreed to a statement of facts. The plaintiff made an affidavit on the writ, "that the principal debtor was about to depart and establish his residence beyond the limits of this State, with property or means more than sufficient for his immediate support," and Abiel McAllister was arrested thereon, and to procure his release therefrom, gave the bond in suit, as principal, with the other defendants as his sureties. Judgment was rendered in the action in favor of the plaintiff on Dec. 21, 1838, and execution issued thereon on the 26th of the same month.

On Dec. 26, 1838, Abiel McAllister served upon the plaintiff a notice to attend on Jan. 4, 1839, at a place stated, where he proposed to make "a disclosure of the actual state of his business affairs, and submit himself to examination under oath before two justices of the peace and quorum, in conformity with the bond given on his arrest on mesne process, that the said French might attend the making such disclosure and taking such oath as is provided in § 7 of an act supplementary to an act for the relief of poor debtors, passed April 2, 1836."

On Jan. 4, 1839, at the place stated in the notice, A. McAllister submitted himself to examination before two justices of the quorum, who proceeded to his examination; and upon his disclosure in writing, it appeared to them, that he was the owner of real and personal estate and choses in action, and on the same day, Jan. 4, 1839, they made the following adjudication: —

"Upon the foregoing disclosure, it is ordered by the justices before whom the same was made, that the said Abiel McAllister go at large upon the bond given at the time of his arrest, until the creditor shall make his election to levy his execution

upon the body of said McAllister, or upon the property by him disclosed, as is provided in the eighth section of an act entitled an act supplementary to an act for the relief of poor debtors, passed April 2d, 1836. Within thirty days from that time, the plaintiff delivered his execution to a deputy sheriff of said county, the same officer who made the arrest upon the writ, with orders to arrest the body of Abiel McAllister.

The deputy sheriff made this return upon the execution: — "Waldo ss. Feb. 5, 1839. By virtue of the within precept, and in obedience to the orders of the within creditor, I have made diligent search for the property and body of the within named McAllister, but could find neither within my precinct; and I have notified the bail of said McAllister upon the original writ to deliver up his body, the creditor having elected to take the same within thirty days next after the fourth day of January last past, but they have neglected so to do.

"John W. Sherwood, deputy sheriff."

The judgment still remains unreversed, and the execution unsatisfied.

If upon the facts the plaintiff was not entitled to recover, he was to become nonsuit; but if he was entitled to recover, the defendants were to be defaulted, "and judgment was to be rendered for the plaintiff for the amount of the execution, interest and costs."

The District Judge was of opinion, that upon the facts agreed, the bond was forfeited and ordered the defendants to be defaulted, and the defendants filed exceptions.

W. G. Crosby, for the plaintiff.

W. Kelly, for the defendants.

The opinion of the Court was by

Weston C. J. — The affirmation of the creditor, certified by the justice, is, that the principal debtor is about to depart and establish his residence beyond the limits of this State, with property or means more than sufficient for his immediate support. This must be regarded as equivalent to an affirma-

tion that he was to take with him such property or means, in the language of the statute.

The Statute of 1835, c. 195, § 7, provides, that if in the opinion of the justices, the debtor shall not have entitled himself to the benefit of the oath, he shall be committed to prison, unless the creditor shall within thirty days elect to levy his execution upon the property disclosed. By the statute of 1836, c. 245, § 8, the debtor is permitted to go at large, until the creditor shall have made his election, whether to take the body or the property, which by the former statute must be done within thirty days. But as he was not to be committed at the time of his disclosure, the statute of 1836, § 3, required that the bond should be upon the further condition, that he should submit to an examination, make disclosure under oath, and abide the order of the justices.

The condition of the bond in question is, that the debtor should notify the creditor to attend to the making of the disclosure and the oath, and that he should further do and perform all that is required in and by the acts in such cases made and provided. This does by an intelligible reference to a public law, impose the condition, that the debtor should abide the order of the justices. Their order was, that he should go at large, until the creditor should make his election to take the body or the property. As his enlargement was to be only until the election was made, the necessary implication is, that if within thirty days he should elect to take the body, it should be forthcoming, to be taken and imprisoned. The statute of 1835, § 7, gives the creditor a lien upon the property disclosed, for the space of thirty days, but his right to the body of the debtor is not restricted to that period. If the enlargement of the debtor may be justified, until notified of the election of the creditor, neither of the statutes makes provision for such notice. We are aware therefore of no just reason why it might not be given after thirty days, if the execution remained in force. It is fairly deducible from the statutes, that the election should be made within thirty days. This the creditor did, and within that time put into the hands

of the proper officer his execution, with orders to take the body of the debtor.

The debtor, with the aid of his sureties, had obtained an indulgence. Its limits were fixed by law. They knew when the thirty days would expire. If they might remain passive, until called upon, and the officer had given them a further indulgence of two days, we find no authority for discharging them from the obligation of their bond. They should then have produced the body, that it might be taken and imprisoned under the execution.

By the return of the officer, under date of the fifth of February, 1839, it appears that he had made diligent search for the body of the debtor, without being able to find it, and that he had called upon the sureties to deliver it up, notifying them that the creditor had elected, within thirty days from the disclosure, to take the body, but that they neglected to comply with his demand. If this notice and demand is not to be referred to an earlier day, and was necessary to charge the defendants, we cannot say that it was too late. And upon a view of the whole case, it appears to us, that the plaintiff is entitled to recover.

The bond is subject to chancery, as was decided in *Wilson* v. *Gillis & al.* 15 Maine R. 55. But no facts are here agreed, from which it can be deduced that the creditor's damages should be reduced below the amount of his execution, interest, and costs. That was allowed as the measure of damages, in *Cordis & al.* v. *Sager & al.* 14 Maine R. 475, where no extenuating circumstances appeared.

Exceptions overruled.

The State *versus* The President, Directors and Company of the Waldo Bank.

If the treasurer of the State, by mistake, take from a bank a sum less than the amount of the tax, and give therefor a receipt "in full for the semi-annual tax on the capital stock of said bank which became due" on a certain day, the State is not thereby barred from recovering the just amount.

On the petition of the Waldo Bank, the legislature accepted a surrender of their charter, and declared that it should terminate when the act should take effect, on March 25, 1838, but also provided in the same act, "that the said bank shall continue in its corporate capacity for and during the term of two years from the time this act shall take effect, for the sole purpose of collecting the debts due the corporation, selling and conveying the property and estate thereof, and shall remain liable for the payment of all debts due from the same, and shall be capable of prosecuting and defending suits at law, and for choosing directors for the purpose aforesaid, and for closing its concerns." The bank continued to transact ordinary banking business until March 25, 1838, and no longer, and on the thirty-first day of the same month, fifty per cent. of its capital was divided among the stockholders. *It was held*, that the bank was liable to pay the tax for the six months commencing October 1, 1837.

Where the action was rightfully commenced against the bank, and a statement of facts was agreed upon between the parties and signed by their counsel, while this Court was in session and during the continuance of the charter, and no law term of the Court was holden in the county until after the charter had terminated, the Court, on motion of the plaintiff, ordered judgment to be rendered as of the term when the facts had been agreed upon.

Assumpsit to recover the amount of taxes alleged to be due from the bank to the State. The parties, by their counsel, agreed upon a statement of facts.

The Waldo Bank was incorporated Feb. 11, 1832, with a capital stock of $50,000, and commenced the business of banking under the charter on May 15, 1832, but fifty per cent. of the capital being at that time paid in. Within thirty days after the first Monday of October, 1832, when the whole amount of the capital had been paid in, October 16, 1832, they paid a tax to the treasurer of the State of $93,84; and on April 24, 1833, another tax of $250; and on November 1, 1837, another tax of $250. Receipts were given for each of these sums by the treasurers, or their clerks, "in full for the

semi-annual tax on the capital stock of said bank, which becomes due" on the first Monday of October, 1832, the first Monday in April, 1833, and on October 1st, 1837, respectively. The sum total of taxes paid by the bank, inclusive of these sums, was $2593,84. On August 7, 1837, the stockholders of said bank, by vote, authorized the directors to adopt measures for settling up and closing the business of the bank. The directors applied to the Legislature at the next session to accept a surrender of the charter of the bank, and to authorise them to close their concerns and divide the capital stock. The application was followed by an act accepting the surrender of the charter, which took effect on March 25, 1838. The bank transacted the business of banking under this charter in the usual way to March 25, 1838, but no longer. No tax has been paid since Nov. 1, 1837. On March 31, 1838, fifty per cent. of the capital stock of the bank was divided by the directors among the stockholders, and an order was passed to pay out the same to the several persons holding stock at that time.

The State claimed the tax alleged to have accrued on their capital stock of $50,000, since the first Monday of Oct. 1837, to the close of the time the bank was liable to pay the tax, and also the deficiency of a former tax not wholly paid. The Court were to order a nonsuit or default and enter judgment according to law.

The statement of facts was agreed upon and signed by the counsel for the parties at the December Term of the Supreme Judicial Court in this county, 1839, holden by one Judge.

At next law term in this county, holden in July, 1840, the same counsel for the bank by whom the statement of facts was signed made a written suggestion, that since the last term of the Court, the corporation, called the President, Directors and Company of the Waldo Bank, was dissolved by the expiration of the time limiting the continuance of the bank in its corporate capacity, fixed by the act of March 20, 1838.

Emery, Attorney General, for the State, moved for judgment as of December Term, 1839.

The Reporter was absent during the argument of this case, at the July Term, 1840, and has unexpectedly failed of receiving a sketch of the points made and authorities cited.

Emery, Attorney General, for the State.

White and *W. Kelly*, for the bank.

The opinion of the Court was by

EMERY J. — If the Waldo bank owed nothing to the State payable within ten days after the first Monday of April, 1838, this action cannot be maintained. And this is the position assumed by the defendants.

By the second section of the act, c. 456, which took effect on the 25th of March, 1838, accepting the surrender of the bank's charter, it is provided, that the bank shall continue in its corporate capacity for and during the term of two years from the time the act shall take effect, for the sole purpose of collecting the debts due the corporation, selling and conveying the property and estate thereof, *and shall remain liable for the payment of all debts due from the same*, and shall be capable of prosecuting and defending suits at law, and for choosing directors for the purpose aforesaid, and for closing its concerns.

The statute of January 23, 1821, c. 144, enacted "that the corporation of each and every bank within this State which now is or which shall hereafter come into operation, shall within ten days after the first Mondays of October and April annually, pay to the treasurer of the State, for the use of the same, a tax of one half of one per cent. on the amount of such part of the original stock as shall have been actually paid in by the stockholders in the respective banks; provided, that when the amount of the capital stock actually paid in on the said days, should not have been paid in for the full term of six months then next preceding, said bank corporation are hereby required to pay such portion of the sum of one half of one per cent. on such proportion of capital stock as shall have been paid in for the full term of six months next preceding, as the time from the payment of such portion of such capital stock to the

day when such payment of such tax shall become due may bear to the term of six months."

By the act to regulate banks and banking, c. 519, passed the 31st of March, 1831, the 16th section provides, that "*every bank shall annually pay to the treasurer of the State for the use of the same, a tax of one per centum upon the amount of its capital stock paid in,* one half of which shall be paid within ten days after the first Monday of October, and the remainder within ten days after the first Monday of April in each year. And if any bank shall neglect to pay the aforesaid tax in the space of thirty days after the same shall become due, it shall be the duty of the treasurer to issue a warrant of distress directed to the sheriff of the county in which such bank is located, or his deputy, commanding them to levy and collect the sum due from the estate and effects of such bank, which warrant shall be in the same form, *mutatis mutandis*, as warrants of distress against delinquent sheriffs are directed by law to be issued."

This act did not take effect till after the first day of October, 1831.

By the 5th section of the act to incorporate the Waldo Bank, passed Feb. 11, 1832, c. 234, it is made subject to all the duties and liabilities specified in an "act to regulate banks and banking, passed March 31, 1831."

It is insisted on behalf of the bank, that inasmuch as the statute of 1831 did not retain that portion of the provision of the act of Jan. 23, 1821, which had been construed to authorize a proportionate taxation as to the time in which the corporation was operating on capital paid in for six months, as a banking company, but imposed the tax to be paid of one per centum, one half within ten days after the first Monday of October, and the remainder within ten days after the first Monday of April, in each year, and the State had accepted the surrender of the charter by an act which took effect the 25th of March, 1838, the liability of the bank for the portion of the tax after Oct. 1, 1837, was annulled, because the ten days after the first Monday of April in the year 1838, had not arrived,

nor had even the first Monday of April, 1838, arrived, before the acceptance of the surrender. And no reservation was made in that act of the liability of the bank to the tax, as there was in the act revoking the charter of the Winthrop Bank, c. 500, passed Jan. 30, 1828. It is true, there is a provision in that act, "that nothing therein contained shall be construed or deemed to impair or annul the right of the State to exact payment of the arrears of taxes from said bank which may be due up to the 30th day of June, 1828." A similar provision was made in the act of March 20, 1821, c. 84, respecting the Castine Bank, "as to arrears of taxes then due from that bank to the State." And the like provision was retained in the act, c. 486, revoking the charter of the Passamaquoddy Bank, passed Feb. 23, 1827.

The defendants call our attention to 1 Bl. Com. 484, 485, where it is asserted that "the debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot receive or be charged with them in their natural capacity, and that it may be dissolved by surrender of its franchises into the hands of the king, which is a kind of suicide." This is rather a figurative expression, and like most rhetorical descriptions, may not, as applied to the present case, be entirely correct. It is not the only one in the beautiful writings of Blackstone, which will justify this criticism.

The bank contends, that although payment might have been made in 1832, *pro rata*, as to capital paid, in the treasurer's mode of calculation, yet there is no *pro rata* provision as to time; that on the first Monday of April, 1838, there remained only fifty per cent. of the capital paid in, the directors having divided fifty per cent. of the capital stock on the 31st of March, 1838. And it is urged, that "by accepting the surrender of the charter, the authority of the treasurer to collect the tax became null, and there was none due; that the tax did not accrue till the first Monday in April, when the bank was not in existence; that the tax was a bonus. If any could be claimed, it could be only on one half; and if the treasurer took $90

instead of $125, it was his fault, and the defendants are discharged."

What prevented the treasurer from issuing his warrant of distress, we are not informed. That has, at least in one instance, before the separation, been the way in which the right to a tax has been brought before the judiciary. *Portland Bank* v. *Apthorp*, 12 Mass. R. 252. In this case, a more lenient course is adopted. For the State has become complainant against the bank for remissness in duty.

Some of the arguments and suggestions on the part of the defendants, proceed, as we apprehend, upon wrongly assumed principles. Though possibly they may not be destitute of some darkly shadowed analogies to cases arising upon rents and annuities. Thus, it was once held that if a tenant for life made a lease for years, and died the day before the rent was due, the rent was lost both to the executor and reversioner, and equity would not relieve. Though it was admitted to be a hard case, because the tenant had enjoyed the land out of which the rent issued.

The rule with respect to dividends in the public funds, which are made payable on certain days like rent, is that there shall be no apportionment in respect of time, for being one contract and one debt, it cannot be divided. *Clun's* case, 10 Coke, 128; 1 Salk. 66. And these dividends go to the person to whom they are due at the time. And if a person having a life interest die between the times when they are payable, there cannot be any apportionment. 2 Ves. 672; 1 Saund. 287, n. 17; 3 Atk. 260.

All banking charters are contracts between the State and the corporations who accept them. *The stipulation in the act* that a tax of one per cent. on the capital paid in, to be paid half yearly, *constitutes a debt of the highest order.* The stock actually vested is by force of the act of incorporation pledged for the payment of all the debts of the institution, and it ought not to be withdrawn until all such debts are paid. *Spear* v. *Grant*, 16 Mass. R. 9.

The debt of the bank was perfect, to be paid within 10 days after the first Monday of April, 1838. And though the charter was surrendered and accepted so far as discounting notes was concerned, it was still *continued a corporation for the purpose of paying its debts and closing its concerns.* The suicide was not complete.

Whatever of precaution the legislature might see fit to introduce into the acts relating to the Winthrop Bank, the Castine Bank, and the Passamaquoddy Bank, we see no reason to condemn. But we must consider that the omission of the like qualification in the Waldo Bank, did not release the corporation from the obligation to pay the tax due, and payable in ten days after the first Monday of April, 1838.

The tax attaches on the commencement of each year. The times of payment are arranged for mutual convenience. Such questions as have arisen, and may arise as to rents and annuities, cannot fairly arise on this subject. The State lives, though its vigor may be greatly impaired, if its revenues, which indeed contribute to its maintenance, are to be abstracted agreeably to the speculations, or interest of those corporations, who have stipulated a contribution to those revenues, for privileges accorded to them. Whether it be wise in the Legislature to press these exactions to the extent of one per cent. per annum on the capital stock of banks paid in, or be judicious in such corporations to accept the privilege on those terms, considering the great losses to which they may be subjected from failures and bankruptcies of their debtors, and unfaithfulness in cashiers, and subjection to additional taxation for the shares as private property, still exposed to all these casualties, must be left to the State and the parties.

But this corporation was in existence on the first Monday in April, 1838, and long after. It is incompetent to the corporation to deny its existence against a statute of the government, passed too, for the convenience and accommodation of the defendants. *Foster & al.* v. *Essex Bank*, 16 Mass. R. 245.

We cannot accede to the correctness of the argument, that if by mistake the treasurer take from the bank less than its

proportion of tax, that the state is thereby barred from recovering the just amount. It would be substituting the erroneous acts or opinions of the treasurer or his clerks, for the rules prescribed by the law of the land.

The rights of the parties, as we conceive, stand upon entirely different principles from cases of a penalty imposed by a statute on a party for the commission of an offence. In such a case if the statute expire before judgment the penalty is gone.

And the old law as to annuities was, that if the annuity determines *pendente lite*, there shall not be judgment for the arrearages, for the writ fails forever. Co. Lit. 285, a.; 2 Lev. 51; Com. Dig. annuity, C.

And here at the July term, 1840, we are presented with the following, "*State of Maine* v. *Waldo Bank*. And now James White, who was originally retained in this action by the Directors of the Waldo Bank, suggests that since the last term of the Court, the corporation of the President, Directors and Company of the Waldo Bank is dissolved by the expiration of the time limiting the continuance of said Bank in its corporate capacity, in the act accepting the surrender of the charter of said bank, and continuing said bank in its corporate capacity for the term of two years which said act is dated March 20, A. D. 1838. "JAMES WHITE."

It is true that the act is dated as represented, and was then approved. The third section however, says that this act shall take effect and be in force from and after five days from the time of its approval by the Governor.

Whether the order of the Directors to divide fifty per cent. of the capital stock in six days after the act took effect, was in pursuance of a meeting and vote of the stockholders, is not communicated. Perhaps it was thought that the vote of the 7th of August, 1837, rendered it unnecessary. It is apparent the intention was not to delay them from the early enjoyment of this portion of their capital. And this division, which must have been on Saturday, left only the Sabbath intervening between that act and the first Monday in April, when the tax, as stated in one of the receipts introduced by the defendants,

would become due. For all practical purposes beneficial to the institution contemplating a division of the capital, it would seem that the interest on loans for the then last six months must have been realized, and that the claim of the State would be expected to be discharged the next Monday, certainly within ten days after that time. And we must suppose that the proper steps have been adopted by the corporation, by a just appropriation of a portion of their funds to meet so just a demand as that of the plaintiffs.

The case comes before us on a case stated and agreed in this Court at the December term, 1839. And the conclusion says, "The Court are to order a nonsuit, or a default, and judgment for the State agreeably to law."

The suggestion now presented by the original counsel for the defendants, is intended to show that no judgment can be rendered against the defendants. The Attorney General protests that this would not be treating the State fairly, and moves for judgment as of December Term, 1839.

In a case like the present, coming before us on a case agreed by the parties as to an action which was rightfully commenced, and correctly pending when the agreement was signed, and no law term afterwards was holden in the county till July, 1840, which shews that the plaintiffs are not in fault, we must sustain the motion of the Attorney General.

In a case so pending where an individual defendant had died, we should consider it an incumbent duty of the Court to take care that the rights of the parties should not suffer. And the judgment should be rendered as of December Term, 1839. The following cases, *Percy* v. *Wilson*, 7 Mass. R. 393; *Brown* v. *Penobscot Bank*, 8 Mass. R. 445; *Patterson & al.* v. *Buckminster & al. Trustee*, 14 Mass. R. 144; we apprehend are decisively in favor of the decision which we make on this part of the subject.

The whole amount of taxes which the bank should have paid within ten days after the first Monday of April, 1838, would be $2875,00. The whole amount of taxes paid by the bank is $2593,84.

On the 16th of Oct. 1832, there should have been paid to the treasurer of the State, $125,00, instead of $93,84. The difference is only $31,16. That sum with the interest of it should be paid.

According to the agreement of the parties, the defendants must be defaulted, and judgment rendered in favor of the plaintiffs for the sum of two hundred ninety-four dollars and thirty-nine cents, and also the interest on $250 from the ten days after the first Monday in April, 1838, to the second Tuesday of December, 1839, and costs of suit.

ROBERT THOMPSON, JR. *versus* PELEG WILEY.

If the defendant in an action of *scire facias* against him as bail, before a justice of the peace, procures a constable to attend the Court to receive the principal on being surrendered by the bail, and the service is performed by the constable, this is sufficient to enable him to recover of the bail the fees to which he was by law entitled.

And if the mittimus be dated on the twentieth day of the month, and the return of the commitment by the constable be dated on the twenty-second, if any impropriety exists on the part of the officer in detaining the principal, the party injured thereby only can complain, and it will not deprive the officer of his right to recover his legal fees of the person who employed him.

ASSUMPSIT to recover the amount of the plaintiff's fees as a constable of the town of Union for committing to prison at the request of the defendant, one Carkin on his being delivered up and surrendered by the defendant, as bail to Carkin, on the trial of an action of *scire facias* against him as bail.

The case came before the Court on a statement of facts, and on written arguments, and was therefore decided by the whole Court.

Robbins brought an action before a justice of the peace against Carkin, whose body was arrested, and the defendant became his bail. *Non est inventus* was returned on the execution, and Robbins sued out his writ of *scire facias* against Wiley. On the return day, as the record of the justice states,

which was made a part of the case, "the defendant surrendered on *scire facias* Isaac Carkin, and presented Robert Thompson, Jr. constable of the town of Union, to receive the said Carkin, and he was ordered into custody of said Thompson by me, the said justice, and mittimus delivered to Robert Thompson, Jr. costs of *scire facias* paid by defendant." This was under the date of Dec. 20. The justice's mittimus, dated Dec. 20, and the return of the plaintiff thereon, were also made part of the case. This return is dated Dec. 22, and states that he had arrested upon the mittimus the body of Carkin and committed him to prison in the county gaol, and left an attested copy of his precept with the keeper of the prison. The competency of the record of the justice and of the mittimus and officer's return thereon were to be considered as objected to by the defendant. It was proved by a witness, "that the plaintiff admitted in his presence, that the defendant paid him fifty cents for his fees for his attendance before the justice when Carkin was surrendered, as stated in the justice's record and mittimus." A nonsuit or default was to be entered according to the opinion of the Court upon the case.

An amendment of the writ had been permitted, and a reference was made to the writ to show the nature of it, but no such copy was furnished.

Harding, for the plaintiff, said that the statute, 1821, c. 67, § 7, provides, that in a case like this the officer shall be paid by the bail the same fees as are provided by law for committing any defendant to prison on mesne process. The officer, to recover his fees, may well declare in general assumpsit, or declare specially, or may join both counts in one writ. *Boswell* v. *Dingley*, 4 Mass. R. 411.

The case finds, that the defendant procured the plaintiff to attend before the justice, and receive the principal. This shows our right of action. It is however contended by the defendant, that the plaintiff cannot recover, because his return is dated on the second day after the principal was surrendered by his bail. This was the day he left him in the

prison, probably, or may have been by mere mistake. The twenty-first might have been the Sabbath day, or the snow-drifts might have been so deep as to prevent travelling such distance.

J. S. Abbott, for the defendant, contended that the amendment was improperly admitted, and cited *Peabody* v. *Hoyt*, 10 Mass. R. 36.

The plaintiff can only recover as constable of the town of Union, and the case does not show, that he was constable.

The foundation of the suit is, that the defendant had been bail for Carkin, that *scire facias* had been sued out, that Carkin was surrendered by the defendant, and that the plaintiff was requested by the defendant to attend Court and receive the principal; and yet the case does not show by competent evidence, that any of these things were done.

The Court was holden before the justice, Dec. 20, and on that day Carkin was ordered into the custody of the plaintiff. The mittimus merely authorizes the officer to receive the principal, not to arrest him, and forthwith convey him to prison. He did receive him on that day, and if he allowed him to escape, the defendant is not liable to pay for any services rendered afterwards. He must strictly perform his duty as directed, to have a statute remedy upon the defendant. He has already received payment for attending before the justice, and cannot prevail in this suit.

The opinion of the Court was by

Shepley J. — No copy of the amendment is furnished. The inference to be drawn from the copies furnished, and from the arguments, is, that it presented in a different manner the same cause of action, by setting forth the particular facts by which the defendant became liable to pay the officer's fees; and it might well be permitted in the discretion of the Court. The defendant procured the plaintiff to attend as a constable, for the purpose of performing the service for which he now claims to be paid, and he did perform it, acting in that charac-

ter, and that is sufficient to enable him to recover of the defendant the fees to which he was by law entitled.

The return upon the mittimus under date of the 22d of Dec. stating that he has arrested and committed the body of Carkin, does not necessarily imply that he had not done it before that day. And even if the officer had been guilty of any impropriety in detaining him for a day or two, the party injured only could complain, and it would not deprive the officer of his right to recover his legal fees of the person who employed him. It does not appear that the defendant suffered any injury by the neglect or misconduct of the officer, and if he has, he will be entitled to a recompense for it.

Defendant to be defaulted.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN

VOLUME 20, MAINE REPORTS.

ABATEMENT, PLEA IN.

See PLEADING, 3, 4.

ACKNOWLEDGEMENT OF DEED.

1. If the acknowledgement of a deed be taken by a grantee and certified by him as a magistrate, it is but a void acknowledgement, leaving the deed operative between the parties. *Beaman* v. *Whitney*, 413.

ACTION.

1. Where a town voted to loan the surplus revenue, and appointed a committee for that purpose, — one of which number was chosen, by the committee, treasurer of the surplus revenue fund; and the town subsequently voted to receive such notes, and instructed their treasurer to collect the same; *it was held*, that the suit to collect such notes should be in the name of the town. *Garland* v. *Reynolds*, 45.
2. A corporation may sue in its own name on a contract made to an agent for its benefit. *Ib.*
3. It would seem that a suit could not be maintained in the name of an agent who has no interest in the contract. *Ib.*
4. If a person sells goods belonging to another without authority, and receives the proceeds of the sale in money, he holds this money to the use of the owner of the goods, who may maintain an action for money had and received therefor. *Higgins* v. *Brown*, 332.
5. And if the owner of the goods makes his claim for the money, and it is by mutual arrangement deposited in the hands of a stakeholder to await a decision in regard to the right of property, and the seller of the goods afterwards persuades the stakeholder to deliver the money to him, without the consent or privity of the other party, he must be considered as having waived the benefit of the arrangement, and becomes at once without demand answerable to the owner of the goods for the money for which they were sold. *Ib.*
6. In this State, it is sufficient to maintain an action on an indorsed note, if the nominal plaintiff has assented to the suit, and it has been authorized by the party in interest. *Gage* v. *Johnson*, 437.
7. An administrator may maintain an action in his own name on such note, being the property of the intestate at the time of his death, without declaring as administrator. *Ib.*
8. And if the action be brought after the decease of the intestate, and prior to the appointment of an administrator, the taking upon himself that trust by the plaintiff, by relation, legalizes all his acts relative to the goods and credits committed to him from the decease of the intestate, and he may proceed with the suit. *Ib.*

See ASSIGNMENT, 5. HIGHWAY, 1, 2. POOR, 2.

ADMINISTRATOR.

1. Where the cause of action existed against the deceased, the executor or administrator may make himself liable by a written promise to pay, founded on sufficient consideration; and in such case the action should be brought against him in his own right. *Davis* v. *French*, 21.
2. A promise from the executor or administrator, as such, to pay a debt due from the deceased, may be alleged in an action brought against him as executor or administrator, and then the judgment should be *de bonis testatoris*. *Ib.*
3. The executor or administrator can create no debt against the estate of the deceased. *Ib.*
4. If an administrator, under a license from Court to sell real estate for the payment of debts, sells and conveys land for an entire sum of money for the whole tract sold, exceeding in amount the sum he was authorized to raise, such sale is void. *Wakefield* v. *Campbell*, 393.

See ACTION, 7, 8. DEED, 5. EQUITY, 4.

ADMISSION.

An offer to be defaulted in pursuance of the provisions of St. c. 165, § 6, is not an admission of the contract as stated in the plaintiff's declaration. *Jackson* v. *Hampden*, 37.

AGENT AND FACTOR.

See ACTION, 2, 3.

AMENDMENT.

1. When the place of residence of a defendant has been mis-described and the officer in consequence thereof has returned *non est inventus*, the writ may be amended by inserting his proper place of residence and service be made on such defendant by virtue of St. 1835, c. 700. *Patten* v. *Starrett*, 145.
2. A new description of a defendant is inserting a new defendant within the mischief to be remedied by that statute. *Ib.*
3. If the magistrate who administers the oath to the debtor, in his certificate thereof, makes a mistake in the date of the year, he may afterwards correct it. *Fiske* v. *Carr*, 301.

See PARTNERSHIP, 6.

APPRAISER.

See LEVY ON LAND.

ASSIGNMENT.

1. The Statute of 1836, c. 240, concerning assignments, fixes the time when creditors may become parties, and therefore the omission in the instrument of assignment to specify any time for that purpose, does not render the instrument inoperative. *Fiske* v. *Carr*, 301.
2. A creditor who has become a party to the assignment, cannot object to its validity, because it contains a full discharge of the whole claim of the creditor upon the debtor. *Ib.*
3. The St. 1836, c. 240, concerning assignments, protects the property assigned from attachment thereof, made after the execution and delivery of the instrument, but before notice is published in the newspaper, if publication is made in manner required by the Statute within fourteen days after the assignment shall have been made. *Ib.*
4. As the St. of 1838, c. 325, "*in relation to the mode of transfer of shares in corporate bodies*," declares that "*the title to such stock shall not pass from such proprietor, until such transfer has been so far entered on the corporate records, as to show the names of all the parties thereto, and the date of the transfer*," the title to shares in a bank remain in the original proprietor after an assignment thereof has been made and notice been given to the bank until the entry is made upon the books of the bank; and may be holden against such assignee on an attachment, made after such notice, in a suit by the bank against such assignor. *Ib.*
5. Where furniture is mortgaged to secure the mortgagee against the payment of a note to a third person, given by the mortgagor as principal, and the mort-

gagee as surety; and the mortgagee assigns the same furniture for the payment of his debts; the assignee may maintain trespass against an officer attaching the furniture on a writ in favor of the third person, against both the mortgagor and mortgagee on the note referred to in the mortgage. *Ib.*

ATTACHMENT.

See ASSIGNMENT, 3, 4. PARTNERSHIP, 2.

ATTORNEY AT LAW.

1. In a suit against an attorney for negligence, it is sufficient proof that he was employed, to show that he acted and was recognized on the records of the Court as acting as such. *Smallwood* v. *Norton*, 83.
2. An attorney charged with the collection of a demand, having procured an attachment to be made of the debtor's property, which was replevied from the possession of the officer making the attachment, is bound to act as such in the defence of the replevin suit, and is responsible if he is guilty of negligence in the defence. *Ib.*
3. He cannot relieve himself from responsibility by the employment or substitution of other counsel. *Ib.*
4. If the plaintiff in replevin becomes nonsuit, it is the duty of the counsel for the defendant, for the omission of which they are responsible, to move for judgment for a return of the property replevied, and that the writ be placed on file, that the record may be properly made up. *Ib.*
5. Without such judgment, a failure to return would not be a breach of the bond. *Ib.*
6. In a suit against an attorney for negligence in not moving for a return of property replevied in a suit in which the plaintiff in replevin had become nonsuit, and that the writ should be placed on file, it is not competent for him to show, in reduction of damages, that the plaintiff in replevin was the real owner of the property replevied. *Ib.*
7. The attorney of the plaintiff without any special authority therefor may approve of the receipt taken by the officer for personal property attached by him, and thereby relieve him from his obligation to retain and produce the property, that it may be taken in execution. *Jenney* v. *Delesdernier*, 183.
8. He may elect and control the remedy, and all the proceedings arising out of and connected with it, but he cannot release or discharge the cause of action, without receiving payment. *Ib.*
9. Though the attorney may conduct so indiscreetly, negligently or ignorantly, or may so abuse his trust as to be answerable to his client in damages, such conduct is not to prejudice the officer, who is entitled to regard him as the agent of his client in all the contingencies which may arise in the prosecution, and all the processes adopted to secure or collect the debt entrusted to his care. *Ib.*
10. Payment of a debt by the judgment debtor to an officer having an execution against him in force, discharges the debtor; but proof of such payment to the officer does not raise a liability on the part of the attorney to pay the debt to the creditor. The officer must have paid the money to the attorney before such liability is raised against him. *Wilson* v. *Russ*, 421.
11. An attorney is bound to execute business in his profession entrusted to his care with a reasonable degree of care, skill and despatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable. But if he act with good faith, to the best of his skill, and with an ordinary degree of attention, he is not responsible for the loss of demands left with him for collection. *Ib.*

See SET-OFF.

BAILMENT.

See SHIPPING, 3, 4.

BANK TAX.

1. If the treasurer of the State, by mistake, take from a bank a sum less than the amount of the tax, and give therefor a receipt "in full for the semi-

annual tax on the capital stock of said bank which became due" on a certain day, the State is not thereby barred from recovering the just amount. *State* v. *Waldo Bank*, 470.

2. On the petition of the Waldo Bank, the legislature accepted a surrender of their charter, and declared that it should terminate when the act should take effect, on March 25, 1838, but also provided in the same act, "that the said bank shall continue in its corporate capacity for and during the term of two years from the time this act shall take effect, for the sole purpose of collecting the debts due the corporation, selling and conveying the property and estate thereof, and shall remain liable for the payment of all debts due from the same, and shall be capable of prosecuting and defending suits at law, and for choosing directors for the purpose aforesaid, and for closing its concerns." The bank continued to transact ordinary banking business until March 25, 1838, and no longer, and on the thirty-first day of the same month, fifty per cent. of its capital was divided among the stockholders. *It was held*, that the bank was liable to pay the tax for the six months commencing October 1, 1837. *Ib.*
3. Where the action was rightfully commenced against the bank, and a statement of facts was agreed upon between the parties and signed by their counsel, while this Court was in session and during the continuance of the charter, and no law term of the Court was holden in the county until after the charter had terminated, the Court, on motion of the plaintiffs, ordered judgment to be rendered as of the term when the facts had been agreed upon. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. To charge an indorser, the day on which notice was placed in the postoffice addressed to him should be made certain. *March* v. *Garland*, 24.
2. Where the person by whom notice of the non-payment of a draft was sent to the indorser, was uncertain as to which of two places the same was directed, but it appeared that he was correctly informed on the day the notices were sent, of the residence of such indorser; and that the indorser had said he knew, or had notice that the draft had come back, it was held, that the jury were justified in finding the notice to have been properly directed. *Ib.*
3. the cashier of a bank in which a draft has been left for collection, is a competent witness to prove that due notice of its dishonor has been given to the several parties. *Huntress* v. *Patten*, 28.
4. The indorsement by the holder of a note "good to J L, or order, without notice," does not dispense with demand on the maker; nor can such indorsement be considered as a guaranty. *Lane* v. *Steward*, 98.
5. When a note thus negotiated appears by indorsement to have been partially paid on the day of its maturity, such indorsement authorizes the conclusion of due presentment. *Ib.*
6. Parol evidence is admissible when there is a written contract of indorsement to prove a waiver of demand. *Ib.*
7. A waiver of demand on the maker is sufficiently established by proof that the indorser, at the time of the indorsement of the note, said that if the maker did not pay the note when it became due, he would; and that after it became due, he told the holder that if he would commence a suit against the maker and could not collect it, he would pay it. *Ib.*
8. The indorser of a note is not discharged by the holder's releasing the property of the maker attached, and taking a statute bond, though done at the solicitation of the maker and for a valuable consideration. *Ib.*
9. Neither is he discharged by the refusal of the holder to receive from the maker a conveyance of sufficient real estate as security, and give day of payment. *Ib.*
10. A sale of a promissory note at a greater discount than legal interest, does not make the transaction usurious. *Ib.*
11. A demand upon the maker of a note, in order to charge an indorser must be satisfactorily proved to have been made on the day when the note falls due. *Robinson* v. *Blen*, 109.
12. The declaration of the holder of a note to the indorser, that he has called on the maker the day the note became due, and that he refused to make payment thereof, is not evidence for him of such fact, although it was not denied by such indorser. *Ib.*

13. Bills of exchange payable out of the State, are to be considered as foreign bills, and the ordinary notarial certificate is evidence of demand and notice. *Warren* v. *Coombs*, 139.
14. Damages on a protested draft, cannot be recovered against the drawer or indorser, when the principal has been paid by a levy of an execution recovered in a suit in favor of the holder against the acceptor. *Ib.*
15. In a suit against the indorser on bills of exchange in which usurious interest has been reserved, but which have been paid by a levy on the real estate of the acceptor the defendant is not entitled to costs. *Ib.*
16. If the indorser of a note has changed his place of residence between the making of the note and the maturity of the same, the holder is bound to ascertain the new residence of the indorser, to which notice of non-payment should be sent, or to use all reasonable efforts to ascertain where it is. *Barker* v. *Clark*, 156.
17. Inquiries in such case are to be made at the former place of residence of the indorser; and those inquiries, and the answers thereto, are facts to be laid before a jury to prove diligence in the holder. *Ib.*
18. If transmitted a draft to G, his creditor, for collection, with a request that when paid, the proceeds should be passed to his credit. G indorsed the same and procured it to be discounted, and passed the proceeds to the credit of H. The draft was protested for non-payment, though the acceptor was in funds and would have paid the same on presentment, but the notary was unable to find his residence; G took up the same as indorser, at the bank at which it had been discounted, paying costs of protest and damage; *it was held*, that he was entitled to recover the same of H. *Goodnow* v. *Howe*, 164.
19. A creditor receiving a draft for collection and negotiating the same, and passing the proceeds thereof to the credit of his debtor, is not thereby concluded, unless chargeable with negligence or want of fidelity in endeavoring to collect the same. *Ib.*
20. The indorsee of a draft taken before maturity in payment of a pre-existing debt, is to be regarded as a *bona fide* holder, and is not subject to any existing equities between the parties to the bill. *Norton* v. *Waite*, 175.
21. The possession of a bill of exchange by one who negotiates the same, is presumptive evidence of his ownership of it. *Lowney* v. *Perham*, 235.
22. The holder of a bill though others may have an interest in the same, may maintain a suit on it in his own name with the consent of the parties interested. *Ib.*
23. Where an agreement was entered into between the holder of a draft in suit and the acceptor; that the acceptor was to be defaulted at the then next term of the Court, in which the action was pending, and if a stipulated sum should be paid before such term, the cause was to be continued one term more for judgment, and if the sum was not paid, then judgment was to be rendered on the default; and the action against the indorser was to be continued— *it was held*:—

That the first clause of the agreement, by which the acceptor was to be defaulted, would enable the plaintiff sooner to obtain judgment and could not be considered as giving time. *Ib.*
24. That the further agreement for a continuance on payments being made as stipulated, was a conditional contract to give time — and:— *Ib.*
25. That a conditional agreement not performed, to give time to the acceptor on his payment of part, does not discharge the drawer or indorser. *Ib.*
26. Where the third day of grace falls on the Lord's day, by the Statute of 1824, c. 272, the maker of a promissory note is entitled to a grace of two days only; and in such case, a presentment for payment on the Lord's day, is made too late to charge the indorser. *Homes* v. *Smith*, 264.
27. After a note is written and signed by one promisor, the attestation generally, when he was not present, by a subscribing witness, on seeing another promisor affix his signature, if done through inadvertency, and not designed to have any injurious effect, does not impair the liability of the first promisor. *Rollins* v. *Bartlett*, 319.
28. Where a note was made by one as principal, and others as sureties, payable to a person from whom it was then expected that money might be received therefor, but who declined to furnish it, and the sureties consented that the note might be passed to any one who would advance the money, it is avail-

able against them for the benefit of such person, in an action in the name of the payee with his assent. *Starrett* v. *Barber*, 457.
29. Where property is put into the hands of the payee of a note by the principal promisor as collateral security therefor, it is received by him under an implied obligation to account for the proceeds. And whatever expense is necessarily incurred by him in asserting his title, or in rendering it available, is a fair charge upon the property, and the balance only is to be applied to the payment of what is due. *Ib.*
30. And if in a suit in relation to such property by the payee of the note, he calls the principal promisor as a witness, and releases him from the warranty of title to the property, implied in the bill of sale, such release does not discharge the principal or sureties. *Ib.*

See ACTION, 6. 7. EVIDENCE, 14, 15, 16, 18. PRINCIPAL AND SURETY.

BOND.

See POOR DEBTORS, 1, 2, 10, 11, 13, 14, 15, 16. CONTRACT, 11. EVIDENCE, 5, 29.

COLLATERAL SECURITY.

See BILLS AND NOTES, 29.

COLLECTOR OF TAXES.

1. It is no defence to a suit on a collector's bond, that the assessment preparatory to issuing the tax list and the warrant accompanying the same, were not signed by the assessors. *Kellar* v. *Savage*, 199.
2. The collector is bound to obey a warrant in due form, and issuing from the assessors, though they may not have complied with every requisition of law anterior to issuing it. *Ib.*
3. In the absence of proof, the Court will presume that the tax list and the warrant for collection were duly signed by the assessors. *Ib.*
4. A collector of taxes, having acted in that capacity and given a bond, is estopped to contest the legality of his election. *Ib.*

CONSIDERATION.

1. An agreement by the owner of an execution against the inhabitants of a town that if they would at once assess the amount required, and collect the same, he would make a certain discount, is founded on sufficient consideration, and will be enforced. *Baileyville* v. *Lowell*, 178.
2. The performance of labor for an association, is a good consideration for an express promise in writing to pay therefor, made by one of the members. *Chick* v. *Trevett*, 462.

See EVIDENCE, 21. PARTNERSHIP, 4.

CONSTABLE.

See OFFICER, 6, 7.

CONSTRUCTION.

1. A conveyance of "a certain saw mill site, in and with the saw mill, machinery, &c. thereon standing," &c. "meaning to convey all the premises which said A B (grantor) purchased of C D by deed dated, &c. with all the privileges and subject to all the restrictions therein expressed: reference thereto being had for a more particular description of the premises," will pass the mill and the whole land under the same, notwithstanding the grantor acquired by the deed to which reference was had, but a part of the premises upon which the mill was erected. *Crosby* v. *Bradbury*, 61.
2. The term mill site embraces all the land the mill covers. *Ib.*
3. Erroneous or defective references to the sources of title will not be permitted to vary a prior description clearly and definitely given. *Ib.*

See CONTRACT, 4, 5, 6, 7, 11. CUTLER MILLDAM COMPANY, 1, 2. DEED, 5.

CONTRACT.

1. Where the final payment of a draft was guaranteed, it is sufficient to main-

tain a suit against the guarantor to prove the insolvency of the parties to the draft before the commencement of the suit, and that the draft could not have been collected. *Huntress* v. *Patten*, 28.

2. Neglect to proceed against the principal debtor, or to become a party to his assignment, (in case he has made one,) does not discharge the guarantor in whole or in part. *Ib.*

3. The guarantor of a contract tainted with usury, is so far a party to the same that he may set up usury as a defence to a suit upon his guaranty. *Ib.*

4. In a contract between the plaintiffs and the defendant in relation to the building of a house for the defendant, by the terms of which the plaintiffs were to lay all the brick work, and do the plastering in the same — and the defendant was to procure the joiner work to be done, and in which it was among other things stipulated that the house was to be completed by the 17th Sept. "and the plastering as soon after as the joiners shall have it ready;" *it was held*, that the plaintiffs were by the terms of this contract to fulfil their engagement the same year. *Atkinson* v. *Brown*, 67.

5. That the defendant being bound to procure the joiner work, and no time being fixed in which it was to be ready, the implication was, that it was to be ready in a reasonable time. *Ib.*

6. That if not ready, the defendant had no cause of complaint for any non-performance on the part of the plaintiffs. *Ib.*

7. And that the plaintiffs were not obliged to complete their contract the ensuing season. *Ib.*

8. Where by the terms of a contract the time of its performance was to be extended beyond a year, it is within the statute of frauds, though a part of it was by the agreement to be performed within a year. *Herrin* v. *Butters*, 119.

9. To bring a case within the statute of frauds, it must have been expressly stipulated by the parties, or it must, upon a reasonable construction of their contract, appear to have been understood by them, that the contract was not to be performed within a year. *Ib.*

10. A G B contracted in writing with S to clear eleven acres of land in three years from the date of the contract, one acre to be seeded down the (then) present spring, one acre the next spring, and one acre the spring following, as a compensation for which, he, A G B, was to have all the proceeds of said land three years, except the two acres first seeded down. A G B assigned verbally his interest to the extent of half of the contract, to H, who verbally assigned said half to C B; said H and C B respectively agreeing verbally to perform one half of the contract. A G B and C B commence the performance of the contract, but do not complete it. S sues A G B, and recovers damages for non-performance, which are paid by A G B. H being called on by A G B for half of the damages so recovered and paid, pays the same to him; and then commences a suit for the same against C B — *it was held*, that the contract between them (H and C B) was void by the statute of frauds, and that he was not entitled to recover. *Ib.*

11. Where the defendant gave a bond to convey his "right, title and interest in and to the lath machine and the water therefor, which is under saw mills number three and four at Union mills, in Calais, for so long a time as those mills shall stand," the condition of which was, that if the defendant should "make and execute and deliver to the obligee, or to his heirs or assigns, a deed of release and quitclaim of said defendant's said interest in said machine for said term of time, and should in the meantime, suffer and permit the obligee, his executors, administrators and assigns peaceably to occupy and improve said machine;" then the obligation to be void, &c. *It was held*, that the defendant thereby contracted only to convey his own interest, whatever it might be in the subject matter of the contract, and that having given a deed in the terms of the bond, it was no breach that the obligee had been ousted by a higher and better title. *Sawtell* v. *Pike*, 169.

12. If a party accepts of an agreement from which he is to derive a benefit, when he shall have performed an act on or before a certain day; such acceptance is equivalent to an affirmative agreement on his part to perform the act by the time stated. *Roberts* v. *Marston*, 275.

13. Where an estate was conveyed, and the grantee agreed in writing to allow the grantor a certain sum, less than the consideration money, when he should have removed certain incumbrances upon the estate, such removal to take

place on or before a certain day; and where the incumbrances were removed by the grantor, but not within the time stipulated, no notice having been given, in the meantime, by the grantee that he elected to repudiate the contract; *it was held:* —

That performance at the time, the incumbrances not being to the amount of the consideration, was not to be regarded as a condition precedent. *Ib.*

14. That the grantee should be placed, by compensation, in the same condition, as if the other party had removed the incumbrances at the time fixed. *Ib.*

15. And that if the grantee had suffered damage from the delay of the grantor it should be deducted from the price agreed to be allowed. *Ib.*

16. On a contract for the delivery of specific articles, which are ponderous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one. *Howard* v. *Miner*, 325.

17. And if the debtor be desirous of paying, he should request the creditor to appoint it, or deliver to him in person at a proper place. *Ib.*

18. The debtor, however, is not obliged to follow the creditor out of the State or country to do this. A reasonable effort to ascertain his residence, and give him the notice, will be sufficient. *Ib.*

19. If the creditor, being notified, refuses or neglects to appoint, or avoids and prevents the notice, the debtor may appoint a place, and deliver the articles there. *Ib.*

20. When the intention of the parties as to the place of delivery can be collected from the contract and the circumstances proved in relation to it, the delivery should be made at such place, although it may not be precisely in the condition named in the contract. *Ib.*

21. In a contract for the performance of personal manual labor for a stipulated time, requiring strength and health, it must be understood to be subject to the implied condition, that strength and health remain. An actual inability to perform the labor, arising from sickness, at the commencement of the time, although it may not continue during the whole term contracted for, excuses performance. *Dickey* v. *Linscott*, 453.

See EVIDENCE, 26, 28. MORTGAGE, 12.

CONVEYANCE.

See CONSTRUCTION. DEED.

CORPORATE SHARES.

See ASSIGNMENT, 5.

CORPORATION.

See ACTION, 2, 3. CUTLER MILLDAM COMPANY. INDICTMENT, 4.

COSTS.

Where suits were simultaneously commenced against the maker and indorser of a promissory note, and judgment was obtained against the maker, which was satisfied, in the absence of any agreement to the contrary, the indorser is entitled to costs in the suit against him. *Foster* v. *Buffum*, 124.

See BILLS AND NOTES, 15. PARTNERSHIP, 6. USURY, 2.

COVENANT.

1. A suit for the breach of the covenant for quiet enjoyment, cannot be maintained without proof of an actual eviction. *Boothby* v. *Hathaway*, 251.

2. If the covenant of seizin in a deed of warranty is broken, and thereby the title wholly fails, the law restores to the purchaser the consideration paid, with interest; but in this, as in other covenants usual in deeds for the conveyance of real estate, if there exist facts and circumstances which would render the application of the rule inequitable, they are to be taken into consideration by a jury in estimating the damages. *Baxter* v. *Bradbury*, 260.

3. If the covenant of seizin is broken, but in virtue of the covenant of warranty in the same deed, which was also taken to assure to the purchaser the subject matter of the conveyance, he has obtained that seizin, he cannot retain the seizin of the land, and be allowed besides to recover back the consideration paid for it. *Ib.*
4. If the grantor by deed of warranty had nothing in the estate at the time of the conveyance, but acquires a title afterwards, this title enures to the grantee immediately by way of estoppel; and he cannot elect to reject the title, and recover the consideration money paid in an action for breach of the covenant of seizin, but is entitled to merely nominal damages where no interruption of the possession has taken place, and to the damages actually sustained where there has. *Ib.*
5. The estoppel, being part of the title, may be given in evidence without being pleaded. *Ib.*
6. In an action for the *breach* of *this covenant*, which does not assure the paramount title, if there be an actual seizin, it is immaterial whether it be defeasible or indefeasible. *Ib.*

CUTLER MILLDAM COMPANY.

1. Where the legislature created a corporation, and empowered it "to erect, maintain, repair, and rebuild a milldam on their own land across the head of Little River harbor, with flood gates thereto at least fifteen feet wide, so as to admit the passage of gondolas and boats at high water," the corporation may erect their dam across the head of the harbor, although it may not only be below high water mark, but across a part of the channel below where the tide ebbs and flows. *Parker* v. *Cutler Milldam Co.* 353.
2. The words "*on their own land*," in the act, were not inserted to fix the place of building, but were intended merely to exclude any inference that the legislature designed to authorize the corporation to take the land of others for that purpose. *Ib.*
3. The possession of the dam and mills, and of the land on which they were erected, under the authority given, is sufficient evidence of title for defence of an action for damages done to the land of others by the flowing of the water. *Ib.*
4. The corporation, while acting within the powers granted, is not liable for any injury suffered by an individual by altering the flux and reflux of the tide. *Ib.*

DAMAGES.

See COVENANT, 2, 4. POOR DEBTORS, 17.

DEED.

1. The deed of a Marshal of the U. S. purporting to convey to the tenant the title of the U. S. by virtue of a levy against such fraudulent grantor without proof of the authority of the Marshal to execute it, will not pass the title of the U. S. nor show that the tenant represented that title. *Delesdernier* v. *Mowry*, 150.
2. When in a deed two monuments are described, and the length of the line between them is given, but one of the monuments cannot be found, the location of the lost monument is to be ascertained by measuring the given length of line from the known monument, and not by a reference to and conformity with the length of other corresponding lines on the same tract on which the monuments have been preserved. *Otis* v. *Moulton*, 205.
3. Where a grant is made and bounded by monuments named as existing upon the earth and by distances between them, and not by monuments and distances named as on the plan only, the admeasurement should be made upon the earth, and not by the scale upon the plan. *Ib.*
4. Though there may be a want of accuracy, or indeed a repugnance, in some part of the language of a deed of land, the intention of the parties is to be gathered from the whole language used. *Jameson* v. *Balmer*, 425.
5. Where the owner of a farm conveyed a portion thereof to A. J. and O. C. J., and afterwards conveyed the residue to A. J. and subsequently acquired the title conveyed by him to A. J. by both deeds, and then died; and his

administrator made a sale of real estate, under a license from Court, for the payment of debts, describing in his deed the land conveyed as "being one half of the farm formerly conveyed by said deceased to A. J. and O. C. J."; *it was held*, that one half of the whole farm passed by the deed of the administrator. *Ib.*

See ACKNOWLEDGEMENT OF DEED. EQUITY, 13. EVIDENCE, 1. MORTGAGE, 6. PARTNERSHIP, 4. REAL ACTION.

DELIVERY.

See CONTRACT, 16, 17, 18, 19, 20.

DEMAND.

See BILLS AND NOTES. OFFICER.

DEPOSITION.

See PRACTICE, 7.

DESCENT.

1. An estate in fee, upon the decease of the ancestor, is presumed to descend in pursuance of the laws of inheritance, unless the descent is shown to have been intercepted by a devise. *Baxter* v. *Bradbury*, 260.

DEVISE.

1. A specific legacy is a bequest of a particular article, capable of being designated and identified. *Bradford* v. *Haynes*, 105.
2. The devise of the residue of the real estate, after the happening of a contingency, or after certain objects have been accomplished by the disposition or appropriation of portions of it, is not specific, but general. *Ib.*
3. A bequest providing for the education and maintenance of a minor son, and disposing of the residue of the estate after the payment of certain pecuniary legacies and devises, is not a specific legacy or devise; and it is no defence to the payment of such legacies or devises, that the bequest to the son will absorb the estate. *Ib.*
4. When the testator by will directed that his minor son should be educated and supported till twenty-one years of age from his estate, and bequeathed certain pecuniary legacies to the use of other of his relatives, and the residue of his estate, which might remain in the hands of his executor, he bequeathed to his son in fee at his arrival at twenty-one years of age, or to his issue, if he should have any, in case of decease before that period, but if he should die under age and without issue, then to other relatives; *it was held*, that the legacy to the son was not specific. *Ib.*
5. In a suit brought by a legatee to recover a legacy, *it was held*, that it was no defence in whole or in part that the estate had deteriorated in value, by losses in bad debts and by the assignment of a large portion of the personal estate to the widow, there being assets sufficient to pay the particular legacies. *Ib.*

DOWER.

1. An adverse occupation of the premises in which dower is claimed, for more than twenty years during the life of the husband, will not bar the rights of the widow. *Durham* v. *Angier*, 242.
2. The statute of limitations does not begin to run against her right to claim dower, until after the death of her husband. It is never regarded as operative upon a remainder man or reversioner during the existence of the particular estate. *Ib.*
3. A release of dower by the wife will not be presumed from long continued occupation of the premises, where such occupation is adverse to the husband. *Ib.*

See MORTGAGE, 1, 2, 3.

ENTRY, WRIT OF.

See REAL ACTION.

EQUITY.

1. Where one H purchased a tract of land of F, in payment of which he gave his notes and a mortgage of the premises purchased; and then sold the

same to one C who procured the notes of B, secured by a mortgage of the same tract, with which he paid H in part for the land by him so purchased, without disclosing the fact that B had no title to the same; and H exchanged those notes and mortgage with F for his own notes and mortgage, without disclosing the above facts; *it seems* that the Court would enjoin C from setting up his title against that conveyed by B.
Felch v. *Hooper*, 159.

2. The widow being entitled to a distributive share of the personal estate of her husband, is not a competent witness in a bill brought to establish the validity of a mortgage by which certain notes belonging to his estate, are secured. *Ib.*
3. The answer of one co-defendant is not evidence against another. *Ib.*
4. The executor or administrator is a necessary party to a bill brought to enforce a mortgage securing notes due to the estate. *Ib.*
5. Where the objection of want of proper parties was not taken at the hearing, the Court may order the case to stand over on terms, with liberty for the party to amend by adding new parties. *Ib.*
6. It is a well settled rule in equity that twenty years possession by the mortgagee or his assignees, without an acknowledgement of a subsisting mortgage, operates as a bar to the right of redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations.
Phillips v. *Sinclair*, 269.
7. After a judgment in his favor establishing the right, one may lawfully enter under that judgment upon a vacant lot, without a writ of possession. *Ib.*
8. If the party be not without the limits of the United States at the time the right first accrued, no subsequent absence will prevent the operation of the statute of limitations, (St. 1821, c. 62,) or give him ten additional years in which to bring his suit or make his entry, under the proviso contained in the fourth section. *Ib.*
9. The rule in equity on that subject, is applied upon the same principles as the statute. When that will not allow a party the additional ten years, equity will not relieve him. *Ib.*
10. The right to redeem a mortgage first accrues, when the money secured by it becomes payable. *Ib.*
11. To avoid the operation of this rule in equity, it should clearly appear, that the party was without the United States when his right to redeem first accrued. *Ib.*
12. The rule, that parol testimony is not to be admitted to vary an instrument in writing, prevails as well in equity as at law. But courts of equity admit of an exception to it, where a mistake is alleged; and if clearly proved or admitted, they will give relief. *Peterson* v. *Grover*, 363.
13. If a mistake be made in a deed of land, according to the rules of equity, it should be reformed, and the mistake corrected, so as to make the deed read as it should have done. *Ib.*
14. It is also a rule, that he who seeks equity should do equity. But this rule does not extend so far, as to make one who had committed a mistake, responsible for all the remote consequences, which may arise out of its leading others to commit errors by placing confidence in its accuracy, instead of examining for themselves. *Ib.*
15. Where one of the parties was stricken out of a bill in equity by amendment, and afterwards released all his interest in the subject matter of the bill to the other plaintiffs, who were then minors, and the guardian of the minors accepted the release, *it was held*, that such person was a competent witness.
Hanly v. *Sprague*, 431.
16. If a person receives land to hold in trust for another, if he intends to hold the property and disclaim the trust, it is a fraud upon him for whose use it was received, from the effect of which a court of equity will grant relief. *Ib.*
17. And if the trustee convey the land to another, who does not pay an adequate consideration therefor, if the latter be not equally liable, he has no pretension to retain more than is necessary for his own indemnity. *Ib.*

ESTOPPEL.

See COVENANT, 4, 5.

EVIDENCE.

1. The evidence of the sale of a possessoy interest in real estate is not required to be by deed — and if by deed, the same need not be acknowledged nor recorded. *Clark* v. *Gellerson*, 18.
2. In a suit against a town for the loss of a horse occasioned by a defect in a causeway or road which the town was bound to repair—proof that the horse was in usual health on the day of and up to the time of the accident; that he fell through a causeway, owing to a defect in the same; that the injury was such as might cause death; that the horse immediately after was sick and died — is not *prima facie* evidence that the death was caused by the injury then received, and does not throw the burthen on the defendants to show the existence of any disease or other cause, by which death was occasioned. *Libbey* v. *Greenbush*, 47.
3. So long as there is any doubt as to the cause of death in such case, whether by disease or by the injury, the plaintiff is not entitled to recover. *Ib.*
4. Evidence is admissible to show the circumstances under which, and the consideration for which an order was drawn; such evidence neither varying or contradicting the legal effect of the order. *Herrick* v. *Bean*, 51.
5. In a suit on the bond in a replevin suit, where the plaintiff had become nonsuit, evidence would not be admissible, in reduction of damages to show that the property was in the plaintiff. *Smallwood* v. *Norton*, 83.
6. Where the truth or falsehood of a material fact is known to a party to whom the fact is asserted to exist, his omission to deny its existence is presumptive evidence of its truth. When not known, his silence furnishes no evidence against him. *Robinson* v. *Blen*, 109.
7. Proof that a bargain was made between the plaintiff and defendant that the former should furnish the latter with money at the rate of five per cent. a month, does not authorize the presumption that the draft in suit was taken in pursuance of and under such agreement. *Warren* v. *Coombs*, 139.
8. Where one having in his hands a draft, void for want of consideration, passes it over in payment of a pre-existing debt, he is a competent witness in a suit between the holder and the parties to the draft, his interest being balanced. *Norton* v. *Waite*, 175.
9. A deputy sheriff who has been released by the sheriff is a competent witness in a suit against the sheriff for his default, notwithstanding his sureties may have given a new bond conditioned to indemnify the sheriff against the alleged default, to which his testimony applies. *Jenney* v. *Delesdernier*, 183.
10. A witness is not protected from answering, when his answers expose him merely to pecuniary loss. *Lowney* v. *Perham*, 235.
11. A deed of a collector of taxes under which the grantee has entered and continued in possession, claiming and exercising exclusive control of the premises conveyed, is admisible in evidence to show the nature and extent of his claim, without proof that the grantor was a collector of taxes. *Boothby* v. *Hathaway*, 251.
12. The public seal of a State, affixed to the exemplification of a law, proves itself. It is a matter of notoriety, and will be taken notice of as a part of the law of nations acknowledged by all. *Robinson* v. *Gilman*, 299.
13. Although where the result will determine only which creditor of the witness will be paid, he is competent; yet where, if the party calling him shall prevail, his debt to his creditor will be paid, but if the opposing party prevail the debt to the creditor will remain unpaid, and the witness will have a claim to the same amount against an insolvent man, the interest is not balanced and he will not be a competent witness. *Danforth* v. *Roberts*, 307.
14. In an action against the acceptors upon an order drawn on them for a sum certain, to be paid "when you receive your payments from W. on his house," and accepted by the partnership name of the defendants, "to be paid as here stated;" the plaintiff must prove, to maintain his action, that one at least of the defendants accepted the order by the partnership name; that they were at that time partners in the business to which it related; and that they had "received their payments from W. on his house." *Head* v. *Sleeper*, 314.
15. Where the subscribing witness to a note testifies to his own signature, but can recollect nothing more, and fails to prove its execution by the payer, other evidence of the genuineness of the signature is admissible. *Crabtree* v. *Clark*, 337.

16. If a note is partly written by one hand, and finished by another with a different ink, this does not furnish *prima facie* evidence, that the note was fraudulently altered. *Ib.*

17. The books of a person who had deceased, containing charges against the plaintiff in the action for payments made to him, the deceased not having acted as the agent or clerk of the defendant, or in his behalf, are not competent evidence for the defendant, to prove payments made by him.
McKenney v. *Waite*, 349.

18. Although the general presumption of law is, that when the plaintiff, sueing as indorsee, produces at the trial the bill indorsed, that he became the holder before it fell due; still where the defendant shows that the indorser was in possession of the bill, and claiming to own it, before and until after it became due and was protested, the presumption is so rebutted, that the admissions of the indorser are competent evidence.
Norton v. *Heywood*, 359.

19. Where an original contract is proved to have been last seen in the hands of the party in interest in the suit, although not a party to the record, and notice to him to produce it has been given, a copy is admissible in evidence.
Ib.

20. Where a contract in relation to land is explicit in its terms, and gives no authority to cut timber thereon, testimony to show that the owner had permitted others under similar contracts to cut timber without considering them as trespassers, is inadmissible to prove a license from the owner to cut timber in the case on trial. *Ib.*

21. The defence of want of consideration, is established by proof, that the bill was accepted in part payment of the acceptor's own contract as surety, which was without consideration to the surety or to the principal. *Ib.*

22. When suits are brought by partners, their partnership may be proved by persons who have done business with them as partners.
Gilbert v. *Whidden*, 367.

23. And if it be shown that they were acting as partners before and after the time of the date of a note, thus made to them, this is proper evidence to be left to the jury, to establish the fact that they were so at that time. *Ib.*

24. If in transacting business, they spoke of each other as partners in connexion with the business, such declarations may be given in evidence in their favor, to prove their partnership. *Ib.*

25. In a suit by Timothy Gilbert and *Henry* Safford, testimony that the deponent knew *H.* Safford as the partner of Timothy Gilbert, is competent evidence to go to the jury to prove the identity. *Ib.*

26. Where a contract, made at Augusta, stipulated for the delivery of a certain quantity of pine merchantable clapboards at Providence within a specified time; and where it did not appear but that the same clapboards which were merchantable at Augusta, were also merchantable at Providence; whether the term, *merchantable*, is to be referred to the one place or to the other, testimony to show that the clapboards delivered, were merchantable at Augusta is admissible. *Stockwell* v. *Craig*, 378.

27. When no such question was raised at the trial in the district Court, on instructions on the point given or requested, it cannot be raised in this Court upon exceptions. *Ib.*

28. If an agent of the purchaser receive the clapboards under the contract, this is evidence of performance by the party contracting to deliver them.
Ib.

29. Where a poor debtor's bond, the condition of which was to be performed in six months, was dated Jan. 6, 1838, and the officer returned on the execution, that on the same day he arrested the body of the debtor, "and at the same time he tendered to me a bond which I have annexed herewith;" in an action on the bond, parol evidence will not be admitted to show, that the bond was delivered at an earlier day than the day of its date, and thereby that the six months commenced prior to the sixth of January.
Titcomb v. *Keene*, 381.

See ATTORNEY AT LAW, 6. BILLS AND NOTES, 6, 7, 12.
CUTLER MILLDAM COMPANY, 3. EQUITY, 2, 3, 12, 15.
INDORSER OF WRIT, 2. MILITIA. OFFICER, 1, 4.
PRACTICE, 7, 8, 9, 11, 15. REAL ACTION, 2, 4.
SCHOOLS, 1, 7, 8, 10. ADMISSION.

EXCEPTIONS.

1. Exceptions allowed after a default voluntarily and unconditionally submitted to by a defendant are irregularly taken, and will be dismissed. *Patten* v. *Starrett*, 145.
2. On exceptions from the District Court, although the instructions there given may not be entirely correct, our statute does not require this Court to grant a new trial, when it appears that the verdict is correct. *Howard* v. *Miner*, 325.

EVIDENCE, 27. See INDICTMENT, 2, 3.

EXECUTION.

See LEVY ON LAND. PAYMENT, 1, 2.

EXECUTOR.

See ADMINISTRATOR.

EXTENT.

See LEVY ON LAND.

FISHERY.

1. The adjudication of one fishwarden of the insufficiency of a sluiceway, and of the proper dimensions for one is not valid, "except in case of a refusal or neglect of the Court of County Commissioners to appoint, or of the fishwarden by them appointed to discharge the duties prescribed by St. 1835, c. 194, § 5. *Hancock* v. *E. R. Lock & Sluice Co.* 72.
2. The special law of 1836, c. 181, § 1, does not alter the law in this respect. *Ib.*
3. Where, by the provisions of a statute, two are required to act, except in certain cases, the law does not presume, that the case contemplated by the exception exists, but the contrary. *Ib.*
4. In rivers where the tide ebbs and flows, as well as in the sea, the right of taking fish is common to all the citizens, and extends to the taking of shell fish on the shore of a navigable river. *Parker* v. *Cutler Milldam Co.* 353.

FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

FORGERY.

See INDICTMENT, 5.

FRAUD.

See EQUITY, 16. MORTGAGE, 7. POOR DEBTORS, 6, 9.

GRACE.

See BILLS AND NOTES, 26.

GUARANTY.

See CONTRACT, 1, 2, 3.

GUARDIAN.

1. An indenture in accordance with the provisions of St. 1821, c. 170, concerning apprentices, contains no covenants by which the guardian is personally bound. *Chapman* v. *Crane*, 172.
2. The signature of the parent or guardian is affixed to show his consent to the binding. *Ib.*

HIGHWAYS.

1. A father cannot by virtue of St. 1821, c. 118, § 17, maintain an action against a town for the loss of services of a minor son in his employ, or for expenses paid for medical attendance, occasioned by an injury sustained by such son in consequence of a defect in a highway for which the town was responsible, over which he was passing. *Reed* v. *Belfast*, 246.

2. The right, which a father has to the future earnings of his minor children, does not constitute present property, and is not embraced within the words "other property" in that statute. *Ib.*
3. The money of non-residents, paid instead of labor and materials on account of the highway tax, is subject to the order of the selectmen of the town, or assessors of the plantation, on account of highway expenditures, whether it is paid the first year, or whether, as is authorized by law, it goes into the money tax of the following year; the money being liable to be expended for the benefit of the highways, for which it was originally assessed.
Barnard v. *Argyle*, 296.
4. As assessors of plantations are held to perform all the duties required of the selectmen of towns, relating to highways, and are invested with the same powers, when a fund applicable to highways is assessed and in a train for collection, they may draw orders on highway account, to the extent of the fund, before it is actually received by the treasurer; and such order will be available to the holder against the plantation, if not paid when demanded; and his rights will not be impaired by any irregularity or want of fidelity in the officers charged with the collection. *Ib.*
5. The assessors are the constituted organs to liquidate and adjust all claims against the plantation for services rendered in making highways therein; and when there exists a fund, upon the strength of which their powers may be legally called into exercise, and where they have a full knowledge of the subject, and there is no fraud, such adjustment is conclusive upon the plantation. *Ib.*

See EVIDENCE, 2, 3.

INDENTURE.

See GUARDIAN.

INDICTMENT.

1. A count in an indictment defective for not alleging the offence to have been committed against the form of the statute, is not aided by another count in the same indictment for another offence in which there is that allegation.
State v. *Soule*, 19.
2. When a motion to quash an indictment was overruled, and the indictment was ordered to proceed to trial, it was held that exceptions would not lie to such order. If a motion had been made after verdict, and in arrest of judgment for cause, exceptions would be sustained if improperly overruled. *Ib.*
3. Though exceptions are overruled, the motion in arrest of judgment may be made in this Court, and judgment will be arrested. *Ib.*
4. Where a crime or misdemeanor is committed under color of corporate authority, the individuals concerned, and not the corporation should be indicted.
State v. *Great Works M. & M. Company*, 41.
5. In an indictment for forgery, the instrument alleged to be forged, was set forth as an acquittance or discharge for the sum of forty-eight dollars. The paper forged was on its face an order for the sum of forty-eight dollars; but on its back was an order for the further sum of one dollar. It was held, that there was a variance between the allegation and the proof.
State v. *Handy*, 81.

INDORSER OF WRIT.

1. To render the indorser of a writ liable for costs recovered, the original defendant must make use of reasonable diligence to collect the costs of the original plaintiff. *Wilson* v. *Chase*, 385.
2. And to show such reasonable diligence as will charge the indorser, the inability or avoidance of the original plaintiff should be shown by an officer's return thereof on an execution for costs, issued within one year from the time the judgment was rendered. Parol evidence is inadmissible to supply the omission. *Ib.*

INSURANCE.

1. It is not necessary to render a policy of insurance void, that there should be a wilful misrepresentation or suppression of the truth. A mere inadvertent omission of facts material to the risk, and such as the party insured should have known to be so, will avoid it.
Dennison v. *Thomaston Mutual Insurance Co.*, 125.

2. The insured is only bound to state in reply to interrogatories on that subject, the distance and situation of those buildings, which a man of ordinary capacity would judge likely to endanger, in case of fire, the building insured; not those which by any possibility, might cause its loss. *Ib.*
3. The expression of an opinion, if honestly entertained and communicated, is not a misrepresentation, however erroneous it may prove to be. *Ib.*

JUSTICE OF THE PEACE.

See MILITIA, 4, 7, 9, 10.

LANDLORD AND TENANT.

1. Where the tenant agrees to cultivate and bag the hop crop for the year, in payment of rent, the property in the hops is in the landlord. *Kelley* v. *Weston*, 232.
2. The tenant acquires no more title to the crop, than if he had been paid for his labor in any other way, than by the use of the farm. *Ib.*
3. No separation or delivery is necessary, when the portion of produce agreed upon as rent is never to be the property of the tenant. *Ib.*

LEGISLATIVE POWER.

1. The regulation of the navigable waters within the State, is vested in the sovereign power, to be exercised by laws duly enacted; and the navigation may be impeded, if in the judgment of that power the public good requires it. *Parker* v. *Cutler Milldam Company*, 353.
2. And if the more apparent object be the profit of a grantee, it is the right and duty of that power to determine whether the public interest is so connected with the private, as to authorize the grant. *Ib.*

LEVY ON LAND.

1. Where an agreement was made between the plaintiff and one of the debtors in a suit, who was surety for the principal debtor, that the plaintiff should proceed to judgment and then levy on the land of the principal debtor and that after such levy, the surety was to purchase the land thus obtained of the creditor in the execution, and security was given for the performance of this agreement; *it was held*, that this did not amount to a payment of the execution by the surety and that consequently the levy was good. *Nickerson* v. *Whittier*, 223.
2. The appraisers, chosen to appraise the value of real estate, should be residents of the county where the appraisal is to be made. *Ib.*
3. The officer is required by law to notify the debtor, if he live in the county in which such appraisal is to be made, and if not, the officer should return such fact, which will justify his appointment of an appraiser for the debtor, without notice to him. *Ib.*
4. When an execution is legally levied, and recorded, on land liable to be taken, and the proceedings are duly returned, the creditor is considered as having the actual seizin and possession. *Ib.*

LIBEL.

1. Two articles not simultaneously published in the same paper or book cannot be coupled together for the purpose of ascertaining whether one of them is libellous or not. *Usher* v. *Severance*, 9.
2. In a libel the charge of larceny being made, malice is by law implied and it is for the defendant to disprove it. *Ib.*
3. The presumption of malice, arising from the publication of the charge, is not rebutted by proof that the publisher had reason to suspect and believe the truth of the charges made. *Ib.*
4. In every case it is the province of the jury, under the instruction of the Court, to determine the import of the language used, whether it be libellous or not. *Ib.*
5. The editor of a newspaper has a right to publish the fact that an individual is arrested, and upon what charge, but he has no right, while the charge is in the course of investigation before the magistrate, to assume that the person accused is guilty, or to hold him out to the world as such. *Ib.*

LIMITATIONS.

See STATUTE OF LIMITATIONS.

MILITIA.

1. In an action to recover a fine for neglect in the performance of militia duty in a company of light infantry raised at large by enlistment, whether the soldier was enlisted is a question of fact to be decided by the magistrate. *Lowell* v. *Flint*, 401.
2. The commission of the captain of a light infantry company raised at large by enlistment, is sufficient evidence of the organization of such company. *Ib.*
3. Where a private of a company is duly warned to appear at a company training for the choice of an ensign, such private cannot excuse his neglect by proof, that no legal vacancy in that office had occurred. *Ib.*
4. Where the testimony offered to prove a fact is not free from contradiction and doubt, it is the duty of the magistrate to decide upon it, and to give such weight to the testimony of each witness, and to the circumstances tending to corroborate or to invalidate it, as he judges to be justly due to it. And if it does not appear, that he violated any rule of law, or that he decided without any testimony to authorize the conclusion to which he came, this Court will not revise and reverse his decision. *Ib.*
5. It is not necessary to insert in, or annex to, the order to warn the company a list of the men to be warned. An order to the clerk, who keeps the records, to warn all the non-commissioned officers and privates enrolled in the company, is sufficient. *Ib.*
6. The legal presumption is, that persons acting in an official capacity in the militia are properly authorized, and that their official signatures are genuine. *Ib.*
7. If during the trial of an action for neglect in the performance of militia duty, one party calls upon the other to produce papers proved to be in his possession, and a reasonable time is offered to produce them, and they are not produced, parol evidence of their contents may be admitted by the magistrate. Rule 35 of this Court does not bind a magistrate to its observance. *Ib.*
8. If the commanding officer of a light infantry company raised by enlistment, signs a notice of the enlistment of a private therein to the commanding officer of the local company in which the private resides, and it is proved that this notice has been delivered, there is no necessity for a written military order. *Ib.*
9. In an action to recover a fine for neglect in the performance of militia duty, where there is sufficient testimony, although there may be other and conflicting, to authorize the conclusion of the magistrate, his decision upon the fact is conclusive. But where there was no testimony that could authorize his conclusion, the judgment will be reversed. *Lowell* v. *Flint*, 405.
10. Thus, where the justice held, that the testimony of a witness, "that he had no doubt that he did notify the said commanding officer within five days, but could not swear positively that he did, but he could not state said notice was in writing," was competent and sufficient to prove that a written notice of the enlistment of a private in a company raised at large was given to the commanding officer of the local company within five days, his judgment was reversed on writ of error. *Ib.*

MONEY HAD AND RECEIVED.

See ACTION, 4, 5.

MONUMENTS.

See DEED, 2, 3.

MORTGAGE.

1. The mortgagor is seized of an estate of freehold, and while in possession may convey the mortgaged premises, or may bequeath them as and for dower, or they may be assigned by the judge of probate, and the dowress may enter under such assignment, and hold the same and redeem the mortgaged premises. *Wilkins* v. *French*, 111.

2. The widow, by virtue of such assignment, has the right in equity during her life, and the reversion remains in the heirs at law, and in such case, either may redeem. *Ib.*

3. If the heir at law or his assignee redeem, he may oust the widow, unless she should redeem by paying such sum as he may have paid for redemption, in which case she and her heirs would hold till the amount paid by her should be refunded. *Ib.*

4. A mortgage is a mere charge upon the land mortgaged, and whatever will give the money will carry the estate in the land along with it. *Ib.*

5. The mortgage being only security for the debt, the mortgagor has all the rights he ever had against all but the mortgagee. *Ib.*

6. One co-tenant, holding a mortgage on the part of the other, united with him in a deed of the land of which they are co-tenants, by which the several portions of each are conveyed, and in which the premises conveyed are said to be "free from incumbrances," and "that the grantors have good right to sell and convey," without causing any exception to be made of his own title as mortgagee, and without disclosing its existence to the purchaser. He is estopped by the declarations of his mortgagor in their deed to claim under his mortgage. *Durham* v. *Alden*, 228.

7. To permit him to disturb a title thus acquired, would be a fraud upon the purchaser. *Ib.*

8. Where an equity of redemption is attached, the debtor may lawfully remain passive, and suffer the mortgage to become foreclosed, and may even persuade another creditor to take his interest as security, and assign it to him, and if such other creditor should so take it such arrangement is not a fraud upon the attaching creditor, although the assignee knew of the existence of the attachment. *Danforth* v. *Roberts*, 307.

9. Nor is it a fraud upon the attaching creditor, if the assignee make an agreement with the mortgagee, that the latter shall hold the mortgage until the time for redemption has expired, and then convey the land to the assignee on being paid by him the amount secured by the mortgage. *Ib.*

10. If the statement of the mortgagee to the mortgagor, made one month prior to the time when an entry to foreclose the mortgage would become perfected, that "he would give him some time, but that he must not wait long, as he might take advantage of the mortgage," be binding on a grantee or assignee of the mortgagee without notice of such statement, yet the right of redemption no longer remains, where five years have expired, and no payment, or offer of payment, has been made to the mortgagee or his assignee. *Ib.*

11. If the grantee of the mortgagee, is proved to have been in possession of some land not included in the mortgage, to which the plaintiff in equity shows a title, the bill cannot be supported thereby, because the plaintiff has a full and adequate remedy at law. *Ib.*

12. A contract, free from actual fraud, where the owner of a stock of goods mortgages them to secure the plaintiffs against certain liabilities on certain notes, assumed for him as his sureties, containing a stipulation that the mortgagor should retain the possession of the goods until default should be made in the payment of the notes, or some of them, and "should pay over and account for the proceeds of all sales of said goods to the mortgagees, to be applied in payment of said notes, or directly to apply said proceeds to the payment of said notes, at the discretion of the mortgagees," is a lawful contract. *Abbott* v. *Goodwin*, 408.

13. All persons coming in under the mortgagor, stand by substitution in his place, and are equally affected by the contract, whether notified of its existence or not. *Ib.*

14. The power of the mortgagor to make sale of the goods may be implied from his covenant to account to the mortgagees for the proceeds of the sales. *Ib.*

15. If the mortgagor sell the goods, and with the proceeds thereof purchase other goods, these last represent the first, and are substituted for them, and are equally subject to the lien of the mortgagees thereon. So if the mortgagor exchange the goods mortgaged for other goods, and the mortgagees choose to ratify it, the goods received in exchange are equally subject to their lien. *Ib.*

See ASSIGNMENT, 5. EQUITY, 1, 2, 6, 7, 8, 9, 10, 11. SHIPPING, 1.

NEW TRIAL.

See EXCEPTIONS, 2.

NOTICE.

See PARTITION OF REAL ESTATE.

OCCUPATION, TITLE BY.

1. The proprietors of a township surveyed through mistake a portion of land without the limits of their grant, and conveyed the same, describing it as within their limits.—The grantee entering and occupying such premises with a claim of ownership and adversely to all others, will acquire a title by disseizin by lapse of time. *Otis* v. *Moulton*, 205.
2. The rule that occupation by mistake does not give right, may in such a case be applied to the grantors, but is not applicable as against the grantees, who are not expected to be familiar with the rights of the grantors, and who must be considered as intending to claim what they have purchased. *Ib.*

OFFICER.

1. In case of a demand seasonably made by an officer having an execution, upon the officer by whom the attachment on the original writ was made upon which such execution issued, where the property attached is bulky and is deposited in a suitable and convenient place for safe keeping, and the officer upon whom the demand is made is ready and willing to deliver the property attached at the place of its deposit, so that it may be taken on execution, and offers so to do, and is prevented from delivering the same by the failure of the officer making the demand to go with him and receive it, he is discharged. *Gordon* v. *Wilkins*, 134.
2. It is otherwise, if the property be at an inconvenient and unreasonable place of deposit. *Ib.*
3. A demand made by the officer having the execution, upon the officer by whom the attachment was made, on the last day of the continuance of the lien created by the attachment, will be presumed to have been in sufficient season on that day to enable the officer by whom the attachment was made, to discharge himself. *Ib.*
4. The return of the fact on the execution issued upon the judgment, is *prima facie* evidence of a demand for the property upon the attaching officer. *Hapgood* v. *Hill*, 372.
5. A demand, in whatever words made, which would inform the attaching officer, that the sheriff having the execution desired to obtain from him the property attached, would be sufficient. *Ib.*
6. If the defendant in an action of *scire facias* against him as bail, before a justice of the peace, procures a constable to attend the Court to receive the principal on being surrendered by the bail, and the service is performed by the constable, this is sufficient to enable him to recover of the bail the fees to which he was by law entitled. *Thompson* v. *Wiley*, 479.
7. And if the mittimus be dated on the twentieth day of the month, and the return of the commitment by the constable be dated on the twenty-second, if any impropriety exists on the part of the officer in detaining the principal, the party injured thereby only can complain, and it will not deprive the officer of his right to recover his legal fees of the person who employed him. *Ib.*

See ATTORNEY AT LAW, 7, 9, 10. LEVY ON LAND, 3. POOR DEBTORS, 4. REPLEVIN, 2, 3.

PARTITION OF REAL ESTATE.

1. The commissioners appointed to make partition of lands held by tenants in common, should make return of the manner in which they gave notice, to the persons interested, of the time and place of their meeting to proceed in making the partition, that the *Court* may determine whether *due notice was given*. *Ware* v. *Hunnewell*, 291.
2. And unless it appears, from the return of the commissioners, that reasonable notice had been given to the persons interested, the report will not be accepted. *Ib.*
3. If notice may be legally given (in any case) by merely putting written notices into the mail, reasonable notice is not given, when the persons interested live at the distance of two hundred miles from the land to be partitioned,

by placing notices to them in the mail, seven days before the time appointed to proceed in making the partition. *Ib.*

PARTNERSHIP.

1. The interest of each partner in the partnership property is his portion of the *residuum* after all the debts and liabilities of the firm are liquidated and discharged. *Douglas* v. *Winslow*, 89.
2. A creditor of one of the firm may attach their goods so far as his debtor has an interest in them, subject to the paramount claims of the creditors of the firm. *Ib.*
3. Where a large number of persons, by an agreement in writing, associated together to form a company for the establishment of a store to deal in English and West India goods, to be conducted under the direction of a board of managers, a part of whose duty was "to provide a store for the company," the managers have power to purchase a store, and land whereon to place it, and to give the notes of the company to secure the payment of the consideration. *Beaman* v. *Whitney*, 413.
4. And if the only grantees named in the deed are "Whitney, Watson & Co.," the name under which they conducted their business, Whitney and Watson being persons well known and members of the company; if the other persons embraced under the general term, company, could not take as grantees, Whitney and Watson could, and they would hold for themselves and those associated with them. This would be a sufficient consideration for the notes given for the purchase money. *Ib.*
5. The persons liable to the payment of the notes, besides Whitney and Watson, are to be ascertained by proving who constituted the company at the time the notes were made, and embraced all who had then signed their agreement of association. *Ib.*
6. As some of the persons sued had not joined the company at the time, they cannot be holden as defendants. But under the St. 1835, c. 178, § 4, the plaintiff may amend by striking out their names, on payment of their costs, to be taxed severally, after issue has been joined, and the case has been opened for trial. *Ib.*

See EVIDENCE, 22, 23, 24, 25.

PAYMENT.

1. H contracted with R S to sell a certain quantity of land at a stipulated price, who effected a sale at an advance to B. B alleging the sale to be fraudulent, files a bill in equity against H. R S assumed the defence of the equity suit against H and gave him a bond with E S as surety, to save him harmless from the suit. H then gave to E S, the surety on the bond, the note of B for the profits belonging to R S, who held the same as security. B recovers in equity, and E S recovers judgment in his own name and that of his partner against B and placed the execution in the hands of an officer with orders to take the execution, B *v.* H, in offset of the execution, E S *v.* B; it was held, that this was not a payment of the execution, B *v.* H, but an assignment, and that E S might enforce its collection in the name of B. *Herrick* v. *Bean*, 51.
2. Adverse judgments between the same parties, are extinguished only by an order of the Court, by some act of the parties, or some action of an officer having both executions for collection. *Ib.*
3. Where money is paid, the right of appropriation belongs to the debtor; but if he makes no appropriation, it belongs to the creditor to determine to what debt a payment shall be applied, to be exercised within a reasonable time after payment. *Starrett* v. *Barber*, 457.
4. If the creditor holds two notes, and an unappropriated payment is made amounting to enough to pay one of them, his bringing a suit on one of the notes is an election to appropriate the money to the payment of the other. *Ib.*

See LEVY ON LAND, 1.

PLANTATION.

See HIGHWAY, 3, 4, 5,

PLEADING.

1. In replevin, before a justice of the peace, under the plea of *non cepit* the taking only is in issue. *Vickery* v. *Sherburne*, 34.

2. If the defendant would avail himself of any other defence it should be by special plea or brief statement. *Ib.*
3. A plea in abatement setting forth that no service has been made on one of the defendants, without alleging such defendant to be co-promissor or obligor, is bad. *Patten* v. *Starrett*, 145.
4. The right of a plaintiff, as town treasurer, to sue, can only be contested by plea in abatement. *Kellar* v. *Savage*, 199.

See COVENANT, 5.

POOR.

1. A pauper whose settlement in a town was acquired by a residence in the part of it which was afterwards incorporated into a new town, but whose residence and home at the time of the division were in the part remaining, being then supported there by the town as a pauper, does not have a settlement in the new town by the act of incorporation. *Mount Desert* v. *Seaville*, 341.
2. No person can maintain an action against a town for supplies furnished to a pauper, but the one who gave the notice to the overseers. *Warren* v. *Islesborough*, 442.
3. If a notice has been given by one furnishing relief to a pauper, and supplies have been furnished by the overseers, believed by them to be sufficient, a new notice is essential to a recovery of the town for supplies furnished afterwards. *Ib.*
4. There seems to be no limitation to the claim of an individual against a town for the support of a pauper, but that of the general statute, although there is a special one to an action by one town against another. *Ib.*

POOR DEBTORS.

1. The discharge of a poor debtor from arrest or imprisonment by giving a bond according to the provisions of St. 1835, c. 195, § 8, is not a satisfaction of the judgment, and does not impair the rights of the creditor to obtain satisfaction out of any property or estate of the debtor not exempted by law. *Spencer* v. *Garland*, 75.
2. The bond is only a substitute for the detention of the body, and not a satisfaction of the judgment. *Ib.*
3. The oath of a creditor "that the debtor within named is about to change his residence and abscond beyond the limits of the State," is not a sufficient compliance with the provisions of St. 1835, c. 195, which requires that "no person shall be arrested or imprisoned on mesne process" except "when he is about to depart and establish his residence beyond the limits of the State," &c. and does not authorize the arrest of the debtor. *Mason* v. *Hutchings*, 77.
4. If the debtor be arrested when the oath taken is thus defective, the arrest is unauthorized, and the officer so arresting is not responsible to the creditor for not complying with the statute provisions applicable to the case of a legal arrest. *Ib.*
5. The provisions of the statute by which, in certain cases, an arrest may be made, must be strictly complied with. *Ib.*
6. The plaintiff, to entitle him to recover in a special action of the case, brought upon St. c. 195, § 13, must prove that he has a just debt; that his debtor has fraudulently concealed or transferred property liable to be taken by attachment or seized on execution; and that the person sued has knowingly aided or assisted the debtor to defeat his rights as creditor. His claim is limited to double the amount of the property concealed or transferred, if less than his debt, or to double the amount of his debt, if less than the value of the property concealed. *Quimby* v. *Carter*, 218.
7. This provision is not penal. *Ib.*
8. Recovery of judgment and payment are to be regarded as an extinguishment *pro tanto* of the original debt. *Ib.*
9. The fraudulent concealment of property transferred before the passage of St. c. 195, renders the receiver equally liable under § 13 of that act, as if the conveyance had been after its passage. *Ib.*
10. Since the statute of 1835, c. 195, if a debtor be arrested on an execution issued on a judgment in an action commenced in 1833, founded on a con-

tract made in 1821, the bond to obtain his release should be made pursuant to the provisions of the statute of 1822, c. 209, and the proper oath to be administered is the oath prescribed in the latter statute. If, therefore, in such case, the oath provided in the poor debtor act of 1836 be administered, it is not a performance of the condition, the bond is good at common law, the statute of 1839, c. 366, does not apply, and the creditor is entitled to recover his debt, with costs, interest, and officer's fees.

Wallace v. *Carlisle*, 374.

11. In an action upon a poor debtor's bond, where the justices have examined the notification to the creditor, and have found it to be in conformity with the law, their decision upon this point is conclusive; and it is not competent for the plaintiff to go behind their certificate, and raise subsequently any question as to the sufficiency of the notice, for the purpose of showing that the oath was improperly administered. *Cunningham* v *Turner*, 435.

12. If, to authorize an arrest of the body under the poor debtor acts of 1835 and 1836, it be certified upon the writ that the creditor made oath, "*that the debtor was about to depart and establish his residence beyond the limits of this State, with property or means more than sufficient for his immediate support*," it must be regarded as equivalent to an oath, that he was to take with him such property or means, in the language of the poor debtor acts.

French v. *McAllister*, 465.

13. If one of the conditions of a poor debtor's bond be, "*and further do and perform all that is required in and by the acts in such case made and provided*," this imposes the condition that he should abide the order of the justices before whom he should make his disclosure. *Ib.*

14. Where the justices of the peace and of the quorum, before whom a debtor, having been arrested upon a writ, and having given bond, had made a disclosure after judgment was rendered in the suit, made their order on Jan. 4, 1839, that the debtor might go at large upon the bond until the creditor should make his election to levy his execution upon the body of the debtor, or upon the property disclosed; and where the creditor had within thirty days of that time given the execution to the same officer who had made the arrest, and the officer had made his return, dated Feb. 5, 1839, thirty-two days after the order of the justices was made, "*that he had notified the bail of the debtor upon the original writ to deliver up his body, the creditor having elected to take the same within thirty days next after Jan.* 4, 1839, *but they have neglected so to do*," and that he could find neither the property nor the body of the debtor within his precinct; in a suit upon the bond, *it was held*: —

That if the creditor should within thirty days elect to take the body of the debtor, it should be forthcoming to be imprisoned: *Ib.*

15. That it is fairly deducible from the statutes that the election to take the body should be made within thirty days, although it may not be necessary to give notice to the sureties on the bond to produce the body of the principal within that time, if the execution remain in force: *Ib.*

16. That such bond is subject to chancery: *Ib.*

17. And that where no extenuating circumstances appear, the measure of damages would be the amount of the execution, interest, and costs. *Ib.*

See AMENDMENT, 3. EVIDENCE, 29.

PRACTICE.

1. A verdict will not be set aside because the verdict of a former jury was delivered them, with the papers in the case, unless fraudulently or designedly done with intent to influence them. *Harriman* v. *Wilkins*, 93.

2. It is the practice of this Court, in their discretion, to submit special questions to a jury, to be by them answered. *Gordon* v. *Wilkins*, 134.

3. A new trial will not be granted to enable a party to recover nominal damages. *Jenney* v. *Delesdernier*, 183.

4. Where writings are proper matter of defence, and the adverse party must have understood that they would necessarily come in question, notice to produce them will be dispensed with. *Kellar* v. *Savage*, 199.

5. When the statute gives double damages, they may be assessed either by the Court or the jury, and it is immaterial by which. *Quimby* v. *Carter*, 218.

6. When a bill in equity and answer are introduced as evidence, the Court

have no power, on motion, to order the defendant in equity to answer further, in order that such answer may be used as evidence in the case.
Lowney v. *Perham*, 235.

7. If the legal cause for taking a deposition no longer exists at the time of trial, the proof to exclude it is to come from the adverse party.
Logan v. *Munroe*, 257.

8. When the jury *may find* from the evidence, however improbable it may be that they will do so, the state of facts to be such as is contended for; the Court cannot restrain counsel, when arguing upon such a possible result. But in such case, it will be proper for the Court to call the attention of the jury to the amount of evidence upon which such arguments are built. *Ib.*

9. But where facts have been stated by a witness, which could be legal evidence only by proof of having been brought to the knowledge of the adverse party, and there has been an entire failure of proof on the latter point, the commentaries of counsel thereon as evidence in the case would be improper. *Ib.*

10. In the commencement of real actions, the form of process may be a writ of attachment, or an original summons, at the election of the demandant.
Maine Charity School v. *Dinsmore*, 278.

11. It is provided by the St. of 1835, c. 165, § 6, that in actions founded on contract, the defendant may consent in writing to be defaulted, and that judgment shall be rendered against him for a sum specified by him in said writing; and that the same shall be entered on record. After the record has been made under the direction of the Court, it is the best evidence of the fact, and evidence to contradict the record may properly be excluded.
Hunt v. *Elliott*, 312.

12. But where no offer to be defaulted has been made in writing, if it appears that an entry of such offer was made on the docket by the clerk upon the authority only of a verbal direction of the attorney of the defendant, the Court must disregard it. *Ib.*

13. The Court may according to our practice order a nonsuit, when the testimony introduced by the plaintiff will not authorize the jury to find a verdict in his favor. *Head* v. *Sleeper*, 314.

14. Where a note appears from inspection to have been altered, and the jury are of opinion, that the alteration was made after the execution of the note, it will be their duty to return their verdict for the defendant. But whether altered subsequently, or not, is a question for them, if no explanatory testimony is adduced. They are not to be instructed as matter of law, that if not accounted for by the plaintiff, the note is void. *Crabtree* v. *Clark*, 337.

15. Where a witness testifies to certain acts of the party, and states certain words spoken by him, and then states what he understood by the words spoken, and where the words spoken would not warrant the conclusion drawn by the witness, but the acts and words spoken, taken together, would justify it, and the verdict of the jury was in accordance with it; although the *opinion* of the witness was inadmissible, and ought to have been excluded, yet as the verdict was sustained by the evidence, the Court will not set it aside. *M'Kenney* v. *Waite*, 349.

See BANK TAX, 3. EVIDENCE, 27. EXCEPTIONS. INDICTMENT. LIBEL, 4.

PRINCIPAL AND AGENT.

See ACTION, 2, 3.

PRINCIPAL AND SURETY.

1. Where notes are signed by three persons for a joint debt, each is a principal for one third, and a co-surety for the other two thirds.
Goodall v. *Wentworth*, 322.

2. If one pays another's share of the notes, after they become payable, he has a legal claim upon the third for contribution. *Ib.*

3. And if the third party voluntarily pays the one half in pursuance of such legal obligation, the law raises an implied promise on the part of him for whose benefit the notes were paid, to refund the same. *Ib.*

4. It is not essential to the support of such action, to prove an inability of the principal at the time they were paid, to pay his share of the notes. *Ib.*

See BILLS AND NOTES, 28, 30.

PROMISSORY NOTES.

See BILLS AND NOTES.

REAL ACTION.

1. The demandant in a writ of entry must recover upon the strength of his own title, and is bound to prove the seizin upon which he counts. And upon this point, it is competent for the tenant to adduce rebutting proof, whether he shows any title of his own or not. *Bussey* v. *Grant*, 281.
2. Where in the deed under which the demandant claims, certain tracts of land, the exact location and limits of which are not there defined, are excepted from the operation of that conveyance, such deed is not *sufficient evidence* of seizin of any particular portion of the township in the grantee. *Ib.*
3. Unless it appears, in such case, that the tract of land demanded is not within the exceptions, the demandant cannot recover. *Ib.*
4. A deed from the same grantor, made at the same time, to another grantee, and referred to in the deed to the demandant, of a part of the land excepted, is competent evidence for the tenant, to show the location of the excepted portions. *Ib.*
5. The lots of actual settlers prior to 1797, upon the townships back of Bangor and Hampden, numbered two in the first range, and two in the second range of townships, did not pass to Henry Knox and wife by the conveyance to them of those townships from the Commonwealth of Massachusetts whether the settlers' lands have been confirmed to them by the Common-, wealth or not. *Ib.*
6. Where exceptions or reservations, in a deed conveying lands, depend upon a plan, the actual survey and location upon the face of the earth are to determine their bound. *Ib.*

RECEIPTER.

1. Where property has been attached, and a receipt therefor has been given to the attaching officer by the defendant and another, whereby they promise to pay a sum of money, or safely to keep the property free of expense to the officer, and on demand to re-deliver the same to him, or his successor in office, — and if no demand is made, that they will, within thirty days from the rendition of judgment in the suit, re-deliver the property at a place named, and notify the officer of the delivery, — such contract is not illegal. *Shaw* v. *Laughton*, 266.
2. To maintain an action on the contract after the expiration of the thirty days, it is not necessary for the officer to prove a demand of the property, nor notice to the receipters of the time when judgment was rendered. *Ib.*
3. But the receipters are not to be held liable for the value of a horse, part of the property, which died before the time limited for the delivery, without fault on their part. *Ib.*

RELEASE.

See DOWER, 3. EVIDENCE, 9.

REPLEVIN.

1. The plaintiff in replevin is not a trespasser in taking the goods replevied, if he offer sureties satisfactory to the officer, though in fact insufficient. *Harriman* v. *Wilkins*, 93.
2. If a deputy sheriff takes an insufficient bond in replevin, he is guilty of official misconduct, for which the sheriff is responsible. *Ib.*
3. The officer being required in replevin to take a bond "with sufficient surety or sureties," is not justified if he take insufficient sureties by showing that the plaintiff in replevin was a person of abundant property. *Ib.*
4. The statute of limitations against the sheriff for taking insufficient sureties in replevin, commences running from the time when the plaintiff in replevin, after judgment for a return, has failed to return upon demand the property replevied. *Ib.*
5. The mere taking by one man of the mill logs of another and mixing them with his own, will not constitute confusion of goods; but if he fraudulently takes the logs and manufactures them into boards and intermixes those boards with a pile of his own, so that they cannot be distinguished, with

the fraudulent intent of thereby depriving the plaintiff of his property, the *owner of the logs* thus taken may maintain replevin for the *whole pile of boards*. *Wingate* v. *Smith*, 287.

6. Although the owner may claim his property after it has undergone a material change, yet if he would replevy it, he should describe it as it existed at the time of the commencement of his suit. If mill logs be fraudulently converted into boards before the writ of replevin is sued out, the owner should describe the property as boards in his writ. He cannot describe it as mill logs, and recover boards. *Ib.*
7. It is a good defence, in an action of replevin, *under the general issue*, that the writ was sued out before the cause of action accrued. *Ib.*

See ATTORNEY AT LAW, 2, 3, 4, 5, 6. EVIDENCE, 5. PLEADING, 1, 2.

RIPARIAN PROPRIETOR, RIGHTS OF.

The colonial ordinance of 1641 extended the right of riparian proprietors *in the soil* from high to low water mark, where it did not exceed one hundred rods. But this was a qualified right to use the interest granted in such a manner as not to interrupt the rights of the public, as secured by the ordinance. *Parker* v. *Cutler Milldam Co.* 353.

ROAD.

See HIGHWAY.

SALE, UNAUTHORIZED.

See ACTION, 4, 5.

SCHOOLS.

1. The certificate of the majority of the superintending school committee as to the qualifications of a teacher, is to be regarded as *prima facie* evidence that they have performed their duty as well in notifying those who do not sign as in making the necessary examination. *Jackson* v. *Hampden*, 37.
2. If all the members of the committee have not received notice, a certificate by a majority is void. *Ib.*
3. A member of the committee does not waive his right to be notified by absence. *Ib.*
4. A teacher is not authorized to teach, and cannot recover pay without the requisite certificate of the superintending school committee, even though all the members neglect or wantonly refuse to examine him. *Ib.*
5. The certificate required is of the existing committee, and one of the committee of a former year though composed of the same individuals, would be unavailing. *Ib.*
6. By St. 1834, c. 129, § 4, the production of the requisite certificates by the master is a condition precedent to his lawful employment by the school agent. *Rolfe* v. *Cooper*, 154.
7. The master is *prima facie* entitled to receive his stipulated compensation upon proof that he had been employed by the agent, and that the agreed services had been rendered. *Ib.*
8. If the town, notwithstanding the employment of the master by the school agent, would avail themselves of the want of the requisite certificates, they must prove that fact. *Ib.*
9. A school district meeting may be called legally by the selectmen of the town on the written application of three or more qualified voters, who then resided within the district, although they are not described as such in the application. *Fletcher* v. *Lincolnville*, 439.
10. Where the selectmen issue their warrant to one of the applicants, directing him to call a meeting "*at the schoolhouse in said district*," and he returns on the warrant, that he had posted up notices for the purpose, "*one at the schoolhouse and one at the grist mill, both in said district*," the return furnishes sufficient evidence, that the notices were posted, as to place, as the St. 1834, c. 129, § 11, requires, "on the district schoolhouse and one other public place within the limits of said district." *Ib.*
11. The notice is given a sufficient time before the meeting, if posted up on the sixteenth, when the meeting was to be on the twenty-fourth of the month. *Ib.*

12. If a person be chosen as agent of a school district by the qualified voters thereof, assembled together, but not at a district meeting legally called, such person is not agent of the district. *Ib.*

SEIZIN AND DISSEIZIN.

1. The fact of seizin is shown by proof of a conveyance to an ancestor of the demandant from one seized, and entry under such deed, and a descent cast; and to impeach such a title on the ground that the conveyance was made to defraud creditors, the tenant must show it fraudulent, that the creditors have by some act avoided the same, and that he is entitled to set up their title against the demandant or those from whom he derived his title. *Delesdernier* v. *Mowry*, 150.
2. An entry under a deed from one having no title, is evidence of a seizin arising by disseizin. *Boothby* v. *Hathaway*, 251.
3. A seizin in fact in the grantor, under color of, though without legal title, is a defence to a suit for a breach of the covenants of seizin. *Ib.*

See LEVY ON LAND, 4.

SET-OFF.

If an attorney, holding a note in his own favor against a client, puts it in suit, and it be shown that the attorney received a sum of money for the client, it cannot be allowed to the defendant in set-off, unless a set-off has been filed, or unless it be proved, that the money was received in payment of the note. *Wilson* v. *Russ*, 421.

SETTLEMENT.

See POOR, 1.

SHERIFF.

See OFFICER.

SHIPPING.

1. The mortgagee of a ship, though the register or enrolment of the vessel stand in his name, if he has not taken the actual possession and control of the vessel mortgaged, is not answerable for supplies furnished by order of the mortgagor or by the master acting under his order. *Cutler* v. *Thurlo*, 213.
2. So in case of a contract of sale, where the general owner agrees upon certain contingencies to convey the vessel to one, who takes the whole control of the same with a right to appropriate its earnings to his own use, such owner is not responsible for supplies furnished under the direction of the expected purchaser. *Ib.*
3. The hirer of a chattel cannot without special authority for the purpose, create a liability of the owner for the costs of repairs or supplies furnished by direction of the hirer and to aid him in deriving advantage from the thing hired: — and this principle applies equally to a vessel as to any other chattel. *Ib.*
4. Nor is this rule of law varied by the fact that the supplies were furnished with the expectation, that the owner was liable, and on his credit. He is not responsible except for supplies furnished by his consent personally, or that of his lawfully authorized agent. *Ib.*

See TRUSTEE PROCESS, 2.

STATUTE OF FRAUDS.

See CONTRACT, 8, 9, 10.

STATUTE OF LIMITATIONS.

1. Payment of part of a debt, liquidated and ascertained by a contract, is an admission that the whole was then due. *Haven* v. *Hathaway*, 345.
2. An indorsement on a note by the holder *after the Statute might operate*, affords no satisfactory evidence of such admission. *Ib.*
3. In an action upon a note payable more than six years before the commence-

ment of the suit, it was held, that where the defendant had delivered another note to the plaintiff "to collect the same, and apply the proceeds to the payment" of the note in suit, and the plaintiff had accepted it, that he was bound to comply with these directions; and that as soon as he collected money upon it he was obliged to consider it a payment of so much on the note in suit; and that proof of a payment on the collateral note would operate as proof of payment of the same sum on the note in suit. *Ib.*

4. But in such case, if the plaintiff has not used that reasonable diligence which the law requires to collect the collateral note, and the payments have been made later than they should have been, they cannot be considered as made by order of the defendant; otherwise they will be so considered. *Ib.*

See Dower, 1, 2. Equity, 6, 8, 9. Poor, 4. Replevin, 4.

STATUTES CITED.

1821, c. 40, Dower, 244
" c. 52, Administrators, 399
" c. 59, Judicial Process, 279, [388
" c. 60, Attachment, 279
" c. 62, Limitations of ac- [tions, 97, 347
" c. 76, Justices of the Peace, 36
" c. 85, Depositions, 259
" c. 105, Fees, 190
" c. 118, Defective Highways, 50, 248, 298
" c. 122, Paupers, 343, 445
" c. 144, Banking, 472
" c. 170, Apprentices, 173
1822, c. 209, Poor Debtors, 376
1824, c. 272, Bills and Notes, 265
1829, c. 445, Fees, 190
1831, c. 514, Special Pleading, 36
" c. 519, Banking, 473
" c. 520, Imprisonment for [Debt, 376
1834, c. 129, Public Schools, 155, 441
1835, c. 165, Offer to be defaulted, [40, 313
" c. 178, Amendments, 148, 420
" c. 194, Fishwardens, 74
" c. 195, Poor Debtors, 75, 80, [221, 376
1836, c. 240, Assignments, 305
" c. 245, Poor Debtor's Oath, 376
1838, c. 325, Transfer of Corpo- [rate Shares, 305
1839, c. 366, Poor Debtor's Bonds, 376
Rev. St. c. 148, Poor Debtors, 222

Special Laws.

1832, c. 234, Waldo Bank, 473
1836, c. 123, Cutler Milldam Company, 356
" c. 181, Fishery, 74

SURPLUS REVENUE.

See Action, 1.

TAXES.

See Collector of Taxes.

TENANT AT WILL.

1. Where the grantor remains after the conveyance in possession of the premises conveyed, the presumption of law is that he is there rightfully, and as the tenant of the grantee. *Sherburne* v. *Jones*, 70.
2. In the case of a tenancy at will the crops belong to the tenant. *Ib.*

TENANT IN COMMON.

See Partition of Real Estate.

TOWN.

The inhabitants of a town against whom a warrant of distress has issued, are authorized to raise money with which to satisfy the same, either by loan or assessment; and if by assessment either at once, or if less burthensome, by instalments. *Baileyville* v. *Lowell*, 178.

See Action 1, 2, 3. Consideration, 1.

TOWN TREASURER.

Town treasurers, though annually elected, being authorized to sue for debts due the town, continue in office *quoad* any suit by them commenced till its termination. *Kellar* v. *Savage*, 199.

TREASURER OF STATE.

See BANK TAX.

TROVER.

1. Where the plaintiff delivered his horse to another to be kept until a note given for the price became due or was previously paid, and before the time of payment the horse was sold to the defendant by the bailee without notice of the plaintiff's claim, and the defendant, after having had notice of the plaintiff's rights, continued to use and claim the horse as his own after the time limited for the payment of the note had expired without payment; this amounts to a conversion, and the plaintiff may maintain trover without a demand of the horse. *Porter* v. *Foster*, 391.
2. The neglect of a party to proceed against one who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitation interposes. *Ib.*
3. A judgment in trover without satisfaction against one trespasser, is no bar to an action against another person for a distinct trespass upon the same property, committed at a different period and not jointly, although a writ of execution may have issued upon the judgment.

Hopkins v. *Hersey*, 449.

TRUST.

See EQUITY, 16, 17.

TRUSTEE PROCESS.

1. Property may sometimes be in such situation, that a person may be charged as trustee on account of it, where at the same time a direct attachment of the property might have been made. *Balkham* v. *Lowe*, 369.
2. Where a vessel was built by one man, and the materials were furnished by another who was to receive towards the payment an eighth of the vessel at a stipulated price per ton, and the parties settled their account wherein the eighth was charged and allowed as paid in the adjustment, and the papers were taken out by the builder in his own name, with the assent of the person furnishing the materials; — *it was held*, that the former might be charged as the trustee of the latter. *Ib.*

UNINCORPORATED ASSOCIATION.

The defendants, being members of an unincorporated association for building a parsonage house, made to the plaintiff an instrument in these terms: "*For value received of E. C. we, the trustees of the M. E. Society for building a parsonage house on the F. circuit, promise to pay him or order fifty-one dollars and seventy-seven cents and interest in one year from date.*

"H. S. T. } *Trustees*
"W. H. } *of*
"R. T. } *said House.*"

It was held, that they were personally liable, there having been no plea in abatement, that others should have been joined. *Chick* v. *Trevett*, 462.

See PARTNERSHIP, 3, 4, 5, 6. CONSIDERATION, 2.

USURY.

1. In a suit on two drafts, where the defence relied upon was usury, and the verdict was for a less sum than the amount due; *it was held*, that such verdict established the fact of usury. *Warren* v. *Coombs*, 144.
2. A suit brought on two acceptances, in one of which more than legal interest is reserved, is within the provisions of the statute against usury, and the defendant is entitled to costs. *Ib.*

See BILLS AND NOTES, 10, 15. CONTRACT, 3.

VARIANCE.

See INDICTMENT, 5.

VENDOR AND PURCHASER.

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

Perkins v. *Douglass*, 317.

VERDICT.

See BILLS AND NOTES, 2. EXCEPTIONS, 2. PRACTICE, 1, 14. USURY, 1.

WAY.

See HIGHWAY.

WRIT OF ENTRY.

See REAL ACTION.

ERRATA.

11 lines from the bottom of p. 58, for *Warren* read *Mr. Allen.*

9 " " " " " " 89, for *plaintiff* read *plaintiffs*, and after plaintiffs insert *to move.*

15 lines from top of p. 94, for *it was* read *they were.*

15 " " bottom of p. 95, for *he* read *the defendant in replevin.*