REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

HON. EZEKIEL WHITMAN, LL. D. CHIEF JUSTICE.
HON. ETHER SHEPLEY, } JUSTICES.
HON. JOHN S. TENNEY, }

MEMORANDUM.

The terms of the Court at which the cases reported were argued, are placed at the head of the pages in this volume. But the principal portion of the opinions were not prepared and delivered, and from the necessary attention of the Court to jury trials could not have been, until during the succeeding year.

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OF CASES REPORTED IN THIS VOLUME.

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CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND,

ARGUED AT APRIL TERM, 1842.

THE STATE *versus* ISAAC STURDIVANT.

To sustain, on demurrer, an indictment for erecting and continuing a public nuisance, obstructing "Portland harbor, situate and being between the city of Portland and the town of Cape Elizabeth, and also wholly situate and being in the county of Cumberland," it is necessary that it should allege, that the part of the harbor in which the obstruction was erected was within the bounds of the city of Portland, or of some other town; and the place where the erection was, must be described in a manner that shall be certain to a common intent, and be averred to be within the county.

An allegation in an indictment, for erecting a nuisance, that the said S. at, &c. "unlawfully, wilfully and injuriously did erect, place, fix, put and set in the said harbor, and ancient and common highway there, *a certain part of a wharf, it being a part of a wharf owned by the said S. and known by the name of Weeks' wharf*," and has unlawfully, &c. continued the same, is a defective and insufficient description of the nuisance.

AN indictment was found in the Court of Common Pleas for the county of Cumberland of which a copy follows.

"The jurors for said State upon their oaths present, *that a certain part* of Portland Harbor, situate and being between the city of Portland and the town of Cape Elizabeth, and also wholly situate and being in the said county of Cumberland, is and from time whereof the memory of man is not to the contrary, hath been an ancient harbor and an ancient and common highway for all the citizens of the said State, with their ships, lighters, boats and other vessels to navigate, sail, row, pass and

re-pass, and labor, at their will and pleasure, without any obstructions or impediment whatever. And the jurors aforesaid, upon their oaths aforesaid, do further present, that Isaac Sturdivant of said Portland, gentleman, on the twentieth day of July, in the year of our Lord, eighteen hundred and thirty-two, and on divers other days and times, between that day and the day of the taking of this inquisition, at Portland aforesaid, unlawfully, wilfully and injuriously did erect, place, fix, put and set in the said harbor and ancient and common highway there, *a certain part of a wharf*, it being a part of a wharf owned by the said Sturdivant, and known by the name of "Weeks' wharf," and that the said Sturdivant from the day and year first aforesaid hitherto, at Portland aforesaid, the said part of said wharf, unlawfully, wilfully and injuriously hath continued, and still doth continue so erected, placed, fixed, put and set in the said harbor and ancient and common highway aforesaid; by means whereof the navigation and free passage of, in, through, and along and upon the said harbor, and ancient and common highway there, on the day and year first aforesaid, and from thence hitherto, hath been and still is greatly obstructed, straitened and confined; so that the citizens of said State, navigating, sailing, rowing, passing, re-passing and laboring with their ships, lighters, boats, and other vessels, in, through, along and upon the said harbor and ancient and common highway, there on the same day and year aforesaid, and from thence hitherto, could not, nor yet can navigate, sail, row, pass, re-pass and labor with their ships, lighters, boats and other vessels, upon and about their lawful and necessary business, affairs and occasions in, through, along and upon the said harbor and ancient and common highway there, in so free and uninterrupted a manner, as of right they ought, and before have been used and accustomed to do, to the great damage and common nuisance of all the citizens of said State, navigating, sailing, rowing, passing, re-passing and laboring with their ships, boats, lighters and other vessels in, through, along and upon the said harbor and ancient and common highway there, and against the law, peace and dignity of the State aforesaid."

The indictment was duly authenticated by the signatures of the foreman of the jury and the county attorney.

The papers do not show in what manner the case came into the Supreme Judicial Court, but it appears from them, that at Nov. Term of this Court, 1841, Sturdivant demurred to the indictment, assigning the following causes therefor:—

1. Because the indictment does not contain a sufficient description of the bounds, *termini* and location of said Portland harbor to enable the said Sturdivant to answer thereto.

2. Because it is not alleged and set forth in said indictment in what part of said harbor said wharf and said supposed nuisance is situated.

3. Because it is not alleged and set forth in said indictment what part of said wharf obstructs said harbor, and is a common nuisance to the citizens of said State.

There was a joinder in demurrer in behalf of the State by the Attorney General.

Howard and *W. Goodenow* argued for Sturdivant, and contended, that the indictment was bad because there was no allegation that the wharf was below low water mark. He had a right to go to low water mark, and the indictment does not state what part of the wharf is a nuisance, that he may know how to defend himself, or the Court know how to punish on conviction, or the officer know what part of the wharf to remove or abate as a nuisance. For any thing appearing in the indictment, part of the harbor may be a public highway, and part not, and the wharf may encroach upon the part which is not a highway; nor does it show what part is a highway and what is not. The whole indictment is too indefinite and uncertain to found a conviction upon it. The demurrer admits nothing but what is legally and formally alleged. 1 Chitty's Cr. Law, 138, 139, 140; 1 Russel on Cr. 304 to 306; *Commonwealth* v. *Hall*, 15 Mass. R. 240.

Bridges, Attorney General, said that the demurrer admitted that Portland harbor was a public highway, and that the defendant's wharf obstructs it. Whether it was above or below

low water mark was a matter of fact to be settled by the evidence, and is not open on demurrer.

It is not necessary to state in the indictment the particular boundaries or limits of the highway, or in what particular portion of it the nuisance is placed. It is sufficient that it is alleged to be in the highway. *Commonwealth* v. *Hall*, 15 Mass. R. 220.

It is not necessary to give a description of the boundaries of Portland harbor. The name of the harbor is given, and its bounds and extent are mere matter of proof. So too the wharf is as accurately described as is useful for any purpose. The extent of the wharf can be as easily determined by evidence, as if the names of the adjoining owners or occupants were given. If a particular description had been given of the harbor, or of the wharf, a variance in any particular would have been fatal. Known by the name of *Weeks' wharf*, or *Portland harbor*, is as certain as any description can make it. 2 Chitty's Cr. Law, 374 and notes; 1 Burr. 333.

The opinion of the Court was drawn up by

WHITMAN C. J. — To the indictment, which is against the defendant for erecting a public nuisance, obstructing the navigation of Portland harbor, he demurs; and assigns his causes of demurrer. The first is, that the indictment does not contain a sufficient description of the bounds, termini and location of Portland harbor; nor of the place in the harbor where the nuisance is alleged to be. But it has been often determined, that it is not necessary to describe the termini and width of a highway in indictments for erecting nuisances thereon; nor otherwise to describe its location, than by alleging it to be in some known place, within the county; and so that if it should be required of the sheriff or other officer, charged with the execution of final process, to abate it, he might be enabled to act understandingly in doing it; and, at the same time, so that the accused should not meet with unreasonable difficulty in knowing or ascertaining the place intended; and, if there be any difficulty in any such particular, that advantage

can be taken of it by plea in abatement. *Rex* v. *Hammond*, 1 Str. 44; *Rex* v. *Hammersmith*, ib. 357; *Rex* v. *Pappineau*, 2 ib. 686; *Rex* v. *White & al.* 1 Burr. 333; *Commonwealth* v. *Hall & al.* 15 Mass. R. 240.

Portland harbor is a place known to a common intent; and it is averred, in the indictment, that the part of it, in which the offence is alleged to have been committed, is in the county of Cumberland. The government must prove that the defendant erected the nuisance as alleged, or fail in their prosecution. It does not appear, and may not be a fact, that the part of Portland harbor, in which the obstruction was erected was within the bounds of the city of Portland, or of any other town; and in such case could not be described as being in any such place; and the place, where the erection was, must be described in a manner that shall be certain to a common intent, and be averred to be within the county; and the indictment describes it as having been erected in a part of Portland harbor, within the county of Cumberland.

But it is further alleged, as a cause of demurrer, that the nuisance itself is defectively described. The allegation in the indictment is, that it was a part of a wharf, owned by the defendant, and known by the name of Weeks' wharf. The nuisance complained of should undoubtedly be so described, that it can be abated, without doing violence, unreasonably to the rights of other persons. The nuisance is alleged to consist of a part of a wharf. It is to be presumed that the residue of the wharf is no nuisance; and ought not to be unnecessarily injured in removing the part complained of; and much less ought it to be endangered by the want of accuracy in the description of the part complained of. Now what is the part intended to be described in the indictment as a nuisance? Is it at one end or at the other? or on one side or the other of the wharf? It does seem to be important that this should be clearly indicated; and that the part offending should be distinguishable from that which is innocent. It is said to be a part of a wharf, owned by the defendant. Suppose it

to be a fact, that he owns but a part of the wharf, in what way is it to be ascertained what part he does own? But suppose he owns the whole of the wharf, the description will be left still more indefinite. It can scarcely be contended that, the place called Weeks' wharf covers but a part of the wharf, and therefore is descriptive of the part against which the indictment was intended to be found. On the whole, it does seem that this description is too vague, uncertain and indeterminate. And the indictment for that cause must be adjudged bad.

The State *versus* Meldon Somerville.

In an indictment for larceny, proof that the person alleged to have been the owner had a special property in the thing, or that he had it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support that allegation in the indictment.

The legal possession of goods stolen continues in the owner, and every moment's continuance of the trespass and felony amounts in legal consideration to a new caption and asportation. And therefore it was held, that if goods were stolen before the Revised Statutes took effect, and were retained in the possession of the thief until after they came into operation, he might be indicted and punished under those statutes.

A bill of exceptions from the District Court, under the provisions of the statute, cannot present legally to this Court, or call upon it to decide upon any other matter, than the opinion, direction or judgment of the District Court. Any errors or irregularities in the proceedings, or errors of the jury, are not and cannot be legally presented, except through some opinion, direction or judgment of the District Court upon them, and on a matter not submitted to its discretion.

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

Somerville was indicted at the March Term, 1842, for feloniously taking sundry books on the eighth day of December, 1841, alleged to be "of the goods, chattels, books and property of one Zabdiel Hyde, then and there in the possession of one William Hyde." A witness was introduced to prove the property to be in Z. Hyde. The counsel for Somerville re-

quested the Judge to instruct the jury that the evidence was insufficient to establish the allegation of property in Z. Hyde, and that such allegation was material, to be made out by competent evidence, to maintain the indictment. The Judge instructed the jury, that the testimony of the witness, if believed, was sufficient to sustain the allegation of property in Z. Hyde, and entitled the government to a verdict of guilty, if the jury were further satisfied that the prisoner had feloniously taken the books from the possession of William Hyde.

William Hyde testified that he lost several volumes of the books in the months of April, June and July, 1841, and most of the remainder after August 1, 1841, and that all were found in the possession of the defendant on Dec. 8, 1841. The counsel for Somerville requested the Judge to instruct the jury, that it was not competent for the jury to find the prisoner guilty under the present indictment, of offences proved to have been committed prior to the operation of the Revised Statutes, and that the jury must acquit the defendant of so much of the allegations as relate to the books thus proved to have been taken by the defendant, if taken at all by him, prior to the said period of the operation of the Revised Statutes under which the indictment has been found. The Judge ruled, that it was immaterial for the jury to take notice of so much of the testimony as related to the time when the books were taken by the defendant, if satisfied that they were taken prior to the eighth of December, the time alleged in the indictment; that if the jury were satisfied that the books were taken prior to the operation of the Revised Statutes, and he continued to retain the property after those statutes took effect, the jury were bound to consider the offence as continued, and committed under the Revised Statutes, and punishable under their provisions.

And to the foregoing rulings and directions of the Court, the defendant excepts, as being against the weight of evidence and against law, and here in Court and before sentence passed, prays that the said exceptions may be allowed, and that said verdict may be set aside as erroneous and unjust. And said defendant also alleges against and excepts to said verdict as

being against law and against evidence, and without evidence, and against the instructions of the Court, in that the Court instructed the jury, that there was not sufficient evidence of the allegations of said indictment as relates to sundry of said books and chattels enumerated therein, to wit, of a book entitled "*Arnold's Physic*," and of two volumes of Hilliard's Elements of Law, and of one volume entitled Temperance Reader, there being no evidence of the defendant's having feloniously taken the same from Zabdiel Hyde, or that the same were the property of said Zabdiel, but the evidence being that they were not said Zabdiel's property, but the property of other persons. The witness, William Hyde, further testified, that the books described in the indictment were, at the time of the taking, worth at wholesale price, over one hundred and twenty-seven dollars, and that Arnott's Physics, misnamed in the indictment "Arnold's Physic," the Temperance Reader, and two volumes of Hilliard's Elements of Law, named in the indictment, were all, as it appeared by testimony, of less than fifteen dollars in value. In relation to said last named volumes, the Court instructed the jury, that in estimating the value of the books enumerated in the indictment, they were to return an answer, whether the same, exclusive of said last named volumes, exceeded in value one hundred dollars or not, and without attempting to say how much the same either exceeded or fell short of one hundred dollars. The jury returned a general verdict of guilty against the defendant, and returned for answer, that the said books exceeded the value of one hundred dollars, without specifying whether they did or did not include in said estimate said volumes of which there was no proof as aforesaid.

F. O. J. Smith, for Somerville, contended that he had the right to show, that the evidence was not sufficient to prove that the property alleged to have been stolen was the property of Zabdiel Hyde. Unless this point is made out in proof, the indictment fails. He insisted that this was to be determined, as if it were a question between the creditors of William Hyde and Zabdiel Hyde, and not as a question between W. & Z.

Hyde. The testimony shows that the property is but nominally that of Z. Hyde, and is subject to be taken by the creditors of W. Hyde.

This indictment was after the Revised Statutes took effect, and it cannot be supported by proof of a larceny committed before that time. An offence committed under one law cannot be punished under another law. The offence was completed under the old law, and no law made afterwards can alter the punishment.

As to a part of the books alleged in the indictment to have been stolen, there was no evidence whatever to prove that they were taken from Hyde, or were ever his property, and the Court instructed the jury, that so far as it respected those books, there was no evidence to support the indictment. And yet a general verdict was returned, which was finding the defendant guilty of the whole charge. A new trial should be granted for this cause. 2 Strange, 999; 1 Wils. 329; 17 Mass. R. 534; 5 Burr. 2621; 5 Dane, 230; 13 Pick. 543; 2 Wheat. 221.

There is a different punishment where the value of the property stolen exceeds one hundred dollars, from that where it falls below that sum. In this case the verdict does not state, that the books in relation to which there was no proof were not taken into consideration in estimating the value.

Bridges, Attorney General, for the State, moved for leave to enter a *nol. pros.* as to the books not proved to have been stolen, and cited *Commonwealth* v. *Tuck*, 20 Pick. 356.

Whether the evidence was or was not sufficient to support the indictment was a question solely for the determination of the jury, and was not for the decision of the Court as matter of law. Here was no question as to fraud upon creditors, nor is it for the State to try out questions of that character to convict criminals. It was necessary to allege the ownership of the property to be in Zabdiel Hyde, or William Hyde, and as between them, it clearly belonged to the former. 2 Russell, 159. Where the verdict is right, and justice has been done by it, the

Court will not set it aside. *Kelly* v. *Merrill*, 14 Maine R. 228; *Emerson* v. *Cogswell*, 16 Maine R. 77.

The property stolen was found in Somerville's possession long after the Revised Statutes took effect. Every moment the property stolen remains in the possession of the thief, he may be charged with having stolen it.

There is a saving clause as to the punishment of all offences committed before the repeal, and he may be convicted under either statute. It is not necessary to refer to any particular statute, but only to the statute generally, as it was done here. *Commonwealth* v. *Griffin*, 21 Pick. 523.

This is but the common case of failing to prove every article named in the indictment, to have been stolen. This is not necessary. 2 Campb. 585; 21 Pick. 523.

The Judge directed the jury to exclude the books not proved to have been stolen from Hyde from the calculation of value, and they are to be presumed to have followed his direction unless the contrary appears.

S. Fessenden, for Somerville, replied.

The opinion of the Court was afterwards drawn up by

Shepley J. — The first question presented is, whether the proof of property was sufficient. It is contended, that the testimony discloses an arrangement by which Zabdiel Hyde should be the ostensible owner and should hold the property for the benefit of William Hyde. If the purchases were made in the name of the former and held avowedly for the benefit of the latter, a trespasser could not be permitted to impugn the arrangement or question its propriety. Proof that the person alleged to be the owner had a special property, or that he held it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support the allegation in the indictment. 2 East's P. C. 654; *Wymer's case*, 4 C. & P. 391; *Rex* v. *Boulton*, 5 C. & P. 537.

The second question for consideration is, whether the prisoner can be considered as committing the crime since the Revised Statutes took effect, in respect to those articles which he

had stolen before, and retained in his possession since that time. The doctrine of the common law is, that the legal possession of goods stolen continues in the owner, and every moment's continuance of the trespass and felony amounts in legal consideration to a new caption and asportation. It is upon this principle, that a person stealing goods in one county and carrying them into other counties is considered as guilty of the crime, and may be indicted and convicted in any county, where he has carried them. 1 Hale, 507; Hawk. b. 1, c. 33, § 52; 2 East's P. C. 771. And this rule has been applied, when the goods have been altered in their character before carried from one county to another. But in such a case the indictment should describe the goods in their altered and not in their original state. 2 Russ. 174. This rule of the common law determines, that the prisoner was guilty of theft at all times, while he retained the possession of the stolen goods, as well before as since the revision of the statutes. The person in such cases is not considered as guilty of more than one offence, and an acquittal or conviction in one county or at one period would be a bar in other counties and at other periods.

The third question relates to the finding of a general verdict of guilty, under instructions that there was not sufficient evidence of property as alleged, to enable the jury to find the prisoner guilty of stealing certain books named. By the Revised Statutes, it is provided, that "any person convicted of an offence in the District Court, may allege exceptions to any opinion, direction or judgment of said Court." In this case the Court does not appear to have passed any judgment, and the instructions on this point were favorable to the prisoner. The bill of exceptions states, that "to the foregoing rulings and directions of the Court the defendant excepts as being against the weight of evidence and against law, and here, in Court, and before sentence passed, prays that the said exceptions may be allowed and that said verdict may be set aside as erroneous and unjust. And said defendant also alleges against and excepts to said verdict as being against law and against evidence, and without evidence and against the instructions of

the Court." It does not appear, however, that any motion was made in the District Court to set aside the verdict for any of these causes, or that the Court expressed any opinion respecting the finding of the jury. A bill of exceptions under the provisions of the statute, cannot present legally to this Court, or call upon it to decide upon any other matter than the opinion, direction, or judgment of the District Court. Any irregularities in the proceedings, or errors of the jury, are not and cannot be legally presented, except through some opinion, direction or judgment of the District Court upon them and on a matter not submitted to its discretion. Whether the prisoner should be entitled to a new trial for any error committed by the jury, or whether such error, if any, may not be cured by entering a *nolle prosequi*, as has been proposed by the Attorney General, are questions not legally presented to the consideration of this Court.

Exceptions overruled and case remanded to the District Court.

THE STATE *versus* MELDON SOMERVILLE.

A general verdict of guilty applies to all the material allegations in the indictment; and therefore, where the indictment alleges that many different books, particularly described, were stolen by the accused, a general verdict finds him guilty of stealing all the books named and alleged to have been stolen.

On the trial of such indictment, if the District Judge instruct the jury, that if they find that the accused was guilty of feloniously taking any one of the books specified in the indictment, they should find him guilty generally, the verdict of guilty will be set aside and a new trial granted, although the punishment may be the same for stealing one of the books as for stealing the whole.

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

This was an indictment at the March Term of the District Court, 1842, against Somerville for feloniously taking sundry

books, particularly described, the property of Robert H. Sherburne. With respect to a number of these books, which were particularly specified, the Judge instructed the jury, that there was no sufficient evidence either of property in Sherburne, or of his having lost them, to sustain the indictment so far as related to them; but that if they were satisfied that the defendant was guilty of feloniously taking any one or more of the books specified in the indictment, they should find the defendant guilty generally, if all the books were of less value than one hundred dollars. The jury returned a general verdict of guilty. Somerville, to the rulings and opinion of the Judge "excepts, as being against law and against the evidence in the case."

Bridges, Attorney General, for the State, moved for leave to enter a *nol. pros.* as to the books respecting which there was no proof.

The case was submitted upon the arguments in the last indictment against Somerville, by

S. Fessenden and *F. O. J. Smith*, for the accused, and by

Bridges, Attorney General, for the State.

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

SHEPLEY J. — The bill of exceptions names certain books, and states that "the Court instructed the jury, that there was no sufficient evidence of either property in said Sherburne, or of the loss by said Sherburne, to sustain that part of the indictment, which relates to them. But the Court instructed the jury, that if they were satisfied, that the defendant was guilty of feloniously taking any one or more of the books specified in the indictment, they should find the defendant guilty generally, if all the books were of less value than one hundred dollars; and upon this ruling and direction of the Court a general verdict of guilty was returned by the jury against the defendant."

A general verdict of guilty applies to all the material allega-

tions in the indictment and finds the prisoner guilty of stealing all the goods named and alleged to be stolen. And although the punishment may be the same, whether the prisoner be found guilty of stealing a part only or the whole of the goods alleged to have been stolen, yet his rights in other respects, as well as the rights of others, may be affected by the finding of a general verdict upon proof, which would not authorize it.

The statute provides, that "upon conviction of the offender, the stolen property shall be returned to the owner." Rev. Stat. c. 156, § 14. The property to be restored to the owner must be ascertained from the allegations in the indictment and from the finding of the jury. And if the prisoner should prove a part of the property alleged to have been stolen to be his own, and a general verdict should be taken, it would deprive him of that portion of his property and transfer it to another. And although the punishment may be the same, yet it is not necessarily the same, and might perhaps be expected to vary, where the prisoner should be found guilty of stealing ninety dollars in value, and when found guilty only to the amount of ten dollars. And he should not be found guilty of stealing any property without sufficient proof of his guilt. As the general verdict of guilty applies to the whole property alleged to have been stolen, and the jury were not required to distinguish further than to find a general verdict, if they should be satisfied of the felonious taking of one or more of the books; it will be necessary to submit the case to the consideration of the jury again, that this error may be corrected.

Exceptions sustained, verdict set aside and new trial granted, and remanded.

WILLIAM ORMSBY *versus* WILLIAM ANSON *& Trustee.*

Where the principal had performed services for the person summoned as trustee, and the latter had given the former a negotiable note in payment on the same day the process was served; and where the supposed trustee had deceased after the service and before making an answer, and his administrator came in and made a disclosure, and stated that "*the note was given to the best of his knowledge prior to the service of this trustee process;*" *it was held*, that although the answer might not have been satisfactory, if the intestate had remained alive, yet that being made by an administrator, it was sufficient as the best evidence.

If the intestate was not liable to pay for the services at the time of the commencement of the trustee process, no arrangement made after his death by the administrator by which the principal first became entitled to payment, could authorize a decision that the intestate was liable at the time when the process was served upon him.

THIS suit was commenced by William Ormsby, who has since deceased, and of whose estate H. H. Boody has been appointed administrator, against the present defendant; and John G. Deane was summoned as his trustee. Before any answer was made by him, Col. Deane died, and Rebecca D. Deane was appointed administratrix of his estate, and she came in and made an answer. From this answer, which was somewhat extended, it appeared, that J. G. Deane was one of the commissioners appointed by a resolve of the Legislature of this State to run the northeastern boundary line, and that they concluded to make a map to accompany their report. As the State had appropriated no funds to defray the expenses of the survey, the commissioners determined to incur no personal responsibility, and therefore stated to all they employed, that they could expect nothing for their services, except from the State, and what the State should allow them individually. The commissioners kept an account of the amount of services, and handed it to the Governor and Council, and it was allowed by them and the Legislature to each individual. Anson was employed by Deane in behalf of the commissioners, and his bill was among those thus handed in. He was paid for his services up to January 1, 1839, by the State. Since that time Anson labored fifty days in finishing the map. This account

was presented to the Governor and Council, and also to Deane for payment, but payment was refused by each. Deane gave Anson a certificate of the time he was employed, as a voucher, to be laid before the Governor and Council. Prior to the service of the trustee process upon him, Deane had employed Anson upon some work of his own in preparing a map for publication of the same territory for his own benefit; and had from time to time advanced money on this account. At the time of the service, Anson was indebted to Deane to the amount of fifteen or twenty dollars. Deane had given a note to Anson, and the fifth interrogatory put by the plaintiff to the administratrix of Deane was, "Was said note for seventy-five dollars given by said John G. Deane to said Anson, on the twenty-seventh of April, prior to the service of the plaintiff's writ on said Deane on that day?" The answer by the administratrix of Deane was, "The note of seventy-five dollars was given, to the best of my knowledge, prior to the service of this trustee process."

The case was submitted on the briefs of the Counsel.

F. O. J. Smith, for the plaintiff, cited *Cleaveland* v. *Clap*, 5 Mass. R. 201.

Fessenden, Deblois & Fessenden, for the trustee, cited *Bainbridge* v. *Downie*, 6 Mass. R. 253; *Mann* v. *Chandler*, 9 Mass. R. 335; *Sumner* v. *Williams*, 8 Mass. R. 198; *Scott* v. *Hancock*, 13 Mass. R. 162; *Caswell* v. *Wendell*, 4 Mass. R. 108.

The opinion of the Court was by

Shepley J. — It is contended, that the answer to the fifth interrogatory is not sufficiently certain to entitle the trustee to a discharge. The principal had performed services for the intestate, and had received payments in part, and on the day of the service of the writ a further payment by note of seventy-five dollars. The inquiry is made, whether that note was given on that day before or after the service of the trustee process. The answer is, that it was given to the best of my

knowledge prior to the service. This might not be satisfactory, if the answer had come from one having certain knowledge of the business; but it cannot be expected, that the administratrix should be possessed of the same degree of knowledge, and this appears to be the best evidence, which can be obtained.

The other services must be regarded according to the statements of the administratrix as performed for the State, and not for the intestate. And if the intestate or his personal representative made use of the map in compiling one claimed to be his own, that would not change the character of the original transaction, or give the principal any new rights, unless there was some new agreement. It might perhaps affect the copyright, but not the original contract, under which the services were rendered. The arrangement made by the attorney of the administratrix, after the death of the intestate, could not affect the decision of this question. For if the intestate was not liable to pay for the services at the time of the commencement of this process, no arrangement made after his death by which the principal first became entitled to payment could authorize a decision, that the intestate was liable at the time when the process was served upon him.

Trustee discharged.

Moses K. Marean *versus* Benjamin Longley *& al.*

M. delivered his horse to L. in August, 1840, and at the same time received the note of the latter for one hundred dollars, to be paid when M. V. B. should be elected President of the United States, if elected at the then next November election, and should live until that time. M. V. B. lived until that time, but was not elected; and in February following, M. demanded the horse and payment of the note of L. and brought his action of assumpsit on the note and for the value of the horse as sold and delivered. *It was held:* —

That if the contract, which was to be considered but a bet on the event of the then pending election of president of the United States, was lawful, then the plaintiff cannot recover, as he has lost his bet: —

That if it be unlawful, he cannot recover on the note; nor for the value of the horse, delivered under such unlawful contract, unless the statute against gaming will aid him:

And that this statute will not aid him, because if the winning has been of goods, &c. which have been delivered, then the statute remedy is by an action of trover, or a special action of the case, commenced within three months of the time when the goods were delivered.

The action was assumpsit on a note, on an account for a horse sold and delivered, and for money had and received; and was commenced Feb. 16, 1841. A copy of the note declared on follows: —

"Standish, August 1, 1840. For value received we jointly and severally promise to pay Moses K. Marean, or order, one hundred dollars and interest, to be paid when Martin Van Buren is elected President of these United States; if so be he should be elected at the Presidential election in November next; if the said Martin Van Buren should live until that time.

"Benjamin Longley,
"Nathaniel Bacon, Jr.
"Charles Barrell."

The parties agreed on this statement of facts.

The plaintiff, on August 1, 1840, being the owner of a horse, offered to dispose of the same to the defendants, and received therefor the note signed by the defendants, described in the declaration. The horse was delivered by the plaintiff to the defendants, and the note was executed and delivered to the plaintiff, and the bargain thus completed. Before the

commencement of the present suit, a demand was made by the plaintiff upon the defendants for the horse, for the value thereof, and of payment of the note. Martin Van Buren lived until after the November election, and was not elected President of the United States. The general result of the Presidential election was not known in Maine until December 15, 1840.

If upon these facts the plaintiff is entitled to recover, the defendants are to be defaulted, and judgment be entered for the amount of the note, or of the value of the horse, as the Court may determine. But if not entitled to recover, he is to become nonsuit, and the defendants recover their costs.

Codman and *Fox*, for the plaintiff, said that the defendants had received the horse, and had not paid for it, unless by this note. If therefore the note is valid, we are entitled to recover the amount of it; and if it is not valid, the defendants have purchased our horse, and have not paid for it, and we are entitled to judgment for its value. *Stebbins* v. *Smith*, 4 Pick. 97.

The note is payable but on a contingency; and as that contingency cannot happen, it becomes payable in a reasonable time.

But if it can be considered a gaming transaction, the consideration can be recovered back. The three months limitation commenced when the result of the Presidential election was known, December 15. The case, however, does not show this to have been a gaming transaction, and the Court cannot presume it.

Deblois and *O. G. Fessenden*, for the defendants, contended, that this was an election wager, and therefore an illegal transaction. All wagers in this State are illegal. *Lewis* v. *Littlefield*, 3 Shepl. 233.

But if it were not so, the contingency has never happened on which only the note was to become payable, and the action cannot be maintained.

Where property is delivered over in pursuance of an illegal

transaction, the law will not enable the party to recover it back. Bull. N. P. 132; 2 Com. on Con. 496; Dougl. 696; 8 T. R. 575; Cowper, 790.

The statute in relation to gaming, St. 1821, c. 18, does not apply to this case. But if it did, it was barred by the statute limiting the action to three months from the payment of the money or delivery of the articles. That was in August, and the action was not commenced until February.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of assumpsit, in which the plaintiff is attempting to recover the value of a horse, estimated at one hundred dollars, and interest thereon from the first of August, 1840, at which time the horse was delivered by him to the defendants. The delivery of the horse was upon an agreement, that the defendants should pay the above sum and interest in case Martin Van Buren should live and be elected President of the United States in November then next. It is admitted, that Mr. Van Buren was not so elected, although then living. A note was given, at the time, for the amount stipulated to be paid, in conformity to the above terms, which is duly set forth in the plaintiff's writ which also contains counts for the horse as sold and delivered generally, and for money had and received.

The plaintiff contends, that the condition upon which the horse was to be paid for, was void; and that he has a right to recover the value of him, notwithstanding the non-compliance with the condition. It cannot be winked out of sight, that this was nothing more nor less, in the contemplation of the parties, than a bet upon the event of the then pending election for the presidency of the United States. This was either lawful or unlawful. If lawful the plaintiff has lost his bet, and must abide by the terms agreed upon, and cannot recover pay for his horse. If unlawful he would not seem to be in any better predicament, as *in pari delicto potior est conditio defendentis*; unless the statute against gaming will aid him to recover. That statute provides, that money lost by gaming, and paid to

the winner, may be recovered back, in an action for money had and received; but if the winning be of goods, &c. which have been delivered, an action of trover or a special action of the case may be maintained therefor, if commenced within three months. If therefore, an action were maintainable in this case, upon the ground, that this was a gaming transaction, as the article won and delivered was a horse, and this action is assumpsit; maintainable, if at all, upon an implied promise, the plaintiff must fail. A nonsuit therefore must be entered.

BENJAMIN FRENCH, JR. *versus* INHABITANTS OF BRUNSWICK.

In an action against a town to recover damages sustained by an obstruction placed in the highway, the burthen of proof of due care is upon the plaintiff; but it may be inferred from circumstances.

To decide what shall constitute reasonable notice to the town is, in many cases, attended with difficulty, as the words "*reasonable notice*" are undefined in the statute. It is not necessary to prove notice to the town in its corporate capacity; nor that the majority of the inhabitants should have had notice; nor is it even necessary to bring home the knowledge to any officer of the town; and it has sometimes been considered, if it be proved that some principal inhabitant had notice, it would be sufficient.

Where numbers of the inhabitants of the town were concerned in placing the obstruction, which caused the accident, across the highway, of whom one at least was a man of substance; and the obstruction was so left by all for a short time, during which the accident happened; *it was held*, that the notice was sufficient to render the town liable.

TRESPASS on the case for an injury alleged to have been sustained by the plaintiff by means of a rope, extended across a public road in the town of Brunswick, in the evening.

The case was opened for trial, and many witnesses examined, from which it appeared that several inhabitants of that town had drawn some rafts of logs to the shore, and to prevent their being carried down the river, had fastened a rope to these rafts, and had extended it across the road, which was here near the river, a few feet above the ground, and fastened it to a tree beyond the road, on the opposite side. In this

state it was left by all the men for a time, and while thus left in the evening, the plaintiff passed along the road on horseback, was caught by the rope, thrown from his horse, and severely injured.

After the witnesses had been examined, the parties agreed to take the case from the jury, and refer it for the decision of the Court upon the evidence, all of which appears in the report. They agreed, that if the Court, on the facts, should find that the plaintiff was entitled to recover, judgment was to be entered in his favor for so much damage as they should find him to have sustained; and if not entitled to recover, he was to become nonsuit. The testimony bearing upon any question of law, is stated in the opinion.

Mitchell, for the plaintiff, admitted that the plaintiff must show that he made use of ordinary care, but said that it might be inferred from facts proved. *Foster* v. *Dixfield*, 6 Shepl. 380.

The principal question is, whether the town had *reasonable notice* before the accident happened. He contended that the testimony reported, proved abundant notice; and cited st. 1821, c. 118, § 17; *Thompson* v. *Bridgewater*, 7 Pick. 188; *Frost* v. *Portland*, 2 Fairf. 271; *Bigelow* v. *Weston*, 3 Pick. 267; *Springer* v. *Bowdoinham*, 7 Greenl. 442.

The town is as much liable for injuries occasioned by obstructions placed in the road by individuals, as for those caused by defects in the road through neglect. *Frost* v. *Portland*, before cited.

Everett, for the defendants, contended that it did not appear that the plaintiff conducted himself with ordinary care. The burthen of proof is on him to show it. *Adams* v. *Carlisle*, 21 Pick. 146; *Lane* v. *Crombie*, 12 Pick. 177; *Smith* v. *Smith*, 2 Pick. 263.

The decisions had already gone quite far enough on the subject of constructive notice to towns, but, as was contended, not far enough to include this case. This was the mere carelessness, or misconduct, of individuals without any knowledge of

any inhabitant of the town, but those engaged in it. It was too, but merely placing the rope across the road for an instant, while the men went for a stake to drive into the bank for a fastening. There is no more ground for holding the town liable in this case, than if one should leave his team for a moment in the road, and during his absence an accident should happen in consequence of it. As much evidence is necessary to support an action of this description, as an indictment for neglecting to keep the road in repair. *Howard* v. *North Bridgwater*, 16 Pick. 190.

The most extreme cases in Massachusetts, such as *Reed* v. *North Brookfield*, 13 Pick. 94, require such notice as should ordinarily carry the knowledge of the obstruction to the officers of the town. Reasonable notice should be given, that the officers of the town might remove the obstruction. 9 Mass. R. 247; 1 Metcalf, 308; 4 Mass. R. 422.

Here is no room for presumption in this case, as all the persons, who knew of it, are stated, and they are the very persons who placed the *rope* there. Some substantial citizen at least is required to have had notice.

The opinion of the Court was drawn up by

WHITMAN C. J. — Two questions are raised in this case for the consideration of the Court. The first is, was the plaintiff, at the time of the misfortune complained of, exercising due care and precaution; — and, secondly, had the defendants such notice of the obstruction as to render them culpable, and responsible for the damage sustained by the plaintiff. These the parties have seen fit to refer to the decision of the Court, instead of the jury. The facts agreed upon, and reported by the Judge, as developed at the trial, are supposed to leave nothing for the decision of the Court, but questions of law arising thereon.

As to the question of due precaution, it appears that the plaintiff was riding on horseback, in a public highway, where no obstruction, of the novel kind complained of, was to have been apprehended. He, therefore, could not, reasonably, have

been expected to have been upon the lookout for it. The accident occurred in the twilight of the evening; when it might well happen that the view of such an obstruction would, ordinarily, be obscured; and to one, not previously put upon his guard, would not be discernable. Although the burthen of proof of due care is upon the plaintiff, yet it may be inferred from circumstances; and we think, that what appears in this case will well warrant the conclusion, that the plaintiff was, upon that occasion, in the exercise of due care.

To decide what shall constitute reasonable notice is, in many cases, attended with difficulty. The words "reasonable notice" are undefined in the statute. Every case will present its peculiar circumstances, so that a decision in one will seldom furnish a precedent for another. It is not considered necessary to prove notice to the town in its corporate capacity, as the language of the statute, taken literally, would seem to import: nor is it necessary that the majority of the inhabitants should have had notice; nor is it even necessary to bring home the knowledge to any officer of the town. It has sometimes been considered, if it be proved that some principal inhabitant had notice, it would be sufficient. *Lobdell* v. *New Bedford*, 1 Mass. R. 153. Here again the rule would be indefinite. Who are to be taken and deemed to be the principal inhabitants?

In *Springer* v. *Bowdoinham*, 7 Greenl. 442, one of the inhabitants of the town, two hours before sunset, had so placed a stick of timber, that one end of it was an obstruction in the highway, and it was passed there by several others of the inhabitants of the town. It is not said whether they, or either or any of them, were principal inhabitants or not. The same evening the plaintiff in that action was passing the place and was overturned in his carriage, and sustained an injury. No officer of the town had notice of the obstruction till the next morning. Yet the defendants were held liable.

In the case here, numbers of the inhabitants of Brunswick were concerned in placing the obstruction across the highway. Who they all were does not certainly appear. Some were minors. One Eaton, was so poor, that, when taxed, his taxes

were abated; one Wright, paid only a poll tax, and resided in Brunswick but one year; and one Forsaith, was one of the owners of the timber, which they were attempting to secure; and saw Eaton in the act of fastening the rope to the tree, whereby the obstruction was created; and as he testifies, told Eaton not to fasten it there, and that Eaton replied he was only going to take in the slack. Eaton testified that Forsaith, who was passing that way at the time, took hold of the rope to assist in drawing in the raft, and told him it would not do to make the rope fast to the tree, as people were passing; and charged him to stay by it, and see that no one came along; that the rope was tied to the tree at that time; but could not say that Forsaith knew it. Here it is natural that we should inquire, if he, Forsaith, did not know that the rope was fastened to the tree, why he should have directed Eaton to stay by it; and give as a reason why he should do so, that people were passing. His intention must have been that Eaton should take care to warn those, who were approaching, of the obstruction; or to remove it, so that they might pass; and, if he had done either, the injury to the plaintiff would have been prevented. But Eaton did not stay by it: he left it, as he says, for a short space; and in his absence the injury occurred. It is not questioned but Forsaith was a man of substance. Whether others, who were aiding in hauling in the raft and fastening the rope, were so or not does not appear.

These facts can scarcely be deemed less cogent, as evidence of notice, than those in *Springer* v. *Bowdoinham.* For aught that appears the individuals, who had notice in this case of the obstruction, were equal in substance and respectability with those, who might have had notice in that; and it might have been removed, as it would seem, with about the same expedition and facility, in the one case as in the other. If the case of *Springer* v. *Bowdoinham* is to be regarded as a precedent, obligatory upon the Court, although it may seem to go to the extreme verge of the law, it must have a controlling influence upon our decision. Eaton's desertion of his post, but

for which the accident might have been prevented, was culpable negligence; and, under the circumstances of this case, we think, was imputable to the defendants, and they must answer for the consequences. A default may be entered.

ELIAS CRAIG, JR. *& al. versus* SAMUEL FESSENDEN *& al.*

The return by an officer on an execution for costs, that he has made diligent search for property of the debtor in the execution, and cannot find any within his precinct, is conclusive evidence, that the debtor had no property *within that precinct*, in *scire facias* against the indorser of a writ.

Proof either of avoidance or of inability, is sufficient to render the indorser liable.

SCIRE FACIAS against the defendants, as indorsers of a writ, in a suit which had been tried in this Court, and in which judgment had been rendered for costs for the defendants therein, who are the plaintiffs in this suit.

That judgment was rendered April Term, 1840; the execution issued April 27, 1840; and was put into the hands of a deputy sheriff for the county who returned thereon as follows. "Cumberland ss. Oct. 27th, 1840. I have made diligent search for property of the debtors within named, but could not find any in my precinct. I therefore return this execution in no part satisfied.

Jere. Martin, Deputy Sheriff."

The indorsement of the writ by the present defendants was shown. It was proved, that Gardner, one of the judgment debtors, now resides in Boston, and had resided there for the last three or four years, but the witness stated, that he had frequently seen him in Portland within that time. The defendants offered to show, that Gardner had owned thirty shares in the stock of the Canal Bank in Portland, unincumbered, for the last five years, and that the same had at all times been abundantly sufficient to pay the claim now in suit. The plaintiffs objected to the introduction of this testimony, but the

objection was overruled by SHEPLEY J. then holding the Court, and the testimony was admitted. A nonsuit was then entered by consent, subject to the opinion of the Court. If the testimony was not admissible, or if on that, with the other evidence, the plaintiffs are not entitled to recover, the nonsuit was to stand; but if the action can be maintained, the nonsuit was to be set aside, and a default entered.

Howard & Osgood, for the plaintiffs, contended, that the facts, appearing in the report, disclosed a good cause of action for the plaintiffs.

A return by an officer upon a precept, which he has authority to serve, is conclusive as to the facts returned, except in a suit against the officer for a false return. *Slayton* v. *Chester*, 4 Mass. R. 478; *Bott* v. *Burnell*, 9 Mass. R. 96; *Estabrook* v. *Hapgood*, 10 Mass. R. 313; *Winchell* v. *Stiles*, 15 Mass. R. 230; *Bean* v. *Parker*, 17 Mass. R. 591; *Stinson* v. *Snow*, 1 Fairf. 263; *Agry* v. *Betts*, 3 Fairf. 415.

This very question has been settled by repeated decisions. *Ruggles* v. *Ives*, 6 Mass. R. 494; *Palister* v. *Little*, 6 Greenl. 350; *Harkness* v. *Farley*, 2 Fairf. 491; *Chase* v. *Gilman*, 3 Shepl. 64.

The offer to prove that one of the debtors had property within the county of Cumberland was a direct contradiction of the officer's return. Indeed all evidence to show a want of diligence in the officer to ascertain the facts, is contradicting his return.

A. Haines, for the defendants.

1. *The return of the officer in this case is not conclusive nor sufficient evidence as to the inability of the original plaintiffs.*

It is not contended by the defendants that they are not bound by the return of the officer so far as that return extends: but as the statute regulating and providing for the liability of indorsers (Laws of Maine, c. 59, § 8,) confines itself to the cases in which the AVOIDANCE OR INABILITY *of the original plaintiff is made to appear*, the defendants here contend, that

the return of the officer in this case is entirely insufficient to shew either the avoidance or inability of the original plaintiffs, so as to charge the defendants here as indorsers. The return of the officer states merely, *that having made diligent search, he was unable to find any property of the debtors in his precinct.* But is it to be presumed, contrary to the express provisions of the statute, that the original plaintiffs are unable to pay, merely because a deputy of a sheriff of a single county in the State returns that he is unable to discover any property of the original plaintiffs *within his precinct?* If the officer had stated in his return that the original plaintiffs had avoided, or if the execution bore the returns of the several sheriffs through the State that search had been made, and that the debtors had no property, or that the debtors had been committed to gaol, that would have been a different question.

But in this case, neither avoidance, nor inability is shown, for there is not a particle of evidence of the avoidance of either of the debtors, but on the contrary, the record, (execution,) shews the original plaintiffs all to be residents of Portland, and the return of the officer does not show any avoidance; and in fact they never have avoided.

2. The evidence offered to prove the ability of the original plaintiff, Gardner, was legally admissible, and properly admitted. *Palister* v. *Little*, 6 Greenl. 350. In the case just cited, Chief Justice MELLEN says, "*a question of inability to pay is a question of fact, which must be proved, in order to render the indorser of a writ liable,*" and he goes farther, and says, "*even an arrest and commitment is only prima facie proof of inability, which may be rebutted.*" *Harkness* v. *Farley*, 2 Fairf. 491.

3. The creditors should exhaust the remedy that the law gives them against the original plaintiffs, even to committing their bodies to imprisonment and thus test their inability to pay, before they can recover of the indorser. ***Ruggles & al.*** v. *Ives*, 6 Mass. R. 494.

The opinion of the Court was by

SHEPLEY J. — The statute c. 59, § 8, provides, that the indorser shall be liable in case of the avoidance or inability of the plaintiff to pay the defendant all such costs as he shall recover. It has been decided, that proof, either of avoidance or of inability, is sufficient. And that the return of an officer on the execution, that he has made diligent search for property and cannot find any within his precinct, is conclusive evidence, that the debtor in the execution had no property within that precinct; although such return affords no proof, that he had not sufficient property in other towns or counties. *Harkness* v. *Farley*, 2 Fairf. 491. The testimony in this case did not prove, that the debtors had any property in this State out of the county of Cumberland; and it was inadmissible to prove that they had property within that county. The defendants being precluded from showing that the debtors had property in the county of Cumberland are liable as indorsers.

Nonsuit set aside and defendants defaulted.

The President, Directors and Company of the Maine Bank *versus* Joseph B. Hervey.

An amendment of a writ after service and without leave of the Court is illegal; but if it be afterwards assented to by the defendant, it can no longer afford any legal objection to the further prosecution of the suit.

If there be an omission in the oath, required by the poor debtor acts to authorise the arrest of the body of the debtor, of the words, "*establish his residence beyond the limits of this State,*" and of the words, "*that the demand in the writ is, or the principal part thereof, due him,*" and there be no other words equivalent thereto, the arrest will not be regarded as a service of the writ, but is illegal, and the plaintiff can derive no advantage from it.

Where an action is entered in Court without a service of the writ, the defendant may voluntarily appear and take upon himself the defence; and by a general appearance he becomes a party to the suit, is regularly in Court, and authorises it to state that fact upon the record, and upon proper proof from the plaintiff, to render judgment against the defendant, unless in accordance with its rules of practice he can make a legal defence.

A general appearance to the action cures all defects in the summons and service; but a special one for the purpose of taking advantage of defects, is not attended with such consequences.

But a general appearance will not deprive the defendant of the benefit of the rules of Court; and he may still, within the rules, plead any matter in abatement.

Whenever it becomes apparent on inspection, that the Court has no jurisdiction, it will at any time stay all further proceedings.

The rules of the District Court must govern its practice; and if a plea in abatement, by its rules, is filed too late, it cannot be received.

If the defendant enter a general appearance, where the Court has jurisdiction, the action will not be dismissed on motion for any defect in the service of the writ, if made after it is too late to plead in abatement.

While the Court would act upon it, as a general rule of practice, that a motion to quash for defects apparent on the inspection of the record, if not made within the time required for filing a plea in abatement, should be overruled, there may be exceptions to the rule; such for instance as where the plaintiff withholds the writ until after the time for filing a plea in abatement has elapsed.

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

When this action was called for trial, at June Term, 1841, on the 11th day of the term, the said Hervey, by his attorney, moved that the plaintiffs' writ abate for want of legal service upon the

defendant; he also had filed a plea in abatement setting forth the causes of abatement as hereinafter stated, on the 8th day of the term, being the first day he had seen the writ, but not until after the new entries had been called. The motion and plea stated, and an inspection of the writ showed, that the writ was originally dated April 21st, 1841, and subsequently altered in another hand to the 20th of April. Upon inquiry being made by defendant's counsel, Mr. Daveis who made the alteration, stated that it was done to make the date conform to the fact, that the writ was actually made on the 20th, but it was altered after the writ had been returned to him by the sheriff with the bail bond annexed. Discovering the mistake, he immediately made the alteration, and gave the writ back to the sheriff. The sheriff testified that he took the writ and bond back, and called upon the defendant and the surety, stated to them the mistake, and they consented to it, but he made no alteration in the service or return. The officer's return stated, that on the 20th of April he arrested the defendant, and took bail as required by the statute. Mr. Adams stated, that he made the writ at the bar, while the Supreme Court was sitting, at the request of Mr. Daveis, and that he thought the day was April 21st, until Mr. Daveis called his attention to it after the service, on the same day, and he was satisfied he was mistaken. The defendant objected to all statements in contradiction to the matter apparent on the record. It further appeared that the oath taken by the plaintiffs' attorney and entered on the back of the writ, omitted the words "establish his residence beyond the limits of this State," and the words "and that the demand in the writ is, or the principal part thereof, due him," required by the statute. Whereupon the attorney of the defendant moved that he be not held to answer to said suit.

The Court ruled that the appearance of the defendant by attorney on the docket, without specification of his object, was a waiver of the objections; that the motion should have been made before the new entries were called; and therefore order-

ed the defendant to be called. To which ruling the said Hervey excepted.

Willis and *W. P. Fessenden*, for the defendant.

It appears by the exceptions in this case that the oath taken, and which was essential to authorize the arrest of the debtor, was fatally defective in two important particulars, viz: in not alleging that the defendant was "about to establish his residence beyond the limits of this State," and in omitting the words, "and that the demand in the writ is, or the principal part thereof, due him."

Without these words the arrest was entirely unauthorized and illegal. Act 1835, c. 195, § 3; *Whiting* v. *Trafton*, 4 Shepl. 398. Then, no authority existed for the arrest and it was *illegal;* and *consequently*, as nothing else was done, as no summons was left, or delivered, as provided by law, there has been no *service* of the writ whatever, and therefore the Court had no jurisdiction of the suit.

That a defect apparent on the face of the writ may be taken advantage of *on motion* appears by numerous cases. This principle of practice is recognized in *Hathorne* v. *Haines*, 1 Greenl. 245; *Blake* v. *Freeman*, 13 Maine R. 130; *Upham* v. *Bradley*, 17 Maine R. 423. When must such a motion be made? If a plea in abatement were necessary the 18th rule of this Court requires it to be filed within two days after entry. But this is not a plea in abatement, but a *motion*, and by the 27th rule, these must be made at the opening of the Court on the 2d day of the term, *ordinarily;* but it is "*provided* that when the cause or ground of such motion or application shall first exist or become known to the party, *after* the time in this rule appointed for making the same, *it may be made* [if the cause require it] *at any subsequent time.*"

The case shews that the motion was made by plea on the day the facts became known to the defendant's counsel. There has been therefore, no laches on his part.

The rules of the District Court, in which this suit was commenced, require that pleas in abatement must be filed before

the time allowed for calling the new entries; but there is no rule of that court requiring that motions, for defects apparent on the face of the record, should be made within that time. This motion, then, was seasonably made.

And although it may be true, as stated by EMERY J. in *Trafton* v. *Rogers*, 13 Maine R. 320, that "*generally*, when the objection is taken by motion, it is entitled to no more favor in point of time within which it should be made, than a plea in abatement," yet the cases cited by him do not confirm his position; and even if true, *generally*, the principle cannot apply to a case where the party *does not know the facts*, and cannot be presumed to know them within that time. *Rathbone* v. *Rathbone*, 4 Pick. 89.

The same case shows, that the decisions of the Court below upon its own rules are not final, but subject to revision here.

It has been repeatedly settled that where it appears *by the proceedings* that there has been no legal service of the writ, the Court will, *ex officio*, refuse to proceed in the suit, and stay all proceedings. *Tingley* v. *Bateman*, 10 Mass. R. 343; *Gardner* v. *Barker*, 12 Mass. R. 36; *Jacobs* v. *Mellen*, 14 Mass. R. 132; *Lawrence* v. *Smith*, 5 Mass. R. 362.

The Court will dismiss such a writ on *inspection.*

The defendant did not lose the right to take advantage of this illegal service, or in the want of service, by the appearance of his attorney.

It was good in abatement. Had the attorney filed his plea in abatement within the time limited for such pleas, he would not have lost the benefit of it by having entered his name in the docket.

Then if his *motion* was *in time*, he could not have lost the benefit of it by having so entered his name. His appearance must be construed to have been for the express purpose of taking advantage of the exception. *Blake* v. *Jones*, 7 Mass. R. 28, and cases before cited. He could only lose the right to take this exception by a general continuance, or by having pleaded in bar, or the general issue.

The plaintiffs have no right to amend their writ, after service. *Greeley* v. *Thurston*, 4 Greenl. 479.

C. S. & E. H. Daveis, for the plaintiffs.

A plea in abatement in this case was filed on the eighth day of the term of the W. D. C. in June, 1841, and after the calling of the new entries upon the ground of defect in the service of the writ, by reason of the omission of a part of the oath required by the statute in regard to the arrest of the debtor.

A motion to quash the writ upon the same grounds was made on the eleventh day of the term.

The plea in abatement was not filed in season. Rule 8th, of the Western District Court.

The defendant contends that the motion was made by plea on the day the facts become known to the defendant's counsel. What can be taken advantage of on motion is not ordinarily a proper subject for a plea.

The defendant had real and substantial notice of the whole writ at the time of his commitment, when the certificate and oath formed a part of it. And the writ was at the plaintiff's command on the first day of the term, and if he did not then know the form of the oath certified upon it, it was his own laches; he had constructive notice at least. But it was for the defendant to shew to the satisfaction of the Court that he had no knowledge of these facts until the time the motion was made. This was not done.

In fact there is no rule of the Western District Court, authorizing the plea or motion, when made. And this Court will not impose rules upon the District Court regulating the *order* of proceedings there, nor in ordinary cases interfere with its regulations for the despatch of business. The case of *Rathbone* v. *Rathbone*, 4 Pick. 89, cited by defendant, is to the point that the decisions of the Common Pleas upon its own Rules are not final, but that case was an extraordinary one. The effect of the construction being to deprive the defendant of his *means* of *defence*, in gross contravention of the intention of the statute allowing him to come in and defend.

There can be no question that the plea in abatement was filed too late. If it could be regarded as a motion according to the construction claimed for it by the defendant, it was still too late. A motion to quash a writ must be made at as early a period as is prescribed by law for a plea in abatement. *Trafton* v. *Rogers*, 13 Maine R. 320.

This decision of our own Court is supported by the cases in Massachusetts. *Simonds* v. *Parker*, 1 Metc. 508; *Kittredge* v. *Bancroft*, ib. 513.

Chief Justice Shaw says that the time for moving to dismiss, depends upon the same reasons as those for limiting the time for a plea in abatement.

The ground of the motion is a mere defect in the service of the process and this is cured by a general appearance by attorney. *Knox* v. *Summers*, 3 Cranch, 496; 1 Chitty's R. 129.

Although a defect in the affidavit to hold to bail may be substantial, yet it must be objected to within a reasonable time; and it is too late to object after the defendant has put in bail. 3 Chitty's Practice, 340, citing *Reeves* v. *Hooker*, 2 Tyr. 161; S. C. 2 Crom. & J. 44.

In *Ripley* v. *Warren*, 2 Pick. 592, Chief Justice Parker said, "all irregularities in process must be taken advantage of by motion or plea in abatement in the first stage of the process," citing *Gilliland* v. *Morrell*, 1 Caines, 154; *Hart* v. *Weston*, 5 Burr. 2587.

The case of *Ripley* v. *Warren*, is cited and affirmed in *Carlisle* v. *Weston*, 21 Pick. 535, and in *Simonds* v. *Parker*, 1 Metc. 508, 511, where Chief Justice Shaw says, "the writ was manifestly bad, on its face, in not complying with an express direction of the constitution of the Commonwealth," and he gives this among other reasons for the rule. "If a party takes no notice of any matter of exception to the form or service of the process in an early stage of the proceedings, it affords a reasonable ground to conclude that he considers them of no importance and is willing to proceed to a trial of his rights upon the substantial merits of the controversy."

The cases are uniform in maintaining the reasonableness of the rule that all defects of service must be taken advantage of at the earliest stage of proceedings, whether by motion or plea in abatement. It is decided expressly in *Simonds* v. *Parker*, and in *Trafton* v. *Rogers*, that a motion is entitled to no more favor in point of time than a plea in abatement. While the case of *Rathbone* v. *Rathbone*, cited by defendant, as establishing the contrary, is not at all in point.

The defendant contends that the arrest was illegal, and therefore that the Court had no jurisdiction of the suit, and cases are cited to show, that when the Court has no jurisdiction of the suit, it will *ex officio*, and at any time abate the writ. This language is inapplicable since the Court had jurisdiction over the suit and the parties. It was a defect of service merely, and the same omission in the affidavit was so holden in *Brigham* v. *Clarke*, 20 Pick. 50; and in *Ripley* v. *Warren*, 2 Pick. 592. An equally fatal defect was held to be cured by the defendant's appearing and pleading.

The cases cited by the defendant from 10 Mass. R. 343, 12 Mass. R. 36, 14 Mass. R. 132, and 5 Mass. R. 362, are all cases where there was neither person nor property within the jurisdiction of the Court, and not cases of defect in the form of service of the writ.

The case, *Blake* v. *Jones*, 7 Mass. R. 28, cited by the defendant, merely decides that a party *may* appear for the express purpose of taking advantage of an exception. And the defendant must state in his motion that he appears for that purpose only, as was done in *Ames* v. *Windsor*, 19 Pick. 247.

The attorney's entering his name under the action is a *general* appearance. Howes' Practice, 203; *Knox* v. *Summers*, 3 Cranch, 496.

The defendant cannot say that his appearance was for the express purpose of taking advantage of an exception, of the grounds of which he professes to have been ignorant until the eighth day of the term.

In regard to the amendment of the writ after service, it was, in the first place, proved to have been done with the knowl-

edge and consent of the defendant. Secondly, the amendment was allowed by the Court, upon proof that the writ was actually made on the 20th, and that its being dated the 21st was by mistake; and it is competent to prove by parol evidence that a writ appearing by its date to have been issued on one day, was in fact issued on a different day. *Trafton* v. *Rogers*, 13 Maine R. 315; *Bragg* v. *Greenleaf*, 14 Maine R. 395.

The opinion of the Court was afterwards drawn up by

SHEPLEY J. — Although the amendment of the writ after service, and without leave of the Court, was illegal, yet having been afterwards assented to by the defendant, it can no longer afford any legal objection to the further prosecution of the suit. The affidavit required to authorize an arrest was insufficient; the arrest was illegal; and the plaintiffs can derive no advantage from it. *Whiting* v. *Trafton*, 4 Shepl. 398. The service having been illegal the writ may be regarded as presented in Court and the entry of the action as made without service. The defendant in such cases may voluntarily appear and take upon himself the defence. By a general appearance he becomes a party to the suit, is regularly in Court, and authorizes it to state that fact on record, and upon proper proof from the plaintiff, to render judgment against him, unless in accordance with its rules of practice he can make a legal defence. Such a general appearance to the action cures all defects in the summons and service. *Dalton* v. *Thorp*, Cro. Eliz. 767; *Rex* v. *Johnson*, 1 Stra. 261; *Caswall* v. *Martin*, 2 Stra. 1072; *Knox* v. *Summers*, 3 Cranch, 498. A special appearance for the purpose of taking advantage of defects, can have no such effect, and it is so stated in the case of *Blake* v. *Jones*, 7 Mass. R. 28. Nor will such general appearance deprive him of the benefit of the rules of Court; and he may within the rules still plead any matter in abatement. If it become apparent on inspection, that the Court has no jurisdiction, it will at any time stay all further proceedings.

In this case it does not appear, that the District Court had not jurisdiction over the parties and the subject matter of the suit. The contrary may justly be inferred. The rules of that Court must govern its practice ; and they required, that pleas in abatement should be filed before the new entries were called. And this plea in abatement was filed too late. The motion could not avail the defendant, because, as before stated, his general appearance to the suit cured the defect of service and precluded him from taking the objection. In the case of *Rathbone* v. *Rathbone*, 4 Pick. 89, the motion for leave to plead in abatement was made on the first appearance of the defendant, and it was decided to come within the spirit of the rule. While the Court would act upon it as a general rule of practice that a motion to quash for defects apparent on inspection of the record, if not made within the time required for filing a plea in abatement, should be overruled as stated in the case of *Trafton* v. *Rogers*, 13 Maine R. 315 ; there may be exceptions to the rule ; such for instance as where the plaintiff withholds the writ until after the time for filing a plea in abatement has elapsed. His own wrong should not in such case be allowed to give him an advantage and to deprive the defendant of a right. Although the bill of exceptions states that the court " ordered the defendant to be called," it is understood to have been an erroneous statement, and the counsel do not claim any advantage from it.

Exceptions overruled.

GEORGE F. RICHARDSON *versus* SILAS W. MERRILL.

If land be devised to two persons in fee, with a condition annexed to the estate, that it should be improved by them in common, the land is subject to partition; for the partition of the fee would not destroy the right to have it improved in common.

By the devise of a "*ship yard, the privilege thereon to be improved equally between the heirs of my son S. C. aforesaid, deceased, and my son W. C.*" the mode of improvement is limited to the son and grandsons of the testator, and does not remain after they cease to be interested in the land.

PETITION for partition of a tract of land in Falmouth, called the ship yard. The case depended on the construction to be given to the will of Samuel Cobb, senior, which will was approved March 16, 1790. All the portions of the will, having any relation to this question, are given literally in the opinion of the Court.

At the trial, the respondent contended, that the title to the ship yard was held in such manner that it was not subject to be divided by this process of partition. SHEPLEY J. presiding at the trial, ruled that the ship yard was subject to partition. If in the opinion of the Court, it is subject to partition, judgment was to be entered that partition be made; but if not, the petition was to be dismissed.

Fessenden, Deblois & Fessenden, for the respondents, contended, that the ship yard was not subject to be partitioned by judgment of Court.

The leading object, in the construction of wills, is to ascertain the intention of the testator, as discovered in the will; and to ascertain the intent, the terms of the devise must be construed according to their natural meaning, and conformably to the rules of law. *Richardson* v. *Noyes,* 2 Mass. R. 58; *Davis* v. *Hayden,* 9 Mass. R. 518; *Crocker* v. *Crocker,* 11 Pick. 257. The intention is manifest, that this should not be partitioned.

This intention of the testator is not repugnant to any rule of law. It is not an entailment, Cruise. Title, 32, c. 23. The testator had a right to annex such a condition of enjoying and

possessing the estate, in his will. 1 Shep. Touchstone, 118, and following pages; 2 T. R. 137; 2 Cruise, 50.

The devisees under the will of Cobb having taken that property, they and their grantees are bound to comply with the condition. 2 Cruise, c. 13, § 16; Bro. Ch. R. 165; Co. Lit. 236 (b); 1 Rol. Abr. 250; 1 Lev. 174.

W. P. Fessenden, for the petitioner, said it was a well established rule of law, in the construction of devises, that a will is not to be construed strictly, like a deed; but the intention of the testator, as gathered from the whole instrument, though not expressed in the proper legal and formal words, is to be carried into effect. 6 Cruise, 171; 4 Com. Dig. 152; *Cook* v. *Holmes*, 11 Mass. R. 531; and the cases cited for the respondent from 2 Mass. R. 58, and 1 Pick. 257.

It was not the intention of the testator, as *assumed* by the counsel for the respondent, to devise a mere privilege of using the land of which partition is sought; merely giving a limited right of enjoyment, for a specific purpose.

It was the intention of the testator to give, and the will does give, an estate in fee. By a devise of the rents and profits, or of the income of lands, the land itself passes. 1 Salk. 228; *Reed* v. *Reed*, 9 Mass. R. 372. A devise of the use and improvement of an estate to one for life, with remainder to his heirs, gives a life estate in the premises, with remainder over. *Claflin* v. *Perry*, 12 Mass. R. 425; *Whitney* v. *Whitney*, 14 Mass. R. 88.

A devise to one, without words of inheritance, may give an estate in fee, if from the whole will, such intention is to be inferred. *Cook* v. *Holmes*, 11 Mass. R. 531; *Fox* v. *Phelps*, 17 Wend. 393.

As bearing on the points made by strong analogy were cited *Moore* v. *Fletcher*, 16 Maine R. 63; *Maddox* v. *Goddard*, 15 Maine R. 218; *Whitney* v. *Olney*, 3 Mason, 280. The intention of the testator, in the present case, was that the devisees should take the entire estate.

The opinion of the Court was drawn up by

Shepley J. — The petitioner claims to have partition made of a tract of land called the ship yard. It is admitted, that each party exhibited title deeds purporting to convey to him one undivided half of it as derived by mesne conveyances from the devisees of Samuel Cobb. Partition is resisted on the ground, that the devise required, that it should be improved in common. The testator devised to the heirs of his son, Samuel Cobb, deceased, the southwest part of his home estate, "excepting fifty acres of the northeast part of homestead, together with the house and barn on the same, which I set off to my son William, excepting the ship yard, the privilege thereon to be improved equally between the heirs of my son, Samuel Cobb, aforesaid, deceased, and William Cobb." By another clause the fifty acres are devised to William Cobb. It is not necessary to decide, whether by these words of the will, "the privilege thereon to be improved equally between the heirs of my son, Samuel Cobb, aforesaid, deceased, and William Cobb"; the fee of the ship yard was devised; for, if not, it would remain in the testator and be devised to the same persons and in the same proportions by the residuary clause in these words: — "It is my will, that all my goods and any part of my estate not before mentioned is to be equally divided between the heirs of my son, Samuel Cobb, deceased, and William Cobb." There can be no doubt, that by one or the other of these clauses the fee of the ship yard was devised in equal portions to William Cobb and to the heirs of Samuel. The parties respectively have therefore by purchase acquired title to one undivided half of it in fee. And if the argument should be admitted to be correct, that it was the intention of the testator to annex it as a condition to the estate, that it should be improved by them in common, it would not be a valid objection to a partition. *Fisher* v. *Dewerson*, 3 Met. 544. Because the partition of the fee would not destroy the right to have it improved in common.

The language used by the testator does not however provide, that the ship yard should be equally improved by William

and the heirs of Samuel, and their heirs and assigns. It is limited to the improvement to be made by his son and grandsons. He could not be expected to desire to control the use of it after they should cease to be interested in it; and there is no indication of any such desire or intention. A perpetual limitation of the improvement of an estate to one mode and for one purpose binding under all the changes, to which estates in this country are subjected, should not be inferred from the use of language not requiring any such construction, when permitted to have its full and literal effect.

Judgment that partition be made as agreed.

Moses Chesley *versus* John Welch.

If one would enforce a contract which operates as a penalty, although the damages may be liquidated, he should show that he has performed all the acts incumbent on him to perform to bring the case clearly within the contract.

Where the parties refered an action by rule of Court, and agreed in writing, "that the parties shall have the report of the referee opened as soon as made, and that the party defeated shall pay the other the amount of the referee's award within twenty days of the time of the award," or pay to the other the sum of one hundred dollars; and neither party within twenty days requested that the report of the referee should be opened, and it was not, but was returned into Court, and judgment rendered thereon, and the amount of the judgment was paid before any suit, but not within twenty days of the time of judgment; *it was held*, that no action on the contract could be maintained to recover the hundred dollars.

Assumpsit on a contract of which a copy follows.

"Whereas John Welch and Moses Chesley have this day agreed to refer an action by rule of Court, now pending at Paris in the county of Oxford, between Moses Chesley, plaintiff, and John Welch, defendant, to the determination of John Cousins. Now it is agreed that the parties shall have the report of the referee opened as soon as the same is made; and that the party defeated, shall pay the other the amount of the referee's award within twenty days of the time of the award;

and if either party shall fail to pay the other the amount awarded at the time of the award; and if either party shall fail to pay the other the amount awarded at the time aforesaid, he shall pay, and does hereby agree to pay the other the sum of one hundred dollars as damages for non-performance of this agreement by payment at the time aforesaid. Nov. 17, 1838.

"JOHN WELCH.

"MOSES CHESLEY."

The plaintiff read the contract and the copy of a judgment recovered by him against the defendant in the District Court for the county of Oxford, June Term, 1839, for $11,31, damage, costs of reference, and costs of Court, making in the whole, debt and costs, $37,58. This judgment was founded upon the report of Cousins as referee, the reference having been entered into Nov. Term, 1838. The defendant did not pay the amount of this judgment within thirty days after judgment, but did pay the same afterwards before the commencement of this suit.

The cause was taken from the jury by consent, and it was agreed, that the Court should render judgment for either party according to their legal rights respectively.

Deblois and *O. G. Fessenden*, argued for the plaintiff, citing 2 Bailey, 295; Evans' Pothier on Oblig. 98; 2 Com. on Con. 537; 2 B. & P. 352; 1 H. Black. 232; 4 Burr. 2227; 2 T. R. 32; 8 Mass. R. 223; 14 Maine R. 250; 1 Dane, 549.

Codman & Fox, for the defendant.

The opinion of the Court was by

SHEPLEY J. — The contract between the parties bearing date on the seventeenth day of November, 1838, was not designed to authorize the referee to open and publish his award to the parties. The clause, which states "that the parties shall have the report of the referee opened as soon as the same is made," shews that a future act was contemplated as necessary to be performed by them. This was only the agreement requiring that future act to be done. They did not expect,

that the referee would deliver his award or disclose its character to the party, against whom he had decided, without the presence or the written consent of the other party. It appears to have been their intention to avoid the delay, which might happen by having the award presented to a Court, which might not be in session for months after it was made, and to compel by the agreed damages an earlier performance, than could be enforced by law. The report of the referee does not appear to have been opened before it was returned to the Court; and the event, which was to determine that payment should be made within twenty days after the award, has never happened. If it had been the duty, or even within the power of the defendant alone to have caused the report to be opened as soon as the same was made, this would not have been any sufficient excuse. But this he was not required to do without some further act on the part of the plaintiff. The delivery of the report into Court or its publication there was not the event, upon which the payment within a certain time was to depend. In the case of *Thorpe* v. *Thorpe*, 1 Salk. 171, HOLT C. J. says, "when a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract, in such case performance is a condition precedent and must be averred in an action for the money." If one would enforce a contract, which operates as a penalty, although the damages may be liquidated, he should shew, that he has performed all acts incumbent on him to perform to bring the case clearly within the contract. The parties in this case did not contract to pay within twenty days after the award upon the agreement and condition, that it should be returned to Court and there opened, but on the agreement, that it should be opened as soon as made. The plaintiff therefore does not present a case within the terms of the contract or the intention of the parties, when they entered into it.

Plaintiff nonsuit.

SAMUEL F. MORSE *& al. versus* SIMEON T. RICE *& al.*

The Statutes of 1835, c. 195, and of 1836, c. 245, for the relief of poor debtors, were repealed by the Revised Statutes.

After the Revised Statutes were in force, the oath to be taken by a debtor arrested on execution, is that prescribed in the Revised Statutes, c. 148.

Therefore where a debtor had given a bond, before the Revised Statutes were in force, to cite the creditor, submit himself to an examination and take the oath provided in the poor debtor act of 1836, c. 245, within six months; and where the oath was to be taken after the Revised Statutes were in force and within the six months; *it was held*, that the forfeiture of the bond was saved, by the debtor's taking the oath prescribed in the Revised Statutes, c. 148, instead of that provided in the St. 1836, c. 245.

The substitution in such case of the oath prescribed in the Revised Statutes, c. 148, for that in the St. of 1836, c. 245, is not an unconstitutional act.

THE action was debt upon a bond, dated March 26, 1841, given to the plaintiffs to liberate Rice from an arrest on an execution in their favor against him. The condition of the bond was as follows.

"Now if the said Simeon T. Rice shall in six months from the time of executing this bond, cite the said Samuel F. & Sidney B. Morse, the creditors, before two justices of the peace *quorum unus*, and submit himself to examination as is prescribed in the tenth section of an act, entitled "an act for the relief of poor debtors," passed March 24th, A. D. 1835, and take the oath or affirmation as provided in the seventh section of an act, entitled "an act supplementary to an act for the relief of poor debtors," passed April 2d, A. D. 1836, and perform all the other conditions provided by the laws of the State relative to the relief of poor debtors, or pay the debt, interest, cost, and fees arising in said execution, or be delivered in custody of the gaoler within said time, then the said obligation to be void, otherwise to remain in full force."

Rice had duly notified the creditors, and within the six months, and after the first day of August, 1841, had taken the oath prescribed in the Revised Statutes, c. 148, but did not take that prescribed in the St. of 1836, mentioned in the condition of the bond.

The plaintiffs contended at the trial before SHEPLEY J. that the bond was forfeited, because the oath required by the condition of the bond had not been taken. The Judge was of opinion, that the legal oath was administered; and the plaintiffs submitted to a nonsuit, which was to be set aside, if the opinion was erroneous.

Howard & Osgood, for the plaintiffs, contended that the opinion intimated at the trial, was erroneous.

The bond in this case is to take the poor debtor's oath prescribed in the St. of 1836 on that subject, not the oath provided by law to be taken. The oath actually taken, is more favorable to the debtor, than the one required by the bond. The condition is forfeited, for it has not been performed either in form or substance.

The bond given by Rice is a contract between the obligors and the plaintiffs, to be performed according to its terms. It was made under the statutes then existing, and should be construed according to the principles of the common law. That contract cannot be altered, and a new condition substituted for that made by the parties, by any act of the legislature. They may exercise a control over the remedy, but not over the contract. *Thayer* v. *Seavey*, 2 Fairf. 284.

The Revised Statutes should only have a prospective operation, and not operate upon contracts made before they took effect. It is a settled rule in construing statutes, that they are to be considered prospective, unless the intention to give a retrospective operation is clearly expressed. *Hastings* v. *Lane*, 3 Shep. 134. To give the Revised Statutes a retrospective operation in this case, would be to render them unconstitutional, as impairing the obligation of contracts. *Blanchard* v. *Russell*, 13 Mass. R. 16; *Foster* v. *Essex Bank*, 16 Mass. R. 270; *Reed* v. *Fuller*, 2 Pick. 158; *Walter* v. *Bacon*, 8 Mass. R. 468; *King* v. *Dedham Bank*, 15 Mass. R. 447. If the legislature have the power to alter the condition of the bond to make it more favorable to the debtor, they have power also to make it more favorable to the creditor, and less so to the debtor. It is however manifest from the Revised Statutes, c.

148, § 20, and the general repealing act, § 2, that the operation should be but prospective.

The bond contains three alternative conditions. If one become illegal or impossible, the debtor should have performed one of the other two. He could have gone into prison, or have paid the debt.

Adams, for the defendants, said that the certificate of the magistrates was conclusive evidence, that notice had been given according to law. 13 Mass. R. 239; 3 Fairf. 415; 3 Pick. 405.

By a fair construction of the condition of the bond, the oath intended was the oath required by the law existing at the time the disclosure should be made. It is substantially, to take the legal poor debtors' oath, and the practice in this county has been in accordance with this view.

The statute of 1836 was repealed by the Revised Statutes. The twentieth section of c. 148, is to be considered with the next section, and shows that the new law was to have an immediate operation.

The operation of the statute is merely upon the remedy, and not upon any contract between the parties. A law must be clearly and palpably so, or it will not be pronounced to be unconstitutional.

The opinion of the Court was by

Shepley J. — The condition of this bond is, that one of the obligors shall within six months submit himself to examination and take the oath or affirmation provided in the seventh section of the act of 1836, or pay the debt, interest, costs and fees, or be delivered into the custody of the jailer. The Revised Statutes took effect before the time for taking the oath had expired. And the debtor within the six months took the oath therein prescribed; but did not take the oath named in the condition of the bond. The oaths are not in all respects the same. It is contended, that there has not been a performance of the condition of the bond and that the plaintiffs are entitled to judgment. By the act repealing the statutes which

had been revised, the act of 1835, c. 195, by virtue of which this bond was taken, and the act of 1836, c. 245, prescribing the form of the oath, are repealed. The second section of the repealing act provides, that the acts repealed shall continue in force so far as they respect the trial and punishment of crimes and offences, and the recovery of penalties and forfeitures, which have been incurred; and for saving all rights of action, and all actions and causes of action, which shall have accrued by virtue of, or are founded on any of the repealed acts. It is obvious, that these provisions do not embrace the case now under consideration. The design of the revision was to substitute the revised enactments for the acts repealed, except where an explicit provision was made to the contrary. There is no indication of an intention, that the former oath should continue to be taken by debtors, who had given bonds under the acts repealed. The intention, that the revised code should, after a certain time, be the statute law of the State on this subject, is too clearly indicated to authorize the application of the rule, that statutes should be regarded as having a prospective operation, unless a contrary intention is disclosed. And the rule itself is rather applicable to new legislative provisions, than to a revision and re-enactment of former acts, often with little or no variation, but sometimes with new provisions. If the Revised Statutes are not to be regarded as operating in this respect prospectively, it is insisted, that they cannot vary the performance of the condition of this bond, because it would impair the obligation of the contract. A judgment creditor is permitted in certain cases to arrest the body of his debtor, who is to be released upon giving a bond in a prescribed form to the creditor. The design is to compel a disclosure of the debtor's means of making payment. And to give him time to arrange his affairs and make payment, or to disclose them fully, he is authorized to substitute the bond for a detention of his person. It is made payable to the creditor, but might at the pleasure of the legislature be made payable to the officer. It arises out of a statute prescribing and regulating the mode of proceeding for the collection of debts, and is a part thereof.

It is also a contract, but not of the character protected by that clause in the constitution. The creditor does not dictate its terms, and is not a voluntary party to it. The law provides it, and authorizes him to accept and use it as a means of coercing payment of his debt. And if that mode of coercion be taken from him, his debt and the contract, on which it is founded, remain unimpaired. It is a part of his remedy only, which is varied or destroyed. When the legislature requires a contract to be entered into collateral to the original and as a part of the remedy to enforce it, the rights which it gives arise only out of the statute provision, and not out of any agreement of the parties, and are therefore liable to be modified by statute. To what extent, and in what manner the body and property of the debtor shall be acted upon to enforce payment are the legitimate subjects for legislative consideration, and of variation as the public good and the necessity of the case may require. The power of the legislature to vary the rights and duties of the parties to a bond of this description was considered and decided in the case of the *Oriental Bank* v. *Freese*, 18 Maine R. 109. The defendants having performed the condition of their bond in the manner authorized by law, cannot be considered as guilty of any omission of duty.

Nonsuit confirmed.

INHABITANTS OF GORHAM *versus* INHABITANTS OF SPRINGFIELD.

The special act of 1834, c. 434, incorporating the town of Springfield, is to be considered as a public act, and as such not to take effect until after thirty days from the recess of the legislature.

The provision in the act that the territory "with the inhabitants be, and the same hereby is, incorporated into a town by the name of Springfield," is not sufficient to show that the legislature intended that the act should take effect immediately upon its approval by the Governor.

When a person leaves a town with the intention to go to another place and purchase a lot of land and settle there, the latter place does not become his dwelling and home, under the fifth mode of gaining a settlement by the act of 1821, c. 122, unless that intention is carried into effect by having his dwelling and home actually established there before its incorporation into a town.

Such residences or homes as are referred to in that statute, may be abandoned, and a period elapse before new ones are acquired.

Towns exist at the pleasure of the State, and not at their own; and it is not necessary that a newly incorporated town should accept the act of incorporation. The rule applies only to private, not to public corporations.

THE action was to recover supplies furnished by the plaintiffs to Napthali Harmon and family, alleged to have their legal settlement in Springfield.

Harmon formerly had a settlement in Harrison, and continued to have one there, unless he had acquired a new one in Springfield by dwelling and having his home there at the time of the incorporation of that town. No. 5 in the second Range was incorporated into a town by the name of Springfield, by an act approved Feb. 12, 1834.

The plaintiffs contended that the town was incorporated on that day; but the jury were instructed by SHEPLEY J. presiding at the trial, that the act did not take effect until thirty days after the session of the legislature terminated. By this instruction, the act took effect April 12, 1834. There were proceedings to organize under the act, March 27, 1834.

There was testimony to prove that when Harmon left Harrison to go to No. 5, he expressed an intention to purchase a lot of land and settle there and make it his home; that he went there *about Jan.* 13, 1834, and remained there with a brother and sister *a few days*, and then left and went into the

woods to work for men engaged in lumbering on lot No. 7, and there remained *about a fortnight*, and then returned to No. 5. or Springfield, where he worked at thrashing *for a few days*; that he was in Springfield *on Feb.* 12, 1834, *or at least, at the time when the news of the incorporation reached there*; that *during the spring*, he went to Shirley to settle up his business there, and get the few things he had left there in 1833; that he worked *sometime* in Lee, and was again in Springfield *about haying time*, and *from that time had established himself in Springfield as his home* until he went back to Harrison *in the fall of* 1836; that he went from thence to Gorham in the fall of 1837, where he was married, and continued to reside until the supplies were furnished for which this suit was brought.

The jury were instructed, that it was not sufficient that the pauper, when he left Harrison to go to No. 5, or Springfield, should have expressed the intention to settle there, unless he carried that intention into effect by having his dwelling and home established there before the act, incorporating that town, took effect.

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

Codman and *Fox*, for the plaintiffs, contended: that the act incorporating Springfield took effect, so far as this case is effected by it, at the time of its passage. The St. of 1821, c. 122, mode 5, refers to the *time of the incorporation.* This was a complete and perfect act on Feb. 12, 1834. The town organized under the act before the expiration of thirty days from the close of the session, and thereby accepted the act; and were bound by it from the time of its passage. But the legislature can provide, that any act may take effect immediately, and they have done so in this case, by providing that No. 5, *be and hereby is incorporated* into a town by the name of Springfield. Unless this is the true construction, it will always be known beforehand when the incorporation is to take place, and measures will be taken in contemplation of it. Going into a town with the intention of residing there, makes

that his place of residence, whether he has acquired a permanent right to remain there or not. The instruction is also erroneous, because it requires his home to be established in Springfield *before* the act took effect. It was enough, that his home was there at the time. *New Portland* v. *New Vineyard*, 4 Shep. 69; *Westbrook* v. *Bowdoinham*, 7 Greenl. 363; *Wilton* v. *Falmouth*, 3 Shep. 479; *Baring* v. *Calais*, 2 Fairf. 463; *Greene* v. *Windham*, 1 Shep. 225; *St. George* v. *Deer Isle*, 3 Greenl. 390.

Deblois, for the defendants, was stopped by the Court.

The opinion of the Court was by

SHEPLEY J. — The town of Springfield was incorporated by the act of the 12th of Feb. 1834, spec. acts, c. 434. The act of the 25th of Jan. preceding provided, that public statutes should take effect in twenty days from the date of their publication unless the provision of the statute otherwise ordered. The act of the 12th of March following repealed the act of the 25th of Jan. and provided, that all public statutes should take effect in thirty days from the recess of the legislature passing the same, unless the provision of the act should otherwise order. The effect of these enactments was considered in the case of *New Portland* v. *New Vineyard*, 16 Maine R. 69, which decided, that the public acts of that session passed after the 25th of Jan. of that year did not take effect until thirty days after the recess of the legislature; and that acts regulating the general interests of the State, or of any of its divisions must be regarded as public acts. It is contended, that the language of the act of incorporation, which declares, that township numbered five in the second range "with the inhabitants be, and the same hereby is incorporated into a town by the name of Springfield," shews an intention, that the act should take effect immediately. The use of language *in presenti*, is too common in legislation to afford any indication of an intention, that this act should take effect at an earlier date than the other general acts of that session. It was not necessary, that the town should accept the act of incorpora-

tion. The rule applies only to private, not to public corporations. The latter exists at the pleasure of the State, and not at their own pleasure.

The fifth mode, by which persons may gain a legal settlement, is "by dwelling and having their homes in any unincorporated place at the time, when the same shall be incorporated into a town." And it is contended, that the pauper must in contemplation of law have had a dwelling and home in Springfield after he left Harrison with an intention to purchase a lot of land and settle in that township. The statute provides, that legal settlements shall remain till new ones are acquired. But such residences or homes as are referred to in the statute may be abandoned, and a period elapse before new ones are acquired.

The case of *Hallowell* v. *Saco*, 5 Greenl. 143, authorized the instructions, that the intention to have a home in Springfield must be carried into effect by his actually becoming a resident there before he could be considered as dwelling and having his home there. It is not easy to perceive how he could have a home there "at the time when the same was incorporated," if he had not acquired it "before the act took effect incorporating that town."

Judgment on the verdict.

THE STATE *versus* JACOB BAILEY, JR.

Where an indictment for double voting, under the statute of 1821, c. 115, regulating elections, alleges "that the inhabitants were convened according to the constitution and laws of the State in legal town meeting for the choice of town officers," it is not necessary also to allege, "that the inhabitants were summoned by warrant from the selectmen duly and legally served."

Nor is it necessary to add, that the inhabitants were assembled in town meeting to give in their votes, ballots, or lists for the persons to be voted for.

A copy of the record of the warrant for calling the town meeting, is competent evidence, without producing the original warrant, or showing its loss.

Where one voluntarily appears before the grand jury as a witness, but it does not appear of record that he was the complainant, he is not entitled to half the penalty given by the seventeenth section of that statute; and therefore is not for that cause an incompetent witness on the trial.

The offence may be committed, although the presiding officer of the meeting may not keep a check list, as the law requires; and although he may throw out the ballots after the double voting has taken place, and commence the voting again.

It is not necessary to allege in the indictment *for this offence*, that the accused was an elector entitled to vote at the meeting.

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

Bailey was indicted for voting twice for the same officers, at the same balloting, at a town meeting in Harpswell on the first Monday of March, 1841.

To prove the meeting of the inhabitants of Harpswell, alleged in the indictment, the county attorney introduced the record of the town clerk of Harpswell. The defendant's attorney moved the Court to quash the indictment as insufficient in these respects: —

1. Because it was not therein alleged that the inhabitants were summoned by warrant from the Selectmen of Harpswell duly and legally served upon said inhabitants, to meet on the 1st Monday of March, A. D. 1841, to act upon the articles specified in said warrant: —

2. Because it was not therein alleged that the said inhabitants were assembled in town meeting to give in their votes, ballots and lists for the persons to be voted for.

But the Court ruled that the indictment was not bad on this account.

The attorney for the defendant objected to the introduction of the record, as proof of the calling together and organization of the town meeting, alleged in the indictment. But the Court overruled the objection and admitted the record.

The attorney for the defendant, contended that the warrant, as appeared of record, for calling the town meeting, alleged in the indictment, not being under seal, there was no proof of the legal organization of the meeting; but the Court ruled that the warrant was good and sufficient without seals.

The county attorney then called Rufus Dunning, the moderator of the meeting, to prove the act alleged in the indictment against the defendant, of double voting. It appearing that said Dunning was the complainant, by voluntarily appearing before the grand jury as a witness, the defendant's attorney objected to his admissibility as a witness, on the ground of his being interested in the event of the prosecution, as being entitled to one half the penalty. But the Court overruled the objection, and admitted the witness to testify. Dunning testified that no check list was kept, at the time the defendant was said to have deposited two ballots, as alleged in the indictment. Thereupon the defendant's attorney objected that it was not a balloting such as is contemplated by the statute, at which the offence charged in the indictment, could be committed; but the Court overruled the objection.

Dunning testified that the defendant put in two ballots within a minute of the commencement of the balloting, at that time of balloting; and that at the time defendant put in the second ballot, there were but few ballots in the box, and that upon seeing two ballots put in by defendant, witness upset the ballot box, turned out the votes, rendering void that balloting, and began to receive the votes anew. Thereupon the defendant's counsel contended that that balloting was not a balloting such as is contemplated by statute, at which the offence charged in the indictment could be committed; but the Court ruled otherwise. Upon the aforesaid rulings and instructions

of the Court to the jury, a verdict was found against the defendant. And the defendant excepted.

Bailey also moved in arrest of judgment, because there was no allegation in the indictment, that he was an elector within the town of Harpswell.

Haines, for Bailey, argued in support of these objections.

The indictment is defective, because it does not allege that the meeting was summoned by a warrant from the selectmen, legally served.

It should have stated what the object of the meeting was, that the voters should carry in their votes for the persons to be voted for.

The best evidence is always required, which can be obtained. The original warrant is better evidence, than any copy of it made by a town clerk.

Dunning, the complainant, was improperly admitted as a witness. The statute is express, that the prosecutor, or complainant, shall be entitled to half the penalty. He was directly interested, as he would have been allowed half the penalty on conviction of Bailey.

The statute expressly provides, that a check list shall be kept on voting for town officers, and no one has the right to vote, until his name is found. Unless the check list is kept, the balloting is illegal. Illegal voting is no voting, and no indictment will lie.

The ballots were thrown out and destroyed by the moderator of the meeting, at the commencement, and no balloting, such as the statute contemplates, took place at the time when Bailey voted.

The indictment is bad, because it does not allege, that Bailey was a legal voter in the town of Harpswell. The penalty for double voting is incurred only by one who has the right to vote. This is a part of the offence, and should be alleged in the indictment.

Bridges, Attorney General, for the State.

The law only requires, that the indictment should allege,

that the meeting was convened according to law. The manner in which it is called is but a mere matter of evidence.

The language of the statute is made use of in the indictment, and that is sufficient.

The record of the proceedings in calling the meeting, is not only legal evidence, but the best and only legal evidence. But when it is shown that the defendant was present and voted, it is too late for him to object that the meeting was not legally called. *Ford* v. *Clough*, 8 Maine R. 334; *Bucksport* v. *Spofford*, 12 Maine R. 487; *Cottrill* v. *Myrick*, ib. 222.

A person must appear of record to be the prosecutor, or he is not entitled to any part of the penalty. But there was no evidence, that he caused the complaint to be made. The mere fact of his being a witness, or even signing a complaint, does not give one a portion of the penalty. *Comm.* v. *Frost*, 5 Mass. R. 53.

When the offence was once committed, the selectmen could do nothing which would pardon it. It became wholly immaterial what became of the votes.

The statute requirement to keep a check list, is merely directory on the selectmen, and their neglect is no excuse for the misconduct of others.

The indictment does allege that Bailey was a legal voter. But if it had not, it alleges that he was there and actually voted twice, and the jury would be authorized to infer that he was a voter.

The opinion of the Court was drawn up by

Tenney J. — The two first objections, relied upon by the defendants' counsel, are to the indictment. It is contended, that it should contain the allegation, that the inhabitants were summoned by warrant from the selectmen, duly and legally served upon them, &c. This part of the indictment has no other connection with the acts of the defendant, which constitute the offence charged, than that there was such an occasion, as rendered those acts criminal, when under other circumstances they would have been in violation of no law; and it is

believed that a general charge, sufficiently broad to embrace the proof necessary to render the meeting legal, is all which can be required.

It is alleged, that on the day named, the male inhabitants and legal voters were convened according to the constitution and laws of the State in legal town meeting for the choice of town officers. We can conceive of no benefit, which the defendant could derive by a detail of all the steps taken to make the meeting legal. The record was the only proper evidence on this point, and it could not be contradicted. No rebutting evidence could be adduced. It has not been required in cases which bear some analogy to the one before us. In indictments against towns for defects in highways, a general charge, that the highway complained of, was legally such, is sufficient. If the proof had failed to sustain this allegation, the accused would have had the advantage of the defect.

The second objection is equally without foundation. No statute requires that the warning should be in the mode contended for, nor is it essential to the legality of the meeting. The voters of the town were legally assembled, though the warrant was in the form in which from the indictment, we may suppose it; hence an allegation of that which is not required to be in the warrant, is unnecessary. The charge in this part of the indictment embraces every thing material. The meeting being legal, the citizens had full opportunity of exercising their rights, and the statute under which this bill was found, was intended to guard them against an invasion of those rights.

The objection to the proof offered, that the warrant itself and not the record thereof should have been introduced, is not sustained. The warrant was one of the documents from which the record was made, but it is the record itself made perfect from all the necessary materials by the sworn officer appointed for the purpose, and having the official certificate, which is the proper evidence. This only is the record, and this is the only evidence legally admissible, where from the nature of the case, it is presumed to exist. Nothing short of this can be treated as evidence, unless allowed by special legislative enact-

ments, and it cannot be controled by that which is of an inferior character.

It is insisted that the witness relied upon, to support the charge, by appearing voluntarily before the grand jury, was to be deemed the complainant, and that therefore he was incompetent, because a moiety of the pecuniary penalty belongs to him. Was he the complainant in the sense contemplated in the statute? Is every witness who may testify before that body, without being called on in the mode pointed out, by which witnesses are compelled to appear and give testimony, to be treated as complainants? It is apprehended, that there must be some record, touching the charge, which admits of no dispute, that the one entitled to the half of the penalty is the complainant; he must be such throughout. One cannot be a complainant at one stage of the proceedings and cease to be such at another. If one make complaint before a magistrate, obtain a warrant, and on the examination before him the accused is recognised to appear at a higher tribunal, and another appears before the grand jury *voluntarily*, and gives testimony, which of those is the complainant; and in the event of conviction, entitled to a part of the penalty? After conviction and sentence, is the Judge who tried the case to hear testimony, in order to ascertain who is the one entitled thereto? We are of the opinion, that this claim should be settled by the same species of evidence, which shows that a charge was made and a conviction followed thereon. *Comm.* v. *Frost*, 5 Mass. R. 53.

Our statute requires that there should be a list of witnesses in each case filed with the clerk. This may be regarded as a record; but it is not required that this list should be accompanied by a statement of the character of each, whether complainant or not; whether a witness appeared before the grand jury or in court voluntarily or not; and therefore we do not perceive that this can lead to any unerring conclusion. We find no record that the witness relied upon by the government's attorney, in this case, was the complainant. We are not to suppose there was any preliminary examination, in the absence of

proof thereof; and the indictment is silent as to any one except the State, as being interested in the penalty.

It is contended, that the omission of the presiding officer at the meeting to keep a check list, renders the proceedings illegal and void. There is no express requirement, that a check list shall be kept at such a meeting. No person can vote, till the presiding officer has had opportunity to ascertain, that his name is upon the list, and to check the same. This would seem to be a provision, intended to prevent from voting those whose right may be thought doubtful by the presiding officer. But if the one who should preside in the meeting, were to fail to keep a list, we are not satisfied, that this would render void the whole proceedings, disfranchise the town, and deprive all its citizens of their municipal rights. Neither do we think the means taken by the moderator to prevent the effect of the wrongful act of the defendant can avail him. It was sufficient that the meeting was legal, and the balloting properly commenced, and so continued till the two votes were deposited in the box by the defendant; and even if the conduct of the officer presiding was afterwards unwarranted by law, it would not exonerate him from the act committed in violation of the statute.

The defendant moves in arrest of judgment, and founds his motion upon the want of any allegation in the indictment, that he was an elector in the town of Harpswell. This prosecution is under the statute of 1821, ch. 115, sec. 16. The language is, "If any person at any meeting for the choice of town officers shall knowingly give in more than one vote," &c. The terms are different from those used in the tenth section of the same chapter in relation to the choice of State officers, and will embrace one not an elector of the town. The meaning of the Legislature cannot be mistaken; the language is clear and unequivocal, and will apply to one not an elector of the town as well as to one who is such. We cannot think that it was intended, that he should escape the penalty for putting in two votes, although an uncertainty may exist, whether he had the right to vote at all.

The exceptions and motion are overruled.

ALPHEUS FIELD *versus* WILLIAM HUSTON.

In construing deeds, one rule is, that a grant shall be taken most forcibly against the grantor.

Another rule is, that general words are not restrained by restrictive words added, where such words do not clearly indicate the intention and designate the grant.

If reference be made in a deed of conveyance to other deeds by any definite description, they are to be regarded as parts of the conveyance; but to have that effect, the intention of the parties that they should be, must clearly appear.

Where the grantor, at the time of the conveyance, had been in possession of and claimed to own several tracts of land adjoining each other, and containing in the whole about 280 acres, and by a deed conveyed a tract of land and described it as follows: "*A certain tract or parcel of land, situate in Falmouth, containing* 230 *acres more or less, all the lands which I own in said town, the butts and bounds may be found in the county records at Portland,*" and conveyances to him were found on record "of several different tracts of land adjoining each other, all containing 235 acres, and adjoining to these several tracts was another, the close in dispute, and which was claimed and possessed by the grantor, but to which he did not appear to have had any title apparent by the record, or any other than a title acquired by possession:" it was held, that *the whole* of the land was conveyed.

THIS case was argued in 1840, but the opinion was not delivered until April Term, 1843. The action was trespass *quare clausum* for cutting trees on the plaintiff's land in Falmouth. It appeared on the trial that the plaintiff, prior to March 22d, 1821, had been in possession of and claimed to own several tracts of land adjoining each other, and containing in the whole about two hundred and eighty acres; and on that day, by a deed of mortgage, conveyed a tract of land to Samuel Brackett, and described it as follows. "A certain tract or parcel of land, situate in Falmouth, containing two hundred and thirty acres more or less, all the said lands which I own in said town of Falmouth, the butts and bounds may be found in the county records at Portland." Upon examination of the county records conveyances were found of several different tracts of land adjoining each other, and all of them containing two hundred and thirty-five acres. Adjoining to these several tracts is another, which is the close in dispute, and which was

claimed and possessed by the plaintiff, but to which he does not appear to have had any title apparent by the record, or any other than a title acquired by possession.

The defendant derived title to this land under the deed from the plaintiff to Brackett, and contended that it was conveyed by that deed. The plaintiff claimed title by possession, and denied that he had conveyed it to Brackett. The case was taken from the jury, and the parties agreed to submit the case on these facts for the opinion of the Court, and a nonsuit or default was to be directed, in conformity with the opinion.

Deblois, for the plaintiff, contended that the plaintiff was entitled to recover. All the parts of a deed are to be taken into consideration in giving it a construction, and nothing should be rejected, unless inconsistent or contradictory. *Vose* v. *Handy*, 2 Greenl. 322; *Worthington* v. *Hylyer*, 4 Mass. R. 196; *Thorndike* v. *Barrett*, 2 Greenl. 312; *Cate* v. *Thayer*, 3 Greenl. 71; *Keith* v. *Reynolds*, 3 Greenl. 393; *Drinkwater* v. *Sawyer*, 7 Greenl. 366; *Thorndike* v. *Richards* 1 Shepl. 430; *Willard* v. *Moulton*, 4 Greenl. 14; *Bradbury* v. *White*, 4 Greenl. 391.

All the words are to be made operative, if they can be. *Child* v. *Fickett*, 4 Greenl. 471; Shep. Touch. 87; 2 Cruise, 293; 1 Peere Wms. 457; 16 Johns. R. 176; 1 Vern. 416; 1 Phill. Ev. 473. The number of acres excludes this land. The words "I own," apply to the land owned by deed, and not to that of which he was merely in possession. *Thorndike* v. *Barrett*, 2 Greenl. 312; *Crosby* v. *Parker*, 4 Mass. R. 110.

The reference in the deed to the county records restricts the land conveyed to such as might be found there to belong to the grantor, and excludes the land in controversy. *Allen* v. *Allen*, 2. Shepl. 389; *Thorndike* v. *Richards*, 1 Shepl. 430; *Boylston* v. *Carver*, 11 Mass. R. 515; *Whiting* v. *Dewey*, 15 Pick. 428.

The less certain words, if there be a contradiction, should yield to the more certain. *Allen* v. *Littlefield*, 7 Greenl. 220; *Bradbury* v. *White*, 4 Greenl. 391; *Call* v. *Barker*, 3 Fairf. 320.

Codman & Fox, for the defendant, considered that the land was clearly conveyed to Brackett by the plaintiff. All the land in Falmouth owned by the grantor, was a sufficient description. This is not limited by the reference to the registry. Deeds should be taken most strongly against the grantor, where there is any inconsistency in the grant. *Worthington* v. *Hylyer*, 4 Mass. R. 196.

The first and leading object in the deed was to convey the farm in Falmouth on which the grantor lived. Had there been no deeds of the land recorded, still the farm would have passed by the deed. *Keith* v. *Reynolds*, 3 Greenl. 393; *Child* v. *Fickett*, 4 Greenl. 471; *Drinkwater* v. *Sawyer*, 7 Greenl. 366.

The number of acres mentioned in a deed, especially where, as in this case, the deed itself states the number to be uncertain, by the insertion of the words more or less, amounts to nothing. And it is also wholly immaterial how the title of the grantor was acquired, whether by deed, devise, inheritance or disseisin. All the land he owned in Falmouth was conveyed.

Daveis, for the plaintiff, replied.

The opinion of the Court was drawn up by

Shepley J. — The plaintiff, on the day when the deed from himself to Brackett was executed, was in the possession of a farm formed from several lots all adjoining; and he claimed to be the owner of the whole of it. This farm, or a portion of it, was to be mortgaged to secure a debt. The mortgagee would be interested to know, whether all or what portion he was to receive as security; and it would appear from the deed, that no opportunity was afforded to examine the title deeds, otherwise they would have been referred to more explicitly. A conveyance of all his farm, or all the land he owned in the town, would be a clear indication to both parties of the estate to be conveyed. If it had not been the intention of the plaintiff to convey the tract demanded, would he have signed a deed declaring, that he conveyed all he owned, when it appears, that he then possessed and claimed

to own another tract of forty-five acres. It is difficult to believe, that there could have existed a doubt between the parties to that deed, that the whole farm was conveyed. This would surely be the conclusion, unless the language used admits of a construction, that it was not all the land he owned in Falmouth, but all that he owned in Falmouth the bounds of which were to be found in deeds recorded. If this should be admitted to have been the intention, the effect would be to convey only such portion of the farm as was held by a recorded title, although it might be the lesser portion, and although the grantor had a perfectly good title to the remaining portions by deeds of conveyance not recorded. A construction of the language that would have such an effect, is not admissible. It does not appear to be the most simple and literal interpretation of it. The language literally declares, that the grantor conveys all the land he owned in Falmouth, and that the butts and bounds of it all might be found in the county records. The latter statement proves to have been partially erroneous, and so far as it is so, is to be rejected and disregarded. It is true, that when reference is made in a deed of conveyance to other deeds by any definite description, they are to be regarded as parts of the conveyance. The intention of the parties, that they should be, is clearly made known. In this case there is no reference to any deed, and the want of any such reference by date, names of the parties to it, or otherwise, leaves a just inference that no such deeds were present or examined, and that no confidence was placed in the reference to the records to ascertain the extent of the estate conveyed. The rules of construction appear to be in accordance with this view of the case. The one, that every man's grant shall be taken most forcibly against himself, will not be questioned. 1 *Inst.* 183, *a*; *Adams* v. *Frothingham*, 3 Mass. R. 361; *Jackson* v. *Blodget*, 16 Johns. R. 178. Another rule is, that general words are not restrained by restrictive words added, where such words do not clearly indicate the intention and designate the grant. Com. Dig. Parols, A. 23. A case is stated from 2 Rol. 193, l. 10, of a grant of all lands in L.

followed by a grant of the rectory of L. when there were two rectories in L; and it was held, that all the lands passed including both rectories. So if one grant his manor of D. in the county of N. and all his lands in England, parcel of the same manor; all the lands, that are parcel of the manor, will pass though not in the county of N. Com. Dig. Grant, E. 12. Where there was a grant of seventy-eight acres of land and all tithes belonging to the grantor, "and also the tithes of the seventy-eight acres, all which were lately in the farm or occupation of Margaret Peto"; it was held that the tithes of the lands passed though never in the occupation of Margaret Peto. *Swift* v. *Eyres*, Cro. Car. 546. This rule was received in *Bott* v. *Burnell*, 11 Mass. R. 167; and applied in *Cutter* v. *Tufts*, 3 Pick. 272; *Keith* v. *Reynolds*, 3 Greenl. 393. But where the general language appears to have been used to designate the situation or place where the estate is to be found, and the restrictive words to designate what is conveyed, this rule would of course be inapplicable. The case of *Thorndike* v. *Richards*, 13 Maine R. 430, belongs more properly to the latter class of cases. In *Allen* v. *Allen*, 14 Maine R. 387, what was intended by the farm was made certain by the other part of the description. These cases are not regarded as at variance with the rule before stated. Both parts of the description might be consistent. There was no necessity for rejecting any part of it. In this case "all the lands which I own in the said town of Falmouth" can never be consistent with an exclusion of forty-five acres claimed to be owned, and to which no other claimant has appeared. There must be therefore a rejection of some portion of the description, if the words "the butts and bounds may be found in the county records at Portland" can be regarded as forming a part of it. To reject the former part, which is clear and retain the latter, would have the effect to give a preference to a somewhat loose declaration, used restrictively, over a more clear and preceding description, and one more clearly indicating the intention of the parties. The quantity of land named in the deed can afford little, if any, indication of the intention of the parties.

The insertion of the words "more or less" shews, that it was not certainly known, and that no reliance was placed upon it. Such words are introduced to prevent the insertion of the quantity of land from having any material influence upon the rights of the parties. And it has been decided, that the statement of the quantity is superfluous and immaterial, when these words were not contained in the deed. *Powell* v. *Clark*, 5 Mass. R. 355; *Mann* v. *Pearson*, 2 Johns. R. 37. In the case of *Jackson* v. *Barrenger*, 15 Johns. R. 471 the description of the land in the lease for three lives was "all that farm or tract of land being part of the said manor beginning to wit; the farm which Jacobus Jose Decker now lives on, laying east of the farm of Jacob Miller, west of the farm of Andries Bartle and Jerry Decker, and south of the farm of Teunis Becker, to contain eighty acres in one piece." It will be perceived, that there was no boundary named on the south of the farm; which as occupied by the defendant contained 149 1-2 acres of land. The Court say, "It is the farm whereon Jacobus J. Decker now lives. It is reasonably and fairly to be presumed, that this possession was known to both parties, and that it was the farm as an entirety thus possessed by Decker, that was intended to be embraced in the lease." A similar presumption arises in this case, as to what the plaintiff actually occupied and claimed to own; and as to the intention to convey it as an entirety.

The word "own" as used in the description cannot upon the facts stated in the report afford any indication, that it was used in contradistinction to what he possessed, and was designed to exclude a part of those possessions. For the case finds, that prior to the conveyance "he had been in possession and *claimed to own*" all the several tracts composing the farm. How long he had claimed to own the lot now demanded does not appear. Could he have intended to exclude from a conveyance of all he owned any part of what he claimed to own? Or could his grantee have imagined, that his deed would not convey all which his grantor asserted, that he owned? It is true that the case also finds, that "he does not appear to have

had any title apparent by the record, or any other than a title acquired by possession." This language is nearly equivalent to saying that he at least had a title by possession. And there is nothing in the case indicating, that he had not at the time of the conveyance a perfectly good title by possession or otherwise. It is easy to perceive, that he might have had a deed of conveyance unrecorded, and which was unknown to the other party, and that his interest would have prevented its introduction. If there were testimony in the case to shew, that at the time of the conveyance the plaintiff had not already acquired a good title by possession or otherwise, it might be reasonable to attach more importance to the use of the word own; but there is no such testimony.

The legal conclusion therefore appears to be that the language of the deed conveys the lot demanded, and that it was the intention of the parties, that it should do so.

New trial granted.

JAMES DUNN *versus* DAVID HAYES.

The proprietor of a one hundred and twenty acre lot conveyed a portion thereof, describing it thus in his deed. "Twenty acres of land in lot 56 in the 120 acre lot, west side of Royal's river, in N. Y. bounded as follows, viz. beginning on the westerly side of said river, by the river, at the dividing line betwixt the land owned by H. R. and the grantor in the aforesaid lot, thence running westerly on the said dividing line so far that a line running southerly parallel with the westerly end line of said lot until it comes within six rods of the southerly side line of said lot, thence easterly, keeping the width of six rods, from said side line to Royal's river aforesaid, thence by said river to the bounds first mentioned, containing twenty acres of land." And *it was held*, that the grantee was entitled to have the lot conveyed to him marked upon the earth in such a manner, that the westerly line should be parallel to the westerly line of the whole lot, and that the lot should extend southerly to within six rods of the southerly line, and that the line might at that end be made to terminate as near the river, there being no length of line in the deed there, as should be necessary to make twenty acres as nearly as might be, preserving some length to that line.

But if an actual location of the land according to the monuments in the deed had been made after its execution by the agreement of the parties, then owners of the land, it would be binding upon them and their grantees, and could not be varied by either owner alone afterward.

When the Judge, presiding at the trial, fully, clearly and correctly states to the jury in what a disseisin consists, and what is necessary to constitute it, he properly leaves to the jury to determine whether, upon the facts proved a disseisin did, or did not, take place.

If a plan be made in the absence of one of the parties interested, and there is no proof that its accuracy has been agreed to, and it has not been otherwise verified by oath, the plan is inadmissible.

WRIT OF ENTRY, demanding a lot of land in North Yarmouth. The demandant read a deed dated May 21, 1817, from Ichabod R. Loring to Jacob Hayes, jr. of a tract of land described thus: — "Twenty acres of land in the lot numbered fifty-six in the one hundred and twenty acre lot, west side of Royal's river, in said North Yarmouth bounded as follows, viz. beginning on the westerly side of said river by the river, at the dividing line betwixt the land owned by Hannah Russell and the grantor in the aforesaid lot, thence running westerly on the said dividing line so far, that a line running southerly parallel with the westerly end line of said lot until it comes within six rods of the southerly side line of said lots,

thence easterly, keeping the width of six rods, from said side line to Royal's river aforesaid, thence by said river to the bounds first mentioned, containing twenty acres of land."

A deed of the same premises, dated June 2d, 1834, from Jacob Hayes, jr. to Samuel S. Hayes.

A deed of the same, dated April 21, 1837, from Samuel S. Hayes to Luke Libbey.

A deed of the same, dated Dec. 6, 1839, from Luke Libbey to James Mann, jr.

A deed including same dated Feb. 22, 1840, from James Mann, jr. to James Dunn, the demandant.

The defendant read a deed dated in 1839, from John Hayes, as administrator of Ichabod R. Loring, conveying the remainder of Loring's estate adjoining the lot sold by him to Jacob Hayes, jr.

The jury were instructed by SHEPLEY J. presiding at the trial, that the deed from Loring to Jacob Hayes, jr. entitled said Hayes to have the twenty acre lot marked upon the earth in such a manner that the westerly line should be parallel to the westerly line of the Loring lot and to extend it southerly to within six rods of the southerly line, and that the line might at that end be made to terminate as near the river, there being no length of line in the deed there, as should be necessary to make twenty acres as nearly as might be, preserving some length to that line, if no actual location of the land according to the monuments in the deed had been made by the agreement of the parties, then owners of the land; and that if such agreement had been made, it would be binding upon them, and their grantees, and could not be varied by either owner alone afterward.

The counsel for the defendant contended, that when Samuel S. Hayes conveyed to Luke Libbey, he was disseised and so nothing in the disputed tract passed. The plan made by A. Skillings was introduced on which was traced the line claimed by the defendant to be the true line.

Samuel S. Hayes, called by the defendants, testified that he never claimed over the line run by General Russell while he

owned the land; that he did not cut over it; that the defendant cut up to it all that time claiming it as the true line, that when he sold to Libbey he pointed out that line as the line of his lot. There was testimony introduced by the plaintiff at variance with this testimony. The Judge stated the law in relation to what constituted a disseisin, and instructed the jury, that if from the testimony they were satisfied that S. S. Hayes was disseised of the disputed tract at the time he conveyed to Libbey, Libbey would obtain no title to it, and the plaintiff would fail to establish his title to it, but did not give the following instruction requested by defendant's counsel.

That if according to the testimony of Samuel S. Hayes, the defendant, with the knowledge and without objection of said S. S. Hayes, claimed up to the line run by Gen. Russell and occupied as people do their wood land, cutting timber and wood from it up to the Russell line, and that Samuel S. Hayes did not claim or occupy over the Russell line, that then there was a disseisin by the defendant, and nothing passed by the deed from Hayes to Libbey in the premises in dispute.

The defendant's counsel offered a plan made by Gen. Russell, and his field notes, it having been proved that the survey made by Gen. R. was made in the presence and by agreement of the then owners of the lands, who had previously agreed that Gen. Russell should make the survey to ascertain whether the plaintiff's grantor, Jacob Hayes, jr. had his twenty acres of land, he, said Hayes, claiming that he had not, and that the line which the plaintiff claims in his writ would not give him twenty acres exclusive of what had been taken by the running of the adjoining lot, called the Hannah Russell lot. The line called the Russell line was laid down after the first survey above named had been made, and in the absence of one of the parties. There was evidence tending to prove and to disprove, that he afterward agreed to it; but the plan was made in their absence, and presented to one and not proved to have been agreed to by the other party. These were excluded on the ground that their accuracy had not been proved to have been agreed to, nor otherwise verified by any oath.

It appeared that nearly twenty years ago Skillings ran out by the agreement of Loring and Jacob Hayes, jr. a line, and that it was then marked on the earth, and had so continued; and there was evidence tending to prove, that both parties agreed to it, and evidence to the contrary. This was submitted to the jury under the instructions before stated. It appeared that the parties occupied to it during the life of Loring. The verdict was for the demandant. If these instructions or refusals to instruct were erroneous, the verdict is to be set aside.

The arguments were by

Fessenden, Sen. & *Deblois*, for the tenant; who cited *Sumner* v. *Williams*, 8 Mass. R. 162; *Fowle* v. *Bigelow*, 10 Mass. R. 379; *Purinton* v. *Sedgley*, 4 Greenl. 283; *Scamman* v. *Sawyer*, ib. 429; *Vose* v. *Handy*, 2 Greenl. 322; *Keith* v. *Reynolds*, 3 Greenl. 393; *Robinson* v. *Swett*, 3 Greenl. 316; *Pray* v. *Pierce*, 7 Mass. R. 381; *Kenn. Pur.* v. *Springer*, 4 Mass. R. 416; *Boston Mill Cor.* v. *Bulfinch*, 6 Mass. R. 229; 1 Stark. Ev. 326; 4 Wend. 394; 10 Ves. 123; Story on Agency, 126.

And by *Longfellow, Sen.* and *Preble*, for the demandant: who cited *Makepeace* v. *Bancroft*, 12 Mass. R. 469; *Davis* v. *Rainsford*, 17 Mass. R. 207; *Moody* v. *Nichols*, 16 Maine R. 23.

The opinion of the Court was drawn up by

Tenney J. — This is a writ of entry, to obtain possession of certain real estate situated in North Yarmouth. The demandant claims through several mesne conveyances from J. R. Loring, who conveyed to Jacob Hayes, Jun. by deed dated May 21, 1817, the description of which is preserved in all the subsequent conveyances and is in these words, "Twenty acres of land in lot 56 in the 120 acre lot west side of Royal's River in North Yarmouth, and bounded as follows, viz. Beginning on the westerly side of said river, by the river at the dividing line betwixt the land owned by Hannah Russell and the grantor in the aforesaid lot, thence running westerly on said dividing line so far that a line running southerly parallel

with the westerly end line of said lot, until it comes within six rods of the southerly side line of said lot, thence easterly, keeping the width of six rods from said side line to Royal's river aforesaid, thence by said river to the bounds first mentioned, containing twenty acres of land." The defendant claims the residue of the said 120 acre lot, adjoining the lot conveyed to Jacob Hayes, jr. by virtue of a deed from the administrator of said Loring.

A verdict having been returned for the demandant, exceptions are taken to the instructions of the Judge to the jury, and also to the withholding other instructions requested by the defendant's counsel. Were the instructions of the Judge erroneous? The defendant insists that the demandant is not at liberty to extend the boundaries of his lot so as to embrace more than twenty acres — that the intention of the parties to the original deed restricts him to this quantity, and that this is the controlling part of the description. On a fair construction of the language used, we think Loring intended to convey to Hayes twenty acres of land and no more; and the intention of the parties must govern, so far as that intention can be derived from the deed. But monuments clearly referred to, and existing, are not to yield to courses and distances, or quantities. The former are supposed to be fixed, and indicate with greater certainty the meaning of the parties, than the latter, which may often be misconceived, erroneously stated, and which may not in the same case be laid down by different individuals, and at different times, in precisely the same manner. Hence if a grantor convey a given quantity of land and no more, and still locates it by well known and fixed boundaries and monuments, these boundaries and monuments are to control, and remain, notwithstanding it may afterwards be found, that they embrace more or less, than the precise quantity specified. Where the land is represented by several distinct and well described lines, none of them are to be disregarded. In this case the parties contemplated, as we are to suppose, separating twenty acres from the 120 acre lot, on the eastern end, to be conveyed to Hayes. They evidently intended to have it

bounded in part by the river, in part by Hannah Russell's land, in part by a line parallel with the western end line of the whole lot, and by a line parallel with the southerly side line of the whole lot and six rods distant therefrom. Where the western line of the lot conveyed would come, they had not ascertained in their own minds. But that it was to be at some distance from the river where the line last mentioned should strike it, six rods from the south line, is clear. If the grantor was willing to take the risk of incorporating such a line of indefinite length to be sure, into the description, it is not perceived why he is not governed by it, as much as though he had referred to some natural monument, which could not be mistaken. If he had referred to such, and more than twenty acres had been contained he must submit. He could not change that or any other certain description. In the absence of any natural monument at the river, where the last named boundary should strike the same, the point there was fixed at a distance of six rods from the south line of the whole lot, and is as clearly indicated as the point of beginning. But on the construction contended for by the defendant's counsel, that point might and probably would be wide of the description. If we are at liberty to exclude a line mentioned in a deed, why have we not the power to change the direction of a line to accommodate the boundaries to the quantity? When the line, which was to be parallel with the west end of the whole lot and the line from the termination of that to the river cannot both exist together and preserve exactly the quantity, on what principle is it, that the direction of one must be held absolute, and the other annulled entirely? We are not able to see that any thing was omitted in the description, which we can supply, and which will change the construction adopted. The sense is perfect as it stands, upon the hypothesis that the western line of the lot conveyed to Hayes would terminate at a point at some distance from the river. The first instruction, to which exceptions were taken, we think, was properly given.

The second instruction is considered correct in principle and is sustained by authority. It is to be presumed that par-

ties to a contract have clear and distinct views thereof, and that their intentions are full and definite. And when the parties to a deed shall, after its execution and delivery, go on to the ground and erect monuments and make boundaries, and continue to be governed by them for a long time, is it to be doubted, that they thereby conformed to what they understood, at the time the contract was made, to be their agreement? And the monuments referred to in a deed, although set up after the delivery, will conclude the grantor, even though it should not comport with the lines specified in the deed. "Thus if a deed of land should pass at a distance from the premises granted, and reference should be made to stakes and stones for the termination of one of the lines, no such monument actually existing; and the parties should afterwards fairly erect such a monument, with intent to conform to the deed, we think the monument so placed would govern the extent, although not entirely coinciding with the line described in the deed." *Varnum* v. *Abbot & als.* 12 Mass. R. 474; *Davis & als.* v. *Rainsford*, 17 Mass. R. 207; *Moody* v. *Nichols*, 4 Shep. 23. And the same principle is fully recognized by other states.

Exceptions are also taken, that the Judge declined to instruct the jury, that certain facts alleged to be proved in the testimony by a certain witness constituted a disseisin, and thereby prevented the operation of one of the deeds, through which the demandant claimed. It distinctly appeared, that the jury were instructed in what a decision consisted, and what was necessary to constitute it, and no objection was made at the trial or in the argument before the whole Court, that the law in this respect was not fully, clearly and correctly expressed. If so, there was no failure of duty; it was for him to determine the manner and the terms, which he would use in stating to the jury the principles, to which they would apply the evidence. It appears, that upon this point there was conflicting testimony. It was for the jury to hear what each witness said and what weight they would give to his statement. It may have happened in this case, as it probably sometimes does, that

partial credit only was given to the testimony of a single witness. When the law is unfolded in the statement of general principles, easy to be understood, the jury are left to apply to it the result of their deliberations, upon the whole evidence in the case. The instructions requested might be in effect a statement of a purely hypothetical case, and one which might convey a very imperfect view of the law, when applied to the evidence, by which the jury would be governed.

The objection made to the introduction of Gen. Russell's plan and field notes was well taken. They did not come authenticated as evidence is required to be. Nothing showed, that they were in reality, or believed by Russell to be correct. They did not appear nor were they proved to be any thing more than loose and imperfect memoranda and delineations.

Gen. Russell was selected by the parties for a certain specified and limited purpose, to wit, "to make the survey to ascertain, whether the demandant's grantor, Jacob Hayes, jr. had his twenty acres of land, he, the said Hayes, claiming that he had not, and the line, which the plaintiff claims in his writ would not give him twenty acres exclusive of what had been taken by the running of the adjoining lot." The employment of Russell was in contemplation of certain lines, which had long before been run by Skillings and acquiesced in by the grantor till his death. No power was given to him, to correct or to extend the lines, but only to ascertain whether the demandant would have his twenty acres remaining after the northern line was rectified and placed farther south. The lines run by Russell could not bind the parties, and the one run by him after his first survey was in the absence of one of those who had employed him for other purposes, and it was a question in issue, whether the parties had agreed thereto. But the plan was made in the absence of both, presented to one, and not proved to have been agreed to by the other.

Russell could not be considered their agent so that they would be bound by his plan, unless it had appeared, that they had acknowledged its correctness, which so far as the demandant is concerned is negatived by the facts in the report.

The case represents, that during the lifetime of Loring, he, and those holding under his deed to Jacob Hayes, jr. occupied to the line as now claimed by the demandant, and that it was not till after the death of the grantor, and the residue of this lot had been conveyed by his administrator, that any dispute arose. This consideration, though perhaps not tending to support the particular ruling of the Judge, shows the occupation to have been in pursuance of what the original parties to the conveyance supposed to be their respective rights; and although there was more than twenty acres actually embraced in the deed, yet when we take into consideration the well known practice in many instances to give liberal allowance in lines, we are not surprised, that there should have been this acquiescence on the part of the grantor.

Judgment must be entered on the verdict.

THE STATE *versus* ROBERT HULL.

In an indictment for *causing* a nuisance, under c. 164, § 7, of the Revised Statutes, it is not necessary to allege that the nuisance was *continued.*

HULL was indicted at the March Term of the District Court for causing a nuisance in the city of Portland. There was no averment in the indictment, that the nuisance was continued. The defendant demurred, and the demurrer was joined.

Codman & Fox, for Hull, contended that the indictment was bad, because it did not show, that the nuisance was continued by Hull, as well as caused by him. The statute is imperative, that the nuisance must be continued, to render the defendant liable. Rev. St. c. 164, § 7.

Bridges, Attorney General, for the State, thought the statute negatived the position taken in support of the demurrer, the statute makes the person causing, or continuing, the nuisance liable. One may cause it, and another may continue it, and each may be liable. It is not necessary that there should be any judgment to abate the nuisance.

The opinion of the Court was by

TENNEY J. — The defendant is indicted for causing a nuisance in the city of Portland under the Revised Statutes, c. 164, § 7. He demurs to the indictment and contends, that it is bad, because it is not alleged therein, that it is a continuing nuisance. We do not think such an allegation necessary in order to charge him effectually with a violation of the law. One may be guilty of erecting or causing a nuisance, which he does not continue; and if it were required, that there should be a finding by the jury, that the accused was guilty of erecting, causing, *and* continuing, &c. the statute might be entirely evaded; and the seeds of disease and pestilence might be widely scattered in our cities with impunity. An abatement of the nuisance may not be ordered, unless there be enough in the indictment to show that it continues, but the language of the statute is in the alternative, and the offence is committed by any one, who erects, causes *or* continues a public or common nuisance.

Indictment adjudged good.

WILLIAM GOODENOW, Adm'r. *versus* SALLY DUNN, Adm'x.

Whenever it may be agreed between several parties to do and perform reciprocal acts for each other, the performance of one part being the consideration for the performance on the other; and that the agreement shall be evidenced by writing, under the hands and seals of the parties, until so executed by all the parties it cannot be obligatory upon either of them.

Where a cause of action has accrued to a party who has signed such agreement, independent of the agreement, against a party who has not signed, and he has taken measures to enforce his claim, it is too late to alter the state of the case, and prevent a recovery, by thereafter affixing to the instrument the signature and seal of the party who has not previously signed, without the knowledge or consent of the party seeking his remedy.

Prior to the late statutes concerning registration thereof, mortgages of moveables were inoperative against attaching creditors, unless accompanied by a delivery of the property mortgaged, either actually or symbolically.

Ships and goods at sea have, sometimes, been considered as exceptions to the general rule; in regard to which the delivery of the muniments of title are allowed to be sufficient till actual possession can be taken; which must be done when it becomes practicable, or the conveyance will be void against creditors.

The mortgage of a ship, on the stocks, raised and building, to be built and completed afterwards, as security for advances made and to be made, without actual possession or delivery, is not available, by way of hypothecation, against attaching creditors.

THIS action was originally commenced by Daniel Gilbert, since deceased, on whose estate W. Goodenow has been appointed administrator, against Josiah Dunn, formerly sheriff of the County of Cumberland, since deceased, on whose estate Sally Dunn is administratrix, for the default of Sewall Milliken, who had been his deputy. The attachment of the vessel, then unfinished, on Gilbert's writ against Waterhouse, the builder of the vessel, was made October 14, 1837, being the first attachment in the order of time; the bill of sale of one fourth of the vessel from Waterhouse to Southgate was made July 13, 1836, to secure him for advances made and to be made in building her; the bill of sale to Carter by Waterhouse of one half the vessel, to secure him also for advances made and to be made, was on May 27, 1836. No delivery of the vessel to Southgate or to Carter was made until October 17, 1837, after the attachment, when all the delivery was made, which was capa-

ble of being made, while she was in the hands of the officer, without his consent. The vessel was built, so far as Waterhouse conducted the building, on the public landing in Scarborough, and she was there in an unfinished state at the time of the making of the bills of sale and at the time of the attachments of Gilbert and of others, but was afterwards, by an agreement of persons interested, moved round to Portland, and there finished and sold by Milliken. Fifteen other attachments of the vessel by Milliken were proved to have been made, and Gilbert, and all the others, claimed a lien on the vessel under the provisions of the statute. The jury found that Gilbert had no lien, but that the other fifteen had. Milliken had in his hands, after paying all expenses incurred by him in finishing the vessel, $8,705,60. The amount of the judgments of the fifteen creditors, entitled to a lien, was $4,005,00. Balance, 4,700,60. The material facts in the case are concisely stated in the opinion of the Court.

The verdict was for the plaintiff.

W. Goodenow, for the plaintiff.

There has nothing taken place to prevent maintaining the action against the sheriff for the default of Milliken, his deputy. The contract under which the vessel was finished and sold was never signed by Milliken until after our judgment was rendered, and a demand made on him for the property attached, and then without Gilbert's knowledge. Milliken was one of the four parties to that agreement, and unless all the *parties* sign, it is not binding on those who do sign.

Nor has there been any ratification. There can be no parol ratification of an instrument under seal. *Stetson* v. *Patten,* 2 Greenl. 359. But not even that has been proved.

But if the agreement had been executed by all the parties, still it would not have released Milliken in his official character, and of course the sheriff is bound. The sheriff has power to sell personal property attached by consent of creditor and debtor, and the sheriff is liable for the proceeds, when done by the deputy. *New Hampshire Savings Bank* v. *Varnum,* 1 Met. 34. By the terms of the agreement, the proceeds were

to be held in the same manner, as if the sale had been made on execution.

It can make no difference, whether the intestate was entitled to a lien or not. Our attachment was the first, and there is a balance in the hands of the officer of more than sufficient to pay our execution, after paying all expenses and all creditors entitled to a lien. We are then entitled to recover, unless the mortgages of Southgate and Carter are entitled to a priority over us.

Those bills of sale may be good, as between the parties to them; but they are void as to attaching creditors, because there was no delivery of the vessel. No possession was attempted to be taken, until after the vessel was attached, and in the custody of the law.

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

The sheriff is not liable for the acts of Milliken. He did not act as a deputy, but the vessel was sold under an agreement, entered into not only by the creditor, debtor and officer, but two other parties, not standing in either of those relations, but as mortgagees. The whole parties to the agreement covenanted to do certain things between themselves, and that Milliken should be the agent to carry the agreement into execution. He accepted, and went on and acted; and it is wholly immaterial whether he signed or not. He acted under the agreement, and sold under the agreement, and is bound to pay over under the agreement, and in no other manner.

But were it otherwise, his signature related back to the time of the execution of it by the others and is a ratification of it under seal. In the case cited for the plaintiff, the ratification was merely by parol. Besides, the mere sale by his authority, and the receipt of the money, under the agreement, estop him to deny, that he had acted under it.

Being a binding agreement, the terms as well as the spirit of it take the property out of the hands of Milliken as an officer, and place it in them as agent and trustee. As an officer, he could not pay to the mortgagees, and yet the plaintiff, by becoming a party to the agreement, agreed that this

should be done. He is an officer as to the whole of the parties or none.

Again the putting of Milliken's own property into the vessel, and finishing it off, and mixing up the property attached with his own, dissolves the attachment. If the property had been again attached, Milliken could only have held under his agreement, and not under his attachment. *Gordon* v. *Jenney*, 16 Mass. R. 465.

The sheriff is not responsible, unless the deputy acts as an officer. *Marshall* v. *Hosmer*, 4 Mass. R. 60; *Bond* v. *Ward*, 7 Mass. R. 123; *New Hampshire Savings Bank* v. *Varnum*, 1 Metc. 34.

There seems to have been an argument furnished in behalf of the mortgagees; but when, or by whom, or what *it was*, further than appears in the opinion of the Court, is unknown to the Reporter.

The opinion of the Court was drawn up by

WHITMAN C. J. — This action was commenced against the defendant's testator, as sheriff of the County of Cumberland, for an alleged misfeasance of his deputy, Sewall Milliken. It appears that Milliken, on the fourteenth day of Oct. 1837, received a writ of attachment in favor of the plaintiff's intestate, and against John Waterhouse; by virtue of which he made an attachment of a certain vessel, then on the stocks, which Waterhouse had built; afterwards called the barque Horace, as his property; that the plaintiff's intestate afterwards, on the 30th day of Jan. 1841, recovered judgment in the same suit, against said Waterhouse for the sum of $1856,03 debt; and $37,36 costs of suit: and on the first of Feb. 1841, obtained an execution thereon; and put it into the hands of a deputy of the then sheriff of the county (the defendant's intestate not being then sheriff;) who, in due season, demanded of said Milliken, he not being a deputy of the then sheriff of the county, the vessel, or the proceeds of the sales of her, with which to satisfy said execution; which Milliken refused to surrender. Upon this evidence, and evi-

dence tending to prove a lien, under the statute of 1834, c. 104, § 1, the plaintiff's intestate contended he had a right to recover.

The defendant's intestate, thereupon, offered in evidence a certain contract, bearing date Nov. 21, 1837, under the hands and seals of the plaintiff's intestate, and of said Milliken and Waterhouse, and certain other attaching creditors, and mortgagees of portions of said vessel, in which it was agreed, that Milliken should have power, as well by the consent of the parties, as by virtue of *the power in him vested as attaching officer*, to make sale of said vessel for cash, either at private or public sale, as he might judge most for the interest of all concerned; and from the proceeds, that he should reserve and take to himself the amount of his fees, together with his disbursements for the insurance of said vessel, and all other expenses, which he might incur under said contract; and that the balance thereafter remaining, should be deposited in some safe bank, where it was to remain to abide the appropriation of law; according to the several and respective rights of the said mortgagees and attaching creditors, in the same way and manner, and to the same extent, and in the same proportion, that the attaching creditors and mortgagees would be entitled to, had said vessel been retained by said Milliken to satisfy the judgments, which the attaching creditors, respectively, might recover of said Waterhouse; and the said mortgagees, attaching creditors and Waterhouse further covenanted and agreed, in said writing, with the said Milliken, that he might sell and convey said vessel, as she then lay at the wharf in Portland; or might sell her, contracting to finish her, as he on advice, might judge to be most for the interest of all concerned; and as he could agree with the purchaser thereof; the said Waterhouse covenanting, at the same time, to furnish the requisite certificate to obtain a register for said vessel; and the said Milliken covenanting to make sale of said vessel, and apply the proceeds in manner aforesaid. To the introduction of this writing the plaintiff's intestate objected, alleging that it had not been duly and seasonably executed by the said Mil-

liken. And it appeared that said Milliken did not subscribe and affix his seal thereto, until after the demand made upon him, as before stated; nor until long after the sale of said vessel, and the receipt, by him, of the proceeds thereof, viz. not until the 21st of May, 1841; and then, without the knowledge and consent of the plaintiff's intestate. The writing, however, was permitted to be read in evidence; and it appeared, that Milliken had in all respects conformed to the terms of it, by making sale of the vessel, and depositing the nett proceeds in a safe bank; and without objection made by any one of the concerned.

It is now contended, on the part of the defendant, that, by reason of said contract, the sheriff was exonerated from liability, on account of any act, on the part of said Milliken, in reference to the sale and disposition of the proceeds of said vessel, and not accounting therefor; and that the remedy of the plaintiff's intestate, if any he had, was against Milliken as an agent or trustee. And if we could regard the writing as having been duly and seasonably executed by the said Milliken, it may be, that we should come to that conclusion. Whenever it may be agreed between several parties to do and perform reciprocal acts for each other, the performance of one part being the consideration for the performance on the other; and that the agreement shall be evidenced by writing, under the hands and seals of the parties, until so executed by all the parties it cannot be obligatory upon either of them. In this case it was the intention to intrust Milliken with extensive powers, in contemplation of his becoming bound to be responsible to the plaintiff's intestate and to the others, to be faithful to his trust. Whether by oversight or design it does not appear, he did not so become bound, without which the contract could not become obligatory on either side. The consequence was, that, when the plaintiff's intestate became entitled to demand his share of the proceeds of the sale of the vessel, in case the contract had been obligatory upon Milliken, by reason of its not being executed by him, he had no remedy under it; and was compelled to take measures to enforce his claim

simply as an attaching creditor. And, having done so, it was too late to alter the state of the case by thereafter affixing the signature and seal of Milliken, without the knowledge or consent of the plaintiff's intestate. The obligatory effect of instruments takes place from the moment of their execution, and not before; and if not executed, when it was intended they should be, they cannot be effectually executed afterwards, unless by consent of parties. In this case the contract was prepared to be signed; and was signed by all the parties, except Milliken, in Nov. 1837; but not by him till in May, 1841; after the rights of the plaintiff's intestate had become fixed against the defendant's intestate. It must therefore be laid out of the case.

But, as it respects the condition of Milliken, who is responsible to the defendant as administratrix, it is not, perhaps, upon the view, which we have taken of the case, material, whether the contract is considered as in force or not. If the attachment takes precedence of the mortgages of Carter and Southgate, Milliken would be equally responsible either to the plaintiff's intestate, under the contract, or to the defendant's intestate, in case he should be considered as having been liable on account of the malfeasance of his deputy, who is responsible over, for any amount, which may be recovered in this case. The mortgages being out of the way, it will be immaterial to the plaintiff, whether he has a lien under the statute or not; the property attached being amply sufficient to answer the purposes of the attachments, and all statute liens.

It appears that neither of the mortgages had, prior to the attachments, been accompanied by a delivery of possession of the property mortgaged. It is no doubt true, that mortgages are good as between the parties, without a delivery of possession, and perhaps also against trespassers without color of right. But, until the passage of some late statutes, concerning registration, mortgages of moveables, it is believed, have uniformly been held inoperative against attaching creditors; unless accompanied by a delivery of the property mortgaged, either actually or symbolically. Mr. Chancellor Kent, in his com-

mentaries, says, "The pledge of moveables, without delivery, is void as against subsequent *bona fide* purchasers, and generally as against creditors." Vol. 2. p. 581 of 3d ed. Mr. Justice Putnam, in *Parsons* v. *Dickinson*, 11 Pick. 352, says, "If this should be considered a question between a *bona fide* purchaser, and an attaching creditor, it would be clear for the latter; for the creditor attached the goods before the vendee had perfected his title by having an actual delivery of them (the goods sold) to him." And the opinion of the court is equally explicit to the same effect, in *Lanfear* v. *Sumner*, 17 Mass. R. 110; and the principle is recognized in numerous other cases. Ships and goods at sea have, sometimes, been considered as exceptions to the general rule; in regard to which the delivery of the muniments of title are allowed to be sufficient till actual possession can be taken; which must be done when it becomes practicable; or the conveyance will be void against creditors.

In the case at bar the vessel purporting to be mortgaged, was not, as such, at the time actually in being. Carter's mortgage describes it thus; "one half of a ship now on the stocks, raised and building; to be built and completed during the coming season." And Southgate's is of one quarter part of the frame or hull of a ship, which Waterhouse was then building, calculated to be, when finished and launched, about four hundred and fifteen tons. The construction of the vessel was going forward in the shipyard used for the purpose by the mortgagor; and the mortgagees resided in the vicinity, yet no act of possession, under either of the mortgages, before the attachment relied upon in this case, ever took place.

But it is urged that the mortgages amounted to an hypothecation; and, according to the rules of the civil law, were effectual to transfer the property, without a delivery; and that, by the civil law, things, not in being, might be hypothecated; and, as they came into being, the hypothecation would attach upon them. This, as a general principle in the civil law, may be true; yet in countries where that law now prevails it may be questionable whether any such conveyance would be held to

be good against *bona fide* purchasers; and attaching creditors are deemed to be under our law in an equally meritorious predicament. But, be the rule of the civil law what it may, if not in accordance with the common law, it cannot have force here. We have adopted the common law; and must be governed by its principles. The Legislature alone can absolve us from this obligation. The civil law may be, and often is resorted to by way of elucidation, in doubtful cases, and in cases of a novel character; and especially in equity and admiralty proceedings; but the common law, when clearly furnishing the rule of action, whether in conformity to the civil law or not, must, among us, be solely regarded. In Story on Bailments, § 298, it is said, "In none of these States (of modern Europe) is the hypothecation of moveables allowed to prevail, as it did at Rome, against a subsequent *bona fide* purchaser; and, in many of these states, it is void even against personal creditors." And that "this is true in respect to the laws of Scotland, and the law of France; which agree with the *common law of England* in making void all hypothecations of moveables, without a delivery, *so far as regards creditors*," in support of which he cites 2 Bell's Com. § 702, 703, and 707. The opinion of Mr. Justice Burnet, in *Ryall* v. *Rolle*, 2 Atkins, 165, is, as to the common law, to the same effect.

In *Macomber* v. *Parker*, 14 Pick. 497, Mr. Justice Putnam, in delivering the opinion of the court, is reported to have held the following language. "It was an agreement for the pledging of the bricks as they should be made. It is true that, where the property is to be thereafter acquired, it is not strictly and technically a pledge; it is rather an hypothecation; but, when the title is acquired *in futuro*, the right of the pledge attaches immediately upon it," and cites Story on Bailments, § 200 and 294. The last section cited is as follows; "In our law a pledge is strictly confined to property of which there may be a present possession or title; or in which there is a present vested right or interest. But although, by the common law, there cannot be a technical pledge of property, not then in existence, or to be acquired *in futuro*; yet there may be a

contract for an hypothecation thereof; and when the title is acquired, or the property comes into existence, the right of the pledge will immediately attach to it." In his last edition, Judge Story cites, at the close of the above section, the case of *Macomber* v. *Parker*, as in confirmation of the position; but remarks, that it is not easily reconcilable with *Bonsey* v. *Amee*, which will be presently noticed. It may be observed, that Mr. Justice Putnam does not explicitly say, that an hypothecation, whether of property in being or to be acquired or created, without an actual delivery or possession, would be good against *bona fide* attaching creditors; nor does the work on bailments make any such assertion. If they had done so it would have been manifestly opposed to the passage first cited, from Story on Bailments, and to the opinion, before cited, of the court, delivered by Mr. Justice Putnam in *Parsons* v. *Dickinson*; and to all the common law authorities. Yet it must be conceded, that the passage above cited from the opinion, in *Macomber* v. *Parker*, might lead to the apprehension, that the contrary was in the contemplation of the learned Judge. Beginning as he did by saying "this was an agreement pledging the bricks as they should be made," would seem to imply that this position was laid down as applicable to the case before him; and as tending to show, that, without actual possession obtained, such an hypothecation was good against attaching creditors. And in this view, the case of *Macomber* v. *Parker*, would be utterly irreconcilable with the case of *Bonsey* v. *Amee*. But the case then before the court did not call for any such decision. The remarks of the learned Judge were wholly unnecessary (unless by way of elucidation) to the result to which the facts in that case, rendered it indispensable that he should come. He says himself, in that case, "that from the time Evans (the debtor) was discharged, until the attachment, the plaintiffs had the actual care and charge of the brick yard, bricks attached and property, *by themselves or their new agent, Hunting*." And in the conclusion, and summing up of the grounds upon which the opinion is based, no allusion is to be found to an hypothecatory right. Viewing the decision, which actually

took place in that case, in this light, the discrepancies between it and the case of *Bonsey* v. *Amee*, will in a good measure, if not entirely disappear.

But with great deference towards, and profound respect for the learned Judge, who pronounced the elaborate opinion, in the case of *Macomber* v. *Parker*, it does seem to me, that the ground upon which the decision might have taken place, and which might have satisfied the other members of the Court of the correctness of the result to which the opinion came, stands still wider of any necessary inference, that the final decision could have turned upon the hypothesis, that the hypothecation of moveables, not in existence, can, when they come into existence, and before any delivery of possession by the hypothecator, be protected from attachment by his creditors. The plaintiffs owned the brick yard, *quo ad hoc;* and the material of which the bricks had been, and were to be made; they made and were to make all the advances for carrying on the business; and were to make the sales, and to retain the proceeds until paid for their advances, and for the use of the yard, under the denomination of rent, and were to pay Evans (the debtor) one half of the nett profits, if any there were, as and for compensation for his personal services in carrying on the business of making the bricks. Before the attachment he had settled with the plaintiffs, when it was found that nothing was due to him, and retired from the business; leaving the plaintiffs in the entire possession of the yard and bricks; and under a contract with them merely to haul the bricks to market at a stipulated price. After all this, what ground was there left for a decision, that an hypothecatory right existed in the plaintiffs, available without actual possession, against attaching creditors?

But, however this may be, we think, that the opinion of the court, as delivered in the case of *Bonsey* v. *Amee*, 8 Pick. 236, so far as it concerns the mortgages in question, fully supports the conclusion to which we have arrived in this case. In that case there was the pledge of the *hull of a vessel, then building as security for the payment of advances made, or to be made.* Mr. C. J. Parker, in delivering the opinion of

the Court, says, "The instrument does not amount to a mortgage; for it does not appear, that there was any delivery of the vessel; and a delivery is necessary to constitute a mortgage of a chattel. Besides, the vessel not being in existence, as such, the instrument created only an executory contract; not a sale conditional or absolute." We cannot doubt that these remarks are in strict conformity to the principles of the common law.

It is certainly important that additional facilities should not be afforded to the perpetration even of what may be denominated constructive frauds. If by furnishing funds to an individual, which may always be done secretly; and, if in money, will seldom be attended with notoriety, he can be set forward upon a great scale of manufacturing, or the construction of articles attended with extensive expenditure, and thereby become ostensibly possessed of great resources, and of credit without limit; and, upon the threatening of any danger to his credit, if a secret mortgage or hypothecation, made early in the commencement of the business, of whatever shall grow out of the whole outlay, shall be allowed suddenly to spring up, and sweep the whole, it will operate as a fraud upon, perhaps, hundreds of others, who may have been induced by appearances, occasioned by the very impulse, growing out of such secret loans, to expend their time, labor and resources in the adventure, and expose them to an utter loss of the same. It is from a dread of such consequences, it may well be believed, that the civil law principle of hypothecating chattels, so as to be effectual against creditors, without the actual delivery of the same, has been repudiated, not only in countries where the common law has force, but in countries where the civil law has been more generally adopted. We are, therefore, brought to the conclusion, that the verdict in this case was well returned, and that judgment must be entered accordingly.

ALBERT M. MCKENNEY *versus* CARLISLE WHIPPLE.

In an action on a promissory note payable *on demand* at a particular place, no averment or proof of a demand on the part of the plaintiff is necessary, to entitle him to maintain his suit.

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

Assumpsit on a note of which a copy follows.

"Standish, May 10, 1841.

"On demand I promise to pay Albert M. McKenney, or order, ten dollars, with interest, at my residence at Standish, value received. CARLISLE WHIPPLE."

The plaintiff offered the note in evidence, but had not alleged in his declaration, and did not offer to prove a demand of payment at the maker's residence before the commencement of the suit.

The presiding Judge ruled, that as the note was made payable at the residence of the maker, a demand was necessary before bringing the action, and directed a nonsuit. To this the plaintiff filed exceptions.

O'Donnell, for the plaintiff.

If a note be made payable at a time and place certain, no averment or proof of demand is necessary on the part of the plaintiff; but if the maker was ready to pay at the time and place specified, that is matter of defence. *Carley* v. *Vance*, 17 Mass. R. 389; *Bacon* v. *Dyer*, 3 Fairf. 19; *Remick* v. *O'Kyle*, ib. 340; *Ruggles* v. *Patten*, 8 Mass. R. 480; *Hart* v. *Green*, 8 Verm. R. 191; *Wolcott* v. *Van Santvoord*, 17 Johns. R. 248.

There is no reason for any distinction between a note payable at a particular time and place, and one payable *on demand* at a particular place.

A note payable on demand is due immediately, and the statute of limitations begins to run from its date. *Little* v. *Blunt*, 9 Pick. 488; *Newman* v. *Kettelle*, 13 Pick. 418; *Rice* v. *West*, 2 Fairf. 323; *Smith* v. *Bythewood*, 1 Rice, 245. As against the maker, the suit may be maintained without de-

mand, although to charge an indorser, it may be necessary. *Shaw* v. *Reed*, 12 Pick. 132.

This question has been decided in the State of New York in our favor. *Haxton* v. *Bishop*, 3 Wend. 13. In this case, the Court held the intimation made to the contrary in *Caldwell* v. *Cassidy*, 8 Cowen, 271, to be erroneous. In this State, the Court did not intimate, that there was any distinction between a note payable at a place certain on demand or at a fixed time.

The decisions in the English Courts can have no bearing on this particular question, because they have held, that a demand is necessary, where the time and place are both fixed in the note. *Saunderson* v. *Bowes*, 14 East, 500; *Ravee* v. *Young*, 2 Brod. & Bing. 165.

Eveleth, for the defendant, admitted that it had been decided in this country, that when a note is payable at a certain day and place both, no demand is necessary before bringing the suit. But he contended, that the same rule does not apply, where the note is made payable at a fixed place on demand. 2 Brod. & Bing. 165; *Caldwell* v. *Cassidy*, 8 Cow. 271; *Bacon* v. *Dyer*, 3 Fairf. 19; *Tuckerman* v. *Hartwell*, 3 Greenl. 151.

The note was made in this manner to protect the defendant against costs, until a demand should be made upon him at his place of residence. No tender could be made until a demand, and the defendant is not liable until a demand of payment is made upon him at his place of residence, where only he stipulated to make payment.

The opinion of the Court was by

Tenney J. — The necessity of an averment in a writ, of a demand on the maker of a note, or on the acceptor of a bill, and proof in its support, when the same are payable at *a certain time and place*, has undergone at different times in England a very full and elaborate discussion by their most distinguished Judges and other jurists. There have been various and conflicting decisions, sometimes founded upon distinctions,

apparently without any solid basis. At one time, the opinions of the Court of King's Bench and the Common Pleas on this subject were utterly irreconcilable. An able examination of the decisions given in Westminster Hall was made and the discordant views and the reason thereof discussed by Chief Justice SPENCER in 17 Johns. 459 — also in 17 Mass. R. 389, by Mr. Justice WILDE, and in 3 Fairf. by Chief Justice WESTON. The question is considered as settled in England by the opinion given in the case of *Ravee* v. *Young*, 2 Brod. & Bing. 165, that averment and proof of a demand at the time and place of payment, where they are expressed in the note or bill, are indispensable in order to sustain an action against the maker or acceptor. In the case last referred to, which was in the House of Lords, eight Judges dissented and gave their reasons for so doing. Some make no distinction between a note payable on demand at a day certain and those payable at a *particular time and place.* Others hold, that in the former class only is a demand necessary. 17 Mass. R. 389 — Note.

From an examination of the several cases in this country before referred to, and others where the same question has been presented, a different and opposite opinion has prevailed, from that finally adopted in the House of Lords, and has been maintained also by many of the ablest Judges in England. It is believed that in the Courts here, there has been no material want of uniformity. There has been a concurrence in New York, Massachusetts and Maine, and the Supreme Court of the United States have intimated similar views, so far as they had occasion to indicate an opinion. Our commercial community in their domestic intercourse have accommodated themselves to the doctrine, which may be regarded as settled. But the question involved in the case at bar has been supposed to be affected by reasons, which would lead to different conclusions, whenever there should be occasion to discuss and examine them. We have given attention to the cases referred to, that we may ascertain whether the same principles, which are applicable to notes, when payment is to be made at a certain time and place will or not also apply to a case like the present,

Will the arguments, which have been adduced, and which have led to the settlement of the question here, in relation to notes of that description, cease to have weight, when they are tested in reference to the case now before us?

In *Saunderson* v. *Bowes*, 14 East, 500, Lord Ellenborough makes a distinction, and says that in such a case as the one at bar, the time of payment depends entirely on the pleasure of the holder, and he considers that a previous demand is indispensable. In the same case, Bayley Justice says, "Now here the terms of the contract are a promise by the defendants to pay on demand at a certain place; then the plaintiff must bring himself within the terms, by showing, that he made a demand upon the defendants at the place," and such was the opinion of the Court. The last named of these distinguished Judges, never yielded to the doctrine which finally prevailed in the English Courts in reference to bills and notes payable at a particular place and day certain, but resisted it even in the last struggle in the House of Lords. In *Caldwell* v. *Cassidy*, 8 Cowen, 271, the Court make the same distinction which was made in the case of *Saunderson* v. *Bowes*, though the question now before us, was not then presented so as to require an opinion.

It is settled so far beyond dispute, that authorities are not thought necessary to be cited, that a note payable on demand generally is payable every where, and a suit can be maintained though not preceded by a demand. A previous demand, then, in this State, is unnecessary on a note payable at a particular place on a day certain; and also on a note payable on demand generally. In the former, proof that the debtor was prepared at the place and on the day when payment was to be made, to discharge the note, if presented, and bringing the money into Court, would be a bar of damages and entitle him to costs. Why should a different principle be made to apply to the note containing in itself both the terms, which may be disregarded in a note which contains one or the other but not both? Is there any more necessity for the protection of the debtor's interests and rights, that a demand should be made,

when both exist together, than when they may be in two notes between the same parties? Are reasons to be found in one case, inapplicable in the other? The authorities, which have been cited from English books to support the views taken by the defendant's counsel, establish there a doctrine, which is not recognised here. Is the maker of a note payable at his own residence on demand, in a situation to be injured by being called upon to answer to an action commenced upon it, without a previous demand, more than he would be upon one payable at the same place on a day certain? In the latter case, he is to be sure, only to provide himself with the means of payment on the day upon which he engaged to make it, and by doing so, he is secure from injury. When, for instance, he engages to pay on demand at his residence, he is subjected to the additional risk of being called upon, when he may not have provided for the exigency; to be certain of exemption from costs, he must be constantly in funds to meet the note; inasmuch as he would not be entitled to notice of the time, when the presentment of the note would be made; and immediately after a default on his part to meet the demand made according to the terms of his engagement, he would be liable. He could not insist upon a day or an hour in which to provide the means of discharge. But this additional risk he has voluntarily taken upon himself, and therefore he must ask no indulgence on that account. If the action is brought without a previous demand at his residence, the bringing the action would be the demand, as in cases when the note is payable on demand generally; and proof of a readiness to discharge the obligation at his residence, on the day of the commencement of the suit, and bringing the money into Court would be a bar to damages and would entitle him to his costs in the same manner as on a note payable at a certain day at his residence. We are unable to see, wherein he would not be equally protected in the one case as in the other, excepting so far only as his own contract may require him to be constantly ready in one, and only on a particular day on the other. The restriction cannot be regarded as useless in one more than in the other. It may be, and often

is, a great benefit to the maker of a note to be allowed to pay it at a place where he may be possessed of the means, and if he be thus possessed according to his engagement, he does not suffer. And it is not seen in what manner he would be prejudiced, in such a note as the one now under consideration, by a want of presentment, more than in one payable on a day certain. On the hypothesis, that a demand is necessary on a note like the one before us, the demand could be of no utility to the debtor, if unprovided with the means of payment.

In the case *Haxton* v. *Bishop*, 3 Wend. 13, the particular question here presented was examined by Chief Justice SAVAGE, and in giving the opinion of the Court, he takes a view different from the one intimated by him in *Caldwell* v. *Cassidy*, 8 Cow. 271. In the case in 8 Cow. the Court hold the opinion, that no presentment is necessary to be made on a note payable at a particular place on demand, in order to maintain an action thereon. Bank notes were then in question, but the court illustrate their views by supposing the Bank an individual, who was indebted in that manner.

Whether a distinction is to be made between a note on demand at a day certain, and one simply on demand, it is unnecessary here to determine. If there be no such distinction, the term *on demand*, when coupled with a day certain would seem to be unnecessary.

From the whole examination, which we have been able to make of the authorities bearing upon the question, and the consideration which we have given the subject, we are satisfied, that a decision in favor of the defendant in this case, would be virtually a denial of the soundness of the reasons, which sustain the law, that is here settled, that a presentment is unnecessary on a note payable at a particular time and place.

Exceptions are sustained, and a new trial granted.

EDWARD FOX & *al. versus* CHARLES HARDING.

The purchaser of an equity of redemption, where the mortgagee has not made an entry, may maintain an action of trespass, *quare clausum*, against the mortgagor in possession to recover the rents and profits, and without previously making an entry.

TRESPASS *quare clausum* for breaking and entering the plaintiff's close, being a dwellinghouse in Portland. The defendant had purchased a house of George Sumner, and mortgaged the same back to him to secure the sum of 2300 dollars. Andrew Gilman recovered judgment against the defendant in October, 1838. The right of the defendant to redeem was seized on execution and legally sold, Dec. 15, 1838, to the plaintiffs, and the officer conveyed to them by deed of the same date. Harding had been in possession before the sale of the equity, and continued in possession until Dec. 1839, when the mortgagee, for the first time, entered into possession to foreclose his mortgage. For the purpose of settling the facts, the jury were instructed by SHEPLEY J. then presiding, that the plaintiffs on this testimony might maintain the action. A verdict for the plaintiffs was taken for the amount of damages from the time of the sale of the equity to the time of the entry of the mortgagee, which was to be set aside and a nonsuit entered, if the plaintiffs were not entitled to recover.

Harding, for the defendant, contended, that as the plaintiffs had no title, except as purchasers of the equity of redemption, and having made no entry into the premises, they could not maintain the action. Possession in fact is necessary to maintain an action of trespass against the defendant, who had always been in possession. *French* v. *Fuller*, 23 Pick. 104; *Rising* v. *Stannard*, 17 Mass. R. 282; *Taylor* v. *Townsend*, 8 Mass. R. 411.

Codman & Fox, for the plaintiffs, said that the sheriff's deed was as good as Harding's. St. 1821, c. 60, § 17.

Until the mortgagee takes possession, he is not entitled to the rents and profits. The rents belong to the plaintiffs. *Wyman* v. *Hook*, 2 Greenl. 337; *Wilder* v. *Houghton*, 1

Pick. 87; *Boston Bank* v. *Reed*, 8 Pick. 459; *Langdon* v. *Potter*, 3 Mass. R. 215.

The opinion of the Court was drawn up by

Shepley J. — The defendant had mortgaged the premises to Sumner, who had not entered to foreclose. The right in equity to redeem was seized and sold on execution and purchased by the plaintiffs; and the officer conveyed the estate to them subject to the rights of the mortgagee. The defendant continued to occupy the premises; and the plaintiffs have brought an action of trespass to recover of him the rents and profits received after his estate had been conveyed to them. It has been decided, that the defendant is not accountable to the mortgagee before his entry to foreclose. *Boston Bank* v. *Reed*, 8 Pick. 459. The statute of 1821, c. 60, § 17, provides, "that all rights in equity of redeeming real estate mortgaged shall be liable to be taken in execution upon judgment for the payment of the just debts of the mortgagor or owner." And the officer is authorised to make sale of the same at public vendue, and to make, execute, and deliver, to the highest bidder good and sufficient deed or deeds of any estate so sold." The eighteenth section provides "that all deeds made and executed as aforesaid shall be as effectual to all intents and purposes to convey the debtor's right in equity aforesaid to the purchaser, his heirs and assigns, as if the same had been made and executed by such debtor or debtors." It appears to have been the intention, that the purchaser should be immediately entitled to take the rents and profits, for the debtor is entitled to redeem the estate from him within one year upon paying the amount and interest, "deducting the rents and profits the purchaser, or any under him, may have received over and above the repairs and betterments made by the purchaser or any under him." The law, by declaring that the deed of the officer shall be as effectual to all intents and purposes as his own deed, designed that his right to occupy should be extinguished by that conveyance. After a conveyance by himself he could not lawfully continue his occupation without the consent, actual

or implied, of his grantee. He is supposed to have received by the sale made by the officer the full value of all his rights, including the rents and profits, before the entry of the mortgagee, by having the same applied to the payment of his debts. The plaintiffs therefore appear to be entitled by the statute to the rents and profits and to have an equitable claim to recover them. Their rights in this respect are analogous to those acquired by a creditor, who has made a levy on his debtor's estate. In such case the officer delivers seisin and possession of the estate to the creditor, but this is usually only a nominal possession, the debtor being left in the actual occupation of it. And a conveyance by deed duly acknowledged and registered is by statute made equivalent to livery and seisin. *Higbee* v. *Rice*, 5 Mass. R. 352. The grantee by the conveyance becomes legally seised, and in the language used in the case of *Langdon* v. *Potter*, 3 Mass. R. 215, "he only being seised, the possession must be adjudged to be in him because he has the right." And it is also said in that case, "if the defendant shall notwithstanding continue his former possession, it will be an injury to the possession of the plaintiff, who may maintain trespass for that injury."

The defendant contends, that the plaintiffs, to maintain an action of trespass, must prove, that they were in the actual possession, and relies upon the case of *French* v. *Fuller*, 23 Pick. 104, where it is said "to maintain an action of trespass *quare clausum* for an injury done to real property the plaintiff must prove, that he has the actual possession of the property; for though the freehold of the land may be in him, he cannot maintain the action, if the land at the time of the trespass was in the lawful possession of another." What is meant by actual possession is shewn by the latter part of the sentence to be such a possession, that no person can legally claim it against him. And in the same sense similar language is used in the case of *Langdon* v. *Potter*, where it is said, that the creditor "having the actual and rightful possession, he is immediately entitled to the profits against the defendant," although he had never actually occupied the premises.

It was decided in the case of *Wyman* v. *Hook*, 2 Greenl. 337, that assumpsit for use and occupation could not be maintained by a person, who claimed title by levy against the former owner, who remained in possession; because there was no contract between them either express or implied. There could be none in this case; and the plaintiffs must recover, if at all, by an action of trespass; and there does not appear to be any technical difficulty to prevent it. For it is not contended, that the plaintiffs could not maintain an action of trespass after an actual entry against one, who should continue to occupy without right. And proceedings have taken place, which the law regards as equivalent to such an entry. It declares, that the deed of the officer shall be as effectual as the deed of the debtor, and that the deed of the debtor duly acknowledged and recorded shall be equivalent to livery and seisin, which are more effectual to transfer the possession, than an entry by the grantee without a continued possession; for in these are included not only an entry by the grantee, but also a transfer of the possession to him by the grantor. Hence the law must conclude, that the grantee of the officer had received possession, and that the entry of the debtor upon him would be a trespass. In this case the legal effect in this respect is the same as it would have been, if the debtor's estate had been unincumbered, and he had conveyed it to the same grantees by a deed duly acknowledged and recorded. And in such a case to determine, that the grantee had not legally entered and received possession, would be to deny, that these proceedings have the effect, which the statute declares that they shall have; and to require also some other act or ceremony to pass the estate, such as an entry, where the statute says, that the deed shall be effectual "without any other act or ceremony in the law whatsoever."

The difference in the effect of a conveyance by an executor or administrator, and one by an officer, will be found in the difference of language in the two statutes. The deed of an executor or administrator is to "make as good a title to the purchaser, his heirs and assigns forever, as the testator or intes-

tate had therein." The deed of the officer, says the statute, "shall be as effectual to all intents and purposes" "as if the same had been made and executed by such debtor or debtors."

The executor or administrator has only a naked power to sell. He is not entitled to the possession of the estate, which he sells, and is not therefore supposed to be in possession. And he may sell lands fraudulently conveyed by the testator or intestate, as well as lands, of which the deceased had been disseised. Hence he is not authorised to do more than convey such *title* as the deceased had; and the mere execution of a power to convey the title by one not in the possession has little analogy to a conveyance by the owner, who is regarded as in the actual possession. And the statute does not declare that it shall have any other effect, than to convey whatever title the deceased had in the estate.

Judgment on the verdict.

STEPHEN LONGFELLOW *& al. versus* ANDREW SCAMMON *& al.*

The poor debtor's oath must be administered within six months from the date of the bond, or the proceedings will not furnish a legal defence to an action on a poor debtor's bond, or afford the defendants any protection.

DEBT on a poor debtor's bond, dated at Calais, Feb. 20, 1838, given by Scammon, as principal, and by the other defendants as his sureties, to procure the release of the principal from arrest on an execution in favor of the plaintiffs. The condition of the bond recited the judgment and arrest on the execution, and concluded thus: — "Now if the said Andrew Scammon shall within six months from the date hereof cite the said S. Longfellow & Son to appear before two justices of the peace, *quorum unus*, and then and there shall submit himself to examination and take the oath as prescribed in the tenth section of the act entitled 'An act for the relief of poor debtors,' or pay the debt, interest, cost, and fees arising on said execution, or be delivered into the custody of the jailer of said county, then the above bond shall be void, otherwise remain

in full force." The creditors were notified to appear before two justices of the peace and of the *quorum* at a certain place and hour of the day in Bangor, on the 22d of August, 1838, two days after the expiration of six months from the date of the bond, when and where Scammon appeared, and the justices administered to him the poor debtor's oath.

SHEPLEY J. before whom the case came on for trial, was of opinion, that these proceedings did not constitute a legal defence, or afford the defendants any protection, because the oath was not taken within six months from the date of the bond. The defendants thereupon consented to be defaulted, which default was to be taken off, if the opinion was erroneous.

At the April Term, 1842, it was agreed that the case should be argued in writing, but no arguments have come into the hands of the Reporter.

Longfellow, Sen. & Jr. for themselves.

Willis and *Fessenden*, for the defendants.

The opinion of the Court was prepared by

TENNEY J. — Two justices of the peace and quorum of the county of Penobscot, have in due form certified, that the creditors were properly notified of the intention of the principal in the bond, and they have administered to him the oath prescribed in the statute for the relief of poor debtors. The Judge, who presided at the trial, expressed an opinion, that although the creditors were cited within six months from the date of the bond, yet as the oath was not attempted to be taken till afterwards, the defence failed.

It is contended by the defendants' counsel, that the statute requires only, that the citation should be served within the six months. We think the language of the act, of itself, clearly imports a different intention in its authors. If the oath is not to be taken within that time, there is no limit fixed beyond which the oath cannot be taken, provided the citation is seasonably made and served. This would entirely, in effect, take from the creditor, all the security, which the Legislature, we think, intended; and would render useless this part of the act,

The case of *Moore* v. *Bond*, 18 Maine R. 142, by implication gives a construction inconsistent with the defendants' position.

Again, it is insisted, that the *terms used* in the condition of *this bond*, do not require that the oath should be administered within six months from its date; and as the service of the citation was made within that time, there has been a full compliance with its condition. It is true, that bonds clearly departing from the provisions of the statute, cannot be regarded as statute bonds, although it may be *supposed* the parties intended them as such. The intention of the parties must be derived from the language of the whole bond taken together, in connection with the subject matter thereof. It is manifest that this bond was not carefully and skilfully drawn. But there is no form of words required. Yet notwithstanding that, if important statutory provisions are omitted, it can be treated only as a bond at common law. The language used in the condition of the bond, which we are now considering is, "Now if the said Andrew Scammon shall within six months from the date hereof cite the said S. Longfellow & Son, to appear before two justices of the peace, *quorum unus*, and then and there shall submit himself to examination and take the oath as prescribed in the tenth section of the act, entitled "an act for the relief of poor debtors," &c. It is insisted that the word "*then*" refers to the time which shall be fixed in the citation for the caption of the oath. When this term is used in reference to *time*, it properly relates to some antecedent *expressed*, rather than to one *implied;* and on the construction contended for, we must suppose, that the term "*six months*" is not the antecedent, but that it is embraced wholly in the word "*cite*," which implies action and not substance. "*Six months*" immediately precedes the word "*then*," and we think, when we look at the occasion of taking the bond, that we should do violence to the language used, to say the reference was not to that time and no other.

We do not consider, that the word "*there*," being connected with the word "*then*," weakens the construction adopted, for we may as well suppose the latter to refer to the place fixed

upon by the statute, as to that which may be selected by the debtor and referred to in the citation.

But the oath is to be taken "as prescribed in the tenth section of the statute." Now if the statute requires, that the oath should be taken within six months from the time of giving the bond, as we have no doubt it does, it could not be taken "as prescribed in the statute," unless taken within the six months.

It is unnecessary to examine any other points which might have been raised by the parties in the argument, as the views we have taken satisfy us that the default should stand.

LEVI BLANCHARD *versus* JAMES DYER.

Where four persons jointly procured insurance to be made on a vessel owned by them jointly, and afterwards, while the ownership remained the same, a loss happened; *it was held*, that an action on the policy by one of the four, to recover his share of the loss, could not be maintained. All the owners should have been joined as plaintiffs.

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

Assumpsit on a policy of insurance, dated Nov. 5, 1839, whereby "the subscribers, associated for marine insurance, do by these presents cause to be insured, lost or not lost, Levi Blanchard, Jacob G. Loring, Thaxter Prince and Paul Prince, for the term of one year from the twenty-fifth day of October, 1839, on the schooner Oxford," the sum of two thousand dollars, of which sum the defendant subscribed one hundred dollars. The suit was brought in the name of Blanchard alone. The declaration alleged that the plaintiff owned three eighths of the Oxford, and that the remainder was owned by Loring and T. & P. Prince; and averred a total loss within the year by the perils of the sea.

At the trial, the plaintiff read his writ to the jury, and the policy of insurance declared on. The District Judge directed

a nonsuit, on the ground, that it appeared that other persons should have been joined as plaintiffs. The plaintiff filed exceptions.

The case was argued by *Fessenden & Deblois*, for the plaintiff, and by *Preble*, for the defendant.

The Counsel for the plaintiff cited *Harding* v. *Foxcroft*, 6 Greenl. 76; *Copeland* v. *Mer. Ins. Co.* 6 Pick. 198; 1 Saun. 153; Yelv. 177; Hammond on Parties, 28; 2 Caines, 203; 4 Esp. R. 98; *Gardner* v. *Bedford Ins. Co.* 17 Mass. R. 613; 4 B. & Ald. 436; 4 Wend. 75; *Cleaveland* v. *Clap*, 5 Mass. R. 201; 1 Binney, 429; *M'Cullock* v. *Eagle Ins. Co.* 1 Pick. 278; 5 Wend. 541; Phillip's Ins. 58; 5 Cranch, 342; 2 Cranch, 45; 8 T. R. 13; *Oliver* v. *Greene*, 3 Mass. R. 133; 1 Conn. R. 571; 1 Wash. C. C. Rep. 241; *Farrow* v. *Com. Ins. Co.* 18 Pick. 53; *Wood* v. *Ward*, 13 Mass. R. 544; 7 Wend. 82.

The Counsel for the defendant cited *Davis* v. *Boardman*, 12 Mass. R. 80; and *Pearson* v. *Lord*, 6 Mass. R. 81.

The opinion of the Court was afterwards drawn up by

Tenney J. — This policy in its terms is to the plaintiff and others interested jointly, and not severally. All, who were to be benefitted by it were, at its date, owners of the vessel and so continued till the commencement of the action. There is no dispute that a loss has happened and a consequent liability upon the underwriters; the parties stand here at this time in the same position, in which they would be placed under an instrument having no condition. If the same principles apply alike to this and ordinary contracts, the action cannot be maintained in the name of one only of the assured. Numerous cases have been cited by the plaintiff's counsel, in order to show that actions upon policies of insurance are exceptions to the general rule in this respect; but we do not perceive an analogy between those cases and the one at bar. It is true policies are informal contracts and are to be liberally construed, but we cannot believe that established rules are to be broken down unless reason and necessity justify it. Nothing is here

presented, which shows a severance of the contract in any manner, and it is not pretended, that any change has taken place in the interests of the assured, since the policy was made; neither is it insisted that a joint action could not be maintained. The policy does not purport to be to the plaintiff or any other as agent of the owners, but it runs to all, each being expressly named. In the case of *Wood* v. *Ward*, 13 Mass. R. 544, which is relied upon by the plaintiff's counsel, the policy was to the plaintiffs, *for whom it might concern.* It was insisted that as Saunders' interest in the vessel was insured in the same policy, he should have been joined with the plaintiff in order to maintain the action. The Court however, not taking the ground, contended for here by the plaintiffs, that the action could be maintained in the name of one, when others were jointly insured by the policy, decided in favor of the plaintiff on account of the peculiar language used in the instrument, and say, "The plaintiff caused the insurance for whom it might concern, and the interest of Saunders was known at the time to the underwriters. It is in conformity with the contract, that the plaintiff should maintain the action in his own name, and it is agreeable to usage, that he should do so in policies in this form." The parties only can maintain an action on a policy of insurance, except when the same is assigned by consent of the underwriters; *Carrol* v. *Boston In. Co.* 8 Mass. R. 515. When assigned by the consent of the underwriters, the assignees thereby become parties. And since it has been usual to omit the words once used which made the policy available to all for whom it had been made, the recovery can be only for the interest which the party, named as the insured, had at the time. *Pearson* v. *Lord*, 6 Mass. R. 81. An agent may maintain an action in his own name, if interested as a policy broker, for his principals, although the principal or agent may also sue. 1 Chitty's Pleadings, 5. If one named in a policy have no interest, he cannot join in the action, but if he have an interest his name should be used. *March* v. *Robinson*, 4 Esp. R. 98; *Gardner* v. *Bed. In. Co.* 17 Mass. R. 613. But we find no case, where the

general principle, that the suit shall be between the parties to the contract, according to its terms, when all are interested, and there has been no severance, so essential to prevent litigation, has been violated.

The nonsuit is confirmed.

TOPPAN ROBIE *versus* EDWARD T. SMITH.

A tenancy at will, or from year to year, is determined by the death of the tenant.

If one occupies a portion of the premises under a verbal agreement with the tenant at will, his right to occupy ceases at the death of the tenant at will, and he is not entitled to notice to quit before an entry into the premises by the owner.

TRESPASS *quare clausum.* With the general issue the defendant, by brief statement, alleged, that James H. Foster was, at the time of the supposed trespass, the owner of the premises, whose agent he was, and by whose direction he acted; and that if the plaintiff ever occupied the same, it was under an agreement to deliver up the same, whenever said Foster should require it; and that the plaintiff had been previously required to quit.

At the trial before SHEPLEY J. it appeared that there was, and for more than thirty two-years had been, a brick block containing two dwellinghouses, one owned by the plaintiff, and the other by J. H. Foster, a brick wall extending from the front to the rear, in the centre of which was the dividing line between the parties. An addition had been built in the rear of this block, half on each lot; and in the rear of this addition, had been built another, thirty-two years ago, twenty feet by twelve, the ridge of its roof being on the line between the parties. When the last addition was built, William H. Foster, who had conveyed to J. H. Foster, Sept. 10, 1806, occupied the house so owned by the latter, and continued so to do until he died, three or four years before the trial. When they were about to build this last addition the plaintiff and William H.

Foster agreed, that the plaintiff should pay for the whole of the frame, and as a consideration for it, should have the privilege of finishing and using a bedroom in the roof of it. In other respects each built his share. The plaintiff finished off a bedroom in the roof, twelve feet by nine, half on each lot. "This bedroom the plaintiff had continued to occupy as his own during all the lifetime of William H. Foster, without any objection, and until the defendant, in April, 1841, by direction of James H. Foster, caused the roof of the addition on his half to be raised, and thus made room for bedrooms in his own half, and took one half the bedroom so used by the plaintiff, and placed a partition on the line of the lots." This was done with no more injury than was necessary to effect the object.

The Judge, for the purpose of having the damages assessed by the jury, if the plaintiff should be entitled to recover, instructed them, that on the facts the plaintiff might maintain the suit, and recover for the injury he had suffered by taking away half the bedroom. The verdict was for the plaintiff, and the damages were assessed at ten dollars. This verdict was to be set aside, and a nonsuit entered, if the plaintiff was not entitled to recover.

This case was continued at the April Term, 1842, to be argued in writing; but no arguments have come into the hands of the Reporter.

Willis and *Fessenden* and *E. Hayes* for the plaintiff.

Fessenden and *Deblois* for the defendant.

The opinion of the Court was drawn up by

Tenney J. — This is an action of trespass *quare clausum fregit*. It appears, that the defendant acted as the servant and by the direction of James H. Foster, in entering the dwelling-house, alleged to be that of the plaintiff, and tearing down a partition in a bedroom therein.

The estate, which the defendant is charged in the writ with having unlawfully invaded, was that of James H. Foster. The

rights of the plaintiff, whatever they were, originated in an agreement between him and William H. Foster many years ago, when William was in the occupation of all which James claimed to own; and this occupation with the exception of the bedroom in question was continued by William till his death, in 1837. William held by no written agreement with the owner, and can therefore be regarded only as a tenant at will or from year to year; and this tenancy was determined by his death. The plaintiff could have no right superior to those of the one from whom he derived them, and so far as his occupation depended upon the agreement with William, the legal power to continue it ceased with his death.

The counsel for the plaintiff however contended, that he was the tenant at will of James, the owner; and that his claim in this action is founded upon that relation; that his continued occupation for thirty-two years, a part of which was after the decease of William, with whom the contract for the use of the bedroom was made, implies in law, that his occupation was by the assent of James, and that the contract is to be considered as made between the plaintiff and the owner, the latter having acted through his agent, William. They then insist that such a tenancy is not determined till after notice to quit; and that no such notice having been given in this case, the acts complained of are an injury to his rightful possession.

We have seen nothing from which such an implication as is contended for arises. The jury might or might not, so have found had the question been submitted to them. There is no evidence that James ever knew of the plaintiff's possession, and from the situation of the whole building and the manner in which it was occupied by the respective tenants, such knowledge cannot be presumed. From an agreement between a tenant at will and a stranger to the owner of the estate, is the assent of the latter, that such tenant shall occupy after the relation of landlord and tenant has ceased, legally inferible? No authorities are cited in favor of the doctrine contended for, and we see no sufficient reason for its maintenance.

All the plaintiff's rights arose under the agreement with the

tenant, and ended with the determination of his term, which was his life. No relation is shown to exist between the plaintiff and the owner after the tenant's death. The jury have found, that no injury was done, more than was necessary to effect the object of the owner, which was to make an alteration in his own part of the building, and this alteration it was his privilege to make. No legal occupation of the plaintiff was disturbed; and this action, which is for an injury to his possession, cannot be sustained.

The verdict is to be set aside and a nonsuit entered.

JOSEPH P. BRADBURY *& al. versus* JOSEPH SMITH.

Where a partnership was formed between J. P. B. and H. C. wherein it was stipulated that the partnership should be special; that H. C. should be the special partner, and should contribute a certain sum "as capital to the common stock for carrying on the business," which was to be conducted in the name of J. P. B. & Co.; and the sum was paid in and invested in goods, and the goods were sold and other goods purchased in their place with the proceeds of the sales; *it was held*, that whether the partnership was to be considered as a special one under the statute or as a general one, the goods became partnership property, the partnership becoming debtor to the partner advancing the capital to the amount advanced.

An action cannot be maintained by the members of a firm against an officer for attaching goods belonging to the firm on a writ against one of the members for his separate debt.

THIS was an action of trespass by the plaintiffs as copartners against the defendant, then sheriff of the county of Cumberland, for taking and carrying away certain goods, as belonging to the copartnership, on a process against Joseph P. Bradbury, one of the plaintiffs, to satisfy a debt due from him only.

The plaintiffs at the time of the taking were doing business under an agreement of which the following is a copy: —

"COPARTNERSHIP NOTICE.

"This is to certify that the undersigned, all of Portland, County of Cumberland, and State of Maine, have formed this

day a limited partnership under the name of J. P. Bradbury & Co. of which J. P. Bradbury is the general partner and Henry Coffin the special partner — said special partner has contributed $1500 as capital to the common stock for carrying on a general grocery business. The partnership will commence from the day of the date hereof and continue two years.

"J. P. BRADBURY,
"HENRY COFFIN.

"Portland, Nov. 16, 1840."

This was acknowledged on the same day before a justice of the peace, and recorded in the registry of deeds for the county on the next day.

It was proved, that Coffin furnished the fifteen hundred dollars, being the whole capital that was to be employed in the business of the firm; that he was to have profits equal only to six per cent. on his investment; and that Bradbury was to perform all the labor and have the remainder of the profits. Goods were purchased with this money, sold, and other goods purchased with the proceeds of the sale, and the business conducted until the attachment took place, within the two years.

A verdict was taken for the plaintiffs for the value of the property taken by the defendant, which was to be set aside, and a nonsuit entered, if the action could not be maintained.

Codman & Fox, for the defendant, contended that the partnership formed by the plaintiffs, although it might be intended as a special one, was in fact a general partnership.

The statute of 1836, c. 211, § 7, provides, that in special partnerships, the business shall be transacted in the name of the special partner only without the addition of the word, company. In this case, the business was done in the name of Bradbury and company, and they cannot avail themselves of the privileges of the act, when they have violated its provisions.

Whether it is a general or special partnership can make no difference in this case. Whatever stock was bought for the partnership, as soon as purchased, became partnership property. Each partner, therefore, had an interest in the stock; they

were tenants in common; and the sheriff may take and hold the common property for the debt of one, without being liable as a trespasser.

The whole learning upon the subject is to be found in an article in the American Jurist for October, 1841, p. 55 to 85. The point has been met, and expressly decided in our favor in this Court in *Douglas* v. *Winslow*, in Penobscot county, not yet reported.

F. O. J. Smith, for the plaintiffs, contended, that they were entitled to retain their verdict.

The plaintiffs were in business under articles of limited partnership, supposed to have been instituted pursuant to the provisions of the act of 1836, c. 211. They proceeded pursuant to the act, unless the addition of "& Co." to the name of the general partner in the style of their firm be a fatal departure from the statute. This provision of the statute is only directory, and this addition involves no disability or nullity of the firm as a special partnership, nor converts it into one of general partnership, against the manifest purpose of the parties and the intention of the law; especially in favor of a party who has at no time dealt with the firm.

But whether the plaintiffs were partners under the statute, or were partners under the common law principle of contracts, their partnership can only be regarded, upon the proof in the case, as a limited partnership, assimulating in all its features, and in its whole nature, to a contract of agency. If so, it is to be respected in law by all persons, according to such limitations or agency. Was it competent for the plaintiffs to form such a partnership? If so all persons, no less than themselves, were bound by these stipulations, and could do nothing lawfully inconsistent with them, without being guilty of a trespass. This partnership cannot be regarded other than one in which one partner was to furnish the whole capital, in the ownership of which the other was in no event to have any part, but only in the profits derived therefrom, making it a partnership in only the profits. Story on Partnership, § 23, 27, 88, 38,

40, 41, 45, 51; *Allen* v. *Dunn*, 15 Maine R. 293; *Loomis* v. *Marshall*, 12 Conn. R. 69.

The seizure of the property was not at law justifiable. Inasmuch as the facts of the case find, that the property attached was the property of the special partner exclusively, and purchased wholly with his funds, and not otherwise, and that Bradbury never had, and was not, from the nature of the limited partnership proved, to have, any property in the *corpus* of the goods attached, but only was invested by the terms and nature of the partnership with a possessory interest and control over the same, similar in its nature and effect to that of an agent, there was nothing to justify the attachment — no tangible property of Bradbury in the goods for creditors to levy upon. *Rice* v. *Austin*, 17 Mass. R. 197; *Allen* v. *Dunn*, 15 Maine R. 293; *Com. Bank* v. *Wilkins*, 9 Greenl. 38. An attaching creditor of one partner can take no other or different interest in the partnership effects, than his debtor had at the time of the attachment.

The action accrues to the plaintiffs against the officer, in the same manner as if the officer had attached, as Bradbury's property, any other interest not attachable, as in *Smith* v. *Cudworth*, 24 Pick. 197, and in *Wentworth* v. *Young*, 17 Maine R. 70. If either of the plaintiffs could have maintained an action, certainly the two partners could do so, by which is united the proprietary and the possessory interest in the property, in one suit. *Wilson* v. *Conine*, 2 Johns. R. 280; Story on Partnership, § 256.

The opinion of the Court was afterwards drawn up by

Shepley J — Whether a partnership includes the capital stock, or is limited to the profit and loss, must be determined from the agreement and intention of the parties. In this case the agreement signed by the plaintiffs declares, that the "special partner has contributed $1500 as capital to *the common stock*." And there can be no doubt, that it was their intention to form a limited partnership under the provision of the statute of 1836, c. 211. If it be admitted, that a general

partnership was not created by a failure to comply with the provisions of the seventh section of the act, which requires, that "the names of the general partners only shall be inserted without the addition of the word company or any other general term;" the act would still require, that the special partner should contribute a sum in cash, and that it should become a portion of the capital stock of the partnership. The act provides, that "the general partners only shall transact business," and the goods must be purchased by them. The contracts and bills of purchase would be between the seller and the partnership as the purchaser, and the goods would become the property of the partnership. And this would but carry into effect the agreement and intention of the parties; the partnership becoming a debtor to the special partner for the amount of cash by him contributed. A loss of the goods in the shop by fire, or otherwise, would not have fallen exclusively upon the special partner as the sole owner, but upon the partnership. Although at the time of the commencement of this partnership the capital stock was all contributed by the special partner, the general partner would afterward be daily contributing to it by his time and attention to the business. It cannot therefore be correct to assert, that the capital stock at the time of the attachment, after several months' continuance of the partnership, remained as the sole contribution of the special partner. It might have happened, by a rise in the value of the goods first purchased, and by large profits on the sales of these and of other goods subsequently purchased, that the capital would have been more than doubled during the two years provided for its continuance. And as the special partner was to receive as profits a sum only equal to the legal interest on the money advanced, the general partner might at that time become entitled to a larger portion of the capital stock. There is no evidence, that the goods attached were a part of those originally purchased by the cash advanced by the special partner. And if they were not, they must have been purchased on the credit of the partnership, or by funds partly accruing

from the services of the general partner in transacting the business.

Whether the special agreement, or the intention of the parties to it, or the legal effect of their acts, be considered, the result is the same; that the goods in the shop must be regarded as the property of the partnership. And it has been already decided in the case of *Douglass* v. *Winslow*, 2 App. 89, that such goods are liable to be attached for a separate debt of one of the partners.

The verdict is to be set aside and a nonsuit entered.

CHARLES CUSHMAN *versus* ISAAC MARSHALL.

In an action by an indorsee against an indorser of a note, declaring on the indorsement, with the money counts, and where it does not appear but that the plaintiff has a right of action on the note against both indorser and maker, he cannot rescind the contract, and on the money counts recover of the indorser the consideration paid him for the note, by proof that it was obtained of the maker by fraud and misrepresentation, without returning the note to the indorser.

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

The action was assumpsit, the declaration containing two counts; one for money had and received; and the other against the defendant as indorser of an instrument of which a copy follows; — "Bangor, July 19, 1834. Due Alfred Knight, or order, forty-nine dollars twenty-five cents in sixty days. Smith & Parsons." It was indorsed in blank by Alfred Knight and by the defendant. At the trial, the plaintiff abandoned the special count, and relied solely on the count for money had and received.

The plaintiff offered in evidence the deposition of Parsons, one of the makers of the note, to prove that the note was without consideration, and had been obtained from them by Knight by fradulent misrepresentations. To the admission of this deposition the defendant objected, on the ground that one

of the signers of the note could not be called as a witness to impeach the note for want of consideration. The objection was overruled by the Judge, and the deposition admitted.

S. Chesley was called by the plaintiff and testified, that sometime within three months from Jan. 1, 1835, Marshall called at his shop in Portland and enquired of the witness whether he was acquainted with the signers of the note, and if he considered them good. The reply was, that they were good. The note was then produced by Marshall, who wished to sell it, and said he would take part money and part goods. He was referred by the witness to the plaintiff.

Marshall then went and saw the plaintiff, and proposed to let him have the note, if he would pay twenty dollars in money, and the balance in goods. The defendant was asked, if the note had ever been presented, and replied, that it had not. The plaintiff then enquired of the defendant, if the note was good, and if it would be paid when it was sent down, to which the defendant replied in the affirmative. The plaintiff then paid for it twenty dollars in money, and the balance in goods, and Marshall indorsed the note, and delivered it to Cushman.

The Counsel for the defendant contended, that the action was not maintainable upon this evidence, no demand or notice having been proved; that if the plaintiff would recover the money paid for the note on the ground of fraudulent misrepresentations made by the defendant to the plaintiff, it should be in a different form of action, and not under the money count. The Judge instructed the jury, that if the defendant falsely represented to the plaintiff, that the note was valuable and justly due, knowing it was not, then the plaintiff was entitled to recover of the defendant the twenty dollars paid for the note with interest. The verdict was for the plaintiff, and the defendant filed exceptions.

Codman & Fox, for the defendant, said they were entitled to a new trial, on the ground that the deposition of Parsons, one of the makers of the note, was clearly inadmissible; and cited *Deering* v. *Sawtelle*, 4 Greenl. 191.

Haines, for the plaintiff, after remarking that the only objection taken in the opposing argument was, that the deposition of Parsons was improperly admitted, said there could be no objection to it on the ground of interest in the deponent. The recovery of judgment either way could not be evidence in a suit against Parsons. Stark. on Ev. 1729; *Gibbs* v. *Bryant*, 1 Pick. 121; 3 T. R. 601.

The deposition does not go to show, that the note was void at its creation. In a suit against an indorser, the maker may be called to prove a failure of consideration, or payment afterwards. *Baker* v. *Briggs*, 8 Pick. 127; *Gibbs* v. *Bryant*, before cited; *Freeman's Bank* v. *Rollins*, 13 Maine R. 202.

The opinion of the Court was afterwards drawn up by

TENNEY J.—This is an action of assumpsit. The writ originally contained two counts, one as upon an indorsed note against the defendant as indorser, and the other for money had and received. The plaintiff abandoned the first, and under the other sought to recover the amount paid the defendant for the note, on the ground, that the same was originally obtained of the makers, by misrepresentation and fraud, which were known to the defendant; and therefore the plaintiff received no consideration for the sum, which he parted with in the purchase of the note.

Can this action be maintained? The plaintiff still holds the note and has made no offer to give it up to the defendant. It is indorsed in blank by the payee without date and there is nothing in the case to show that it was not negotiated at the time it was made. Whether it came into the hands of the one to whom it was negotiated *bona fide*, and in the due course of business, unaccompanied with any circumstances calculated to awaken suspicion, was not a question made at the trial. It does not appear that the plaintiff had reason to suspect any want of consideration in the note. He it seems relied upon the makers, and also upon the defendant, as he took his indorsement, which was unnecessary, if he did not intend to hold him. The note may still be recovered of the

makers; and it is not seen how a judgment in this action will defeat it. The defendant is liable by virtue of his indorsement, unless the plaintiff by his own laches released him. *Colt* v. *Barnard*, 18 Pick. 260. Every indorsement is a new contract, unless it be qualified, which renders liable him who makes it.

The means of resorting to all the parties to the note the plaintiff retains in his own hands. He seeks to recover back the consideration paid therefor, where he still has, subject to his own control, what was passed to him as an equivalent. It is not a case where there has been a partial failure of consideration by means of fraud, and the claim is for the loss sustained by the difference between the real value of the article purchased, and what it was fraudulently represented to be. The attempt is to rescind the contract as being destitute of consideration entirely. Before the suit can be maintained, we think, there should have been an offer to surrender the note to the defendant, and thereby release him from his liability on the indorsement, and restore to him, what he may make available. *Thurston* v. *Blanchard*, 22 Pick. 18; *Ayers & al.* v. *Hewett*. 19 Maine R. 281. Other important questions are presented in the exceptions, which we consider it unnecessary to discuss.

Exceptions are sustained.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK,

ARGUED AT APRIL TERM, 1842.

JOHN SPRING *versus* WILLIAM P. HAINES, Adm'r.

The mortgagor has no right to have a part of the mortgaged premises, under any circumstances, estimated in payment of his debt, with a view to the redemption of the residue.

A foreclosure of a mortgage cannot take place as to one part of the mortgaged premises, and not as to the residue. If the mortgagor has a right to redeem any part, he has a right to redeem the whole.

And so long as the mortgagor is suffered to remain in possession of any part of the mortgaged premises, his right of redemption to the whole will continue.

THIS was a bill in equity to redeem certain real estate, mortgaged by Spring to the late Samuel Parkman of Boston, on whose estate in Maine the defendant is administrator, *de bonis non.*

The hearing was on bill, answer and proof. The principles upon which the bill, which was drawn by the late A. G. Goodwin, was intended to have been supported, as they appeared upon its face, are stated in the opinion of the Court.

The answer alleged that Spring had conveyed to a third person his right to redeem, and therefore he could not redeem;

denied that any right existed to redeem any of the property mortgaged, because entries had been made at different times upon each parcel, and three years had elapsed thereafter without redemption; and asserted that if the right existed to redeem a portion of the mortgaged premises as alleged in the bill, still that the land to which the title had become absolute in the heirs of Parkman, and the money paid, with the rents and profits of the estate, did not amount to the sum due upon the mortgage; and that no tender had been made of the balance. An account with the estate was annexed, charging the amount due, and crediting the sums received. From this account it appeared, that the heirs of Parkman had sold and conveyed several tracts of the mortgaged estate, admitted on both sides to have been foreclosed by an entry and possession for three years.

Bradley argued for the plaintiff, and on the point on which the decision was based, contended that when the debt is once paid, the mortgage is discharged. The payment may be made in land as well as in money. If the mortgagee chooses to enter upon a part of the several tracts of land included in the mortgage, and continues in possession for three years, the title becomes absolute in him, and he may convey it, and the purchaser becomes seised of an indefeasible estate. In this case many of the parcels of land had been actually conveyed before the filing of this bill. If the mortgagor wishes to redeem, he can only have the remaining estate as to which no foreclosure had taken place. He ought not to be compelled to pay the whole debt, and receive back but a portion of the estate mortgaged. If the mortgagee takes possession of the whole property mortgaged at the same time, then he will have the whole land, or the money for the entire debt. But if he chooses to take possession of but part of the property, and obtains an absolute title to it, he must take it in full payment of the debt, if it be of sufficient value, and if not, in part payment. If this be not correct, then when a large number of tracts of land, lying in three counties in this State, and in an adjoining State, as in the present case, are included in the same mortgage, the mort-

gagee can never safely sell and convey any part of the land, on which he has made an entry and foreclosure by three years possession, until he has ascertained to a certainty, that there has been a legal foreclosure of every parcel. This view of the case is believed to be supported by abundant authorities in New England. Their course of proceeding is so entirely different, that the English and New York decisions are wholly inapplicable. *Dexter* v. *Arnold*, 1 Sumn. 119; *Newall* v. *Wright*, 3 Mass. R. 154; *Amory* v. *Fairbanks*, ib. 562; *Amory* v. *Francis*, 16 Mass. R. 312; *Omaly* v. *Swan*, 3 Mason, 474; *Gordon* v. *Lewis*, 2 Sumn. 155; *West* v. *Chamberlain*, 8 Pick, 338; *Briggs* v. *Richmond*, 10 Mass. R. 396; *Hedge* v. *Holmes*, ib. 381.

Haines, pro se, contended that the statute of 1821, c. 39, respecting mortgages, contemplated that the whole amount of the debt secured should be paid or tendered, to obtain a reconveyance. The only case in which the land is to be taken by the mortgagee at a valuation is, when he has foreclosed the whole, and brings his suit to recover a balance due to him. The redemption of land mortgaged must be of the entire estate mortgaged, and not of separate parcels. Nothing but actual payment, or tender of payment, of the whole debt secured by the mortgage, will discharge it. The mortgagee cannot be compelled to take a part of the land at the appraisal of men in satisfaction of his debt. And yet such would be the effect of the principle contended for. The mortgage is viewed differently, when relief is sought by the mortgagor and mortgagee. *Saunders* v. *Frost*, 5 Pick. 259; 1 Powell on Mort. Rand's Ed. 336; *Mann* v. *Richardson*, 21 Pick. 359; *Crosby* v. *Chase*, 5 Shepl. 369; 4 Kent, 163; 2 Story's Eq. § 1023, and note; *Batchelder* v. *Robinson*, 6 N. H. R. 12.

The opinion of the Court was by

Whitman C. J. — The bill in equity, in this case, sets forth a mortgage by the plaintiff to the defendant's intestate, of sundry parcels of real estate, and that an entry has been made into some of the parcels, and with respect to these, that the

mortgage has been foreclosed by the lapse of time since such entry. The plaintiff claims to have a right to redeem the residue; and to have the parcels, so entered upon, estimated, and to have them accounted for at such estimate, as so much paid towards the debt, to secure which the mortgage was made; and alleges that the amount of such estimate, together with the receipts of the rents and profits of the whole mortgaged premises, and sundry payments otherwise made, are more than sufficient to pay the debt originally due, with interest thereon; and prays, that the other parcels of said premises, in reference to which he avers that the mortgage has not been foreclosed, may be deemed to be restored to him.

It appears to us that the ground relied upon by the plaintiff is wholly untenable. The positions assumed are novel and unprecedented. The cases which he cites are dissimilar to the one here presented. They are cases in which creditors were seeking to recover their debts secured by mortgage. In such cases, if the mortgage had been foreclosed, the creditors were holden to account for the value thereof towards the payment of their debts. But no case is to be found in which the mortgagor has been considered as having a right to have a part of the mortgaged premises, under any circumstances, estimated in payment of his debt, with a view to a redemption of the residue.

Besides, the plaintiff is mistaken in supposing that a foreclosure may take place, as to one part of the mortgaged premises, and not as to the residue. If he has a right to redeem any part he has a right to redeem the whole. So long as the mortgagor is suffered to remain in possession of any part of the mortgaged premises his right of redemption to the whole will continue. A different doctrine would be attended with perplexities, to which the mortgagor is not to be subjected. While the mortgagee might have possession of part of the mortgaged premises, nearly equivalent in value and income to his debt and interest, the mortgagor might well remain quiet, he being left in the possession and enjoyment of the residue. If the mortgagee should, subsequently, before his right of entry

was gone, enter upon the residue the mortgagor could not redeem without paying the whole debt. And if a foreclosure, as supposed in this case, had taken place, as to a part, he must pay the whole debt in order to redeem the residue, and, at the same time, lose the part, as to which there would have been a foreclosure. The law would not sanction such an iniquitous procedure. The plaintiff's bill must therefore be dismissed with costs for the defendant. The conclusion to which we have arrived is fully supported by Cruise, title Mortgage XV, ch. III, § 66 and 67.

Mem. — SHEPLEY J. was called upon to give his deposition, to be used in this case, and took no part in the decision.

JAMES RANGELEY *versus* JOHN SPRING.

Where a party has so conducted himself, as wittingly and willingly to lead another into the belief of a fact, whereby he would be injured if the fact were not as so apprehended, the person inducing the belief will be estopped from denying it to the injury of such other person.

If one procures a conveyance of land to be made, and is the go-between of the parties in accomplishing it, he will not be allowed to question the rights of third persons from thence innocently deriving title.

Although the estate is held in her right, a woman under coverture cannot be bound by her verbal assent or actual knowledge of a conveyance of her lands by her husband; and therefore her knowledge of or assent to such conveyance, is not necessary in order to render the deed operative against the husband.

THIS was a writ of entry demanding certain lands in Saco. The land was the property of Olive Spring, the wife of John Spring. On Jan. 4, 1830, Spring and wife mortgaged the property to the Saco Bank, and before the charter of the corporation expired by its own limitation, the bank assigned the mortgage to Jonathan King, Samuel Hartly and George Thacher for the benefit of the stockholders. On or about May 10, 1833, the precise day not having been shown, the trustees entered into the premises to foreclose the mortgage. At the time the mortgage was made, the bank gave back a paper

wherein they engaged, that when the money was paid, they would re-convey the estate to Mrs. Spring or to her heirs. On the ninth or tenth of May, 1836, the last day before the right of redeeming the land would cease to exist, Spring offered to the trustees a check drawn by David Webster on a bank in Portland, and payable to the bearer, for the sum of five thousand dollars, and offered to pay the balance, about $200, in cash. The trustees declined to take the check of Webster as money, and it was finally agreed, that the trustees should take the check and an assignment of a policy of insurance before that time obtained by Spring on the house, and that if the check was paid at maturity it should be the same as if paid then. The check was delivered to the trustees, and on the next day the policy was assigned. At this time the name of Webster was not mentioned, excepting as drawer of the check. On July 12, 1836, the amount due on the mortgage, $5190,95, was paid to the trustees, the proceeds of the check being a part thereof, and was on that day credited to the stockholders by the trustees as the "balance due on mortgage of the Spring property." The trustees made a deed of quitclaim to David Webster, *dated July* 30, 1836, purporting to have been acknowledged *July* 13, 1836, and recorded Feb. 13, 1837. The material parts of this deed, and the facts in relation to the execution and delivery thereof, will be found in the opinion of the Court. The defendant objected to the introduction by the plaintiff of any part of the recital in the deed of the trustees to Webster, following the description of the premises, as inoperative upon the defendant, and illegal in its character, the defendant being no party to the deed. The objection was overruled. There was testimony in relation to a copy of a writing from Webster to Spring, made at the request of Webster, and of certain conversation between the witness and Webster. Spring was not present, and there was no evidence of the delivery of the paper to Spring. This evidence was objected to by the counsel of Spring, but was admitted. This paper was dated *July ninth*, 1836, and recited, that on the *thirteenth of the same month* the trustees had made a

conveyance of the property to him, and contained a promise by Webster to convey the property to John Spring on being paid the sum of $6017,60 in three years from date. Webster, April 18, 1838, conveyed the land to Burnham. Rangely recovered judgment against Webster and Burnham, and on June 28, 1839, levied his execution on the land mortgaged by Spring and his wife to the bank, as the property of Burnham. There was no evidence that Mrs. Spring had knowledge of any of the transactions after she signed the deed to the bank. The land was of much greater value than the amount due on the mortgage. There was other testimony in the case having no material relevancy to the points on which the decision was made.

The counsel for Spring requested EMERY J. before whom the trial took place, to give to the jury several instructions, and among them, that the reception of the check under the agreement, and the receipt of the money by the trustees and stockholders, and the taking of further additional security by accepting the assignment of the policy of insurance, were a waiver of the entry to foreclose the mortgage, and an admission that the property was then, and was to be continued, a subsisting mortgage. The Judge declined to give this instruction.

Also, that the jury must be satisfied, that Mrs. Spring was apprised of and assented to whatever arrangement or acts of her husband which related to the conveyance from the trustees to David Webster, to render the conveyance to Webster effectual to pass the title. This was given as an instruction by the Judge.

The verdict was for the tenant but was to be set aside, if the ruling or instructions were erroneous as to the rights of the demandant.

There were motions for a new trial for several distinct causes, one of which was because the verdict was against evidence.

Howard, for the demandant, among other grounds on which he contended that the verdict should be set aside, urged that the tenant was estopped from setting up as a defence, that

nothing passed to Webster by the deed of the trustees to him. The deed to Webster was obtained through the agency of Spring, and he had the benefit of it as a valid deed. To enable the tenant to defeat the deed, under the circumstances of this case, would operate as a gross fraud, which a court of justice can never sanction.

There can be no waiver of an entry to foreclose by parol. *Scott* v. *McFarland*, 13 Mass. R. 309.

No notice to Mrs. Spring, she being under coverture, was necessary, and the verdict, for that cause alone, should be set aside.

Bradley, for the tenant, contended that there could be no estoppel in this case, for no person can be precluded from showing the truth by the recitals in a deed between third persons. This principle is found in all the books on this subject.

Nor was there any estoppel on the ground of Spring's standing by and seeing Webster advance his money on property which belonged to Mrs. Spring. The check was given at least sixty-four days before the deed was made, and if the deed related to this money, it was merely as security for a precedent debt. There was no question of fraud raised at the trial. Whether there is fraud or not, is always to be submitted to the jury. *Jackson* v. *Timmerman*, 7 Wend. 437; *Parker* v. *Nichols*, 7 Pick. 116; *Jackson* v. *Peek*, 4 Wend. 304.

Besides, had the fact been found by the jury, this principle could not operate as an estoppel at law, but only in equity. *Heard* v. *Hall*, 16 Pick, 460. This principle is limited to personal property. The Sarah Ann, 2 Sumn. 206. But if this was in a Court of equity, that Court would never suffer the property of Mrs. Spring, worth twice the amount of the mortgage, without her consent to go to pay the debts of Webster. If the paper from Webster, promising to convey to Spring, is in the case, he was guilty of a fraud in conveying to Burnham before the three years expired. Rangeley saw on the record that the property was mortgaged by Mrs. Spring, and had sufficient notice to put him on his guard.

There was no conveyance of the estate by the trustees to Webster. The instrument was on its face but a discharge of the mortgage. *Wade* v. *Howard*, 11 Pick. 289; 6 Peters, 383.

In this case the property in controversy belonged to Mrs. Spring, and when she executed the mortgage she took back a paper, that the reconveyance should be to her. Her rights could not be affected by any acts of her husband. If the demandant can recover, the course taken operated to transfer the real estate to Webster, without her assent or knowledge. The levy is not upon a life estate; the action demands the fee, and throughout, the demandant has gone for the whole. The husband by redeeming a mortgage can acquire no title to lands of his wife. Here the mortgage was made for his benefit, and he was bound to redeem the land from it. The moment the money was paid, the land was restored to her. The rights of the wife cannot be affected by any entry into her land under the mortgage without her assent or knowledge. *Hadley* v. *Houghton*, 7 Pick. 29; *Swan* v. *Wiswall*, 15 Pick. 128; *Peabody* v. *Patten*, 2 Pick. 518. The last instruction of the Judge was therefore right.

But if that instruction was erroneous, still upon the facts in this case, appearing as well from their evidence as from ours, upon one principle, we are clearly entitled to retain our verdict. The reception of the check and of the policy was in itself a waiver of the entry to foreclose the mortgage. The money was actually received and credited, as money received on the Spring mortgage, on the twelfth of July. The mortgage then ceased to exist, not by a foreclosure, giving a title in the premises to the trustees, but by a redemption of the mortgage by payment of the money due. If the trustees had brought a writ of entry on the next day to recover the land mortgaged, it could not have been sustained. They had received the debt, and thereupon the estate was instantly relieved from the incumbrance of the mortgage. The trustees had no more right to the premises, than they would have had, if the mortgage had never been made. The estate belonged to Mrs. Spring, as

soon as the money was paid and received on the twelfth. Webster then had not been heard of in the business. The deed by the trustees to Webster made afterwards, whether on the *thirteenth* or the *thirtieth* of July is immaterial, passed nothing to Webster. The levy on the premises by the demandant gave him no title thereto; and he cannot maintain this action without showing a title. *Quint* v. *Little*, 4 Greenl. 495; *Dexter* v. *Arnold*, 1 Sumn. 118; *Fay v. Valentine*, 5 Pick. 418; *Batchelder* v. *Robinson*, 6 N. H. R. 12; *Flanders* v. *Barstow*, 6 Shepl. 357; *Cutts* v. *York Man'g Co.*, 2 Shepl. 326; *Clark* v. *Wentworth*, 6 Greenl. 259; *Gray* v. *Jenks*, 3 Mason, 527; *Leighton* v. *Shapley*, 8 N. H. R. 359; *Jackson* v. *Crafts*, 18 Johns. R. 110; *Eaton* v. *Simonds*, 14 Pick. 98.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a writ of entry, wherein the plaintiff seeks to recover of the defendant certain real estate in Saco. He sets up a levy upon the estate, which is admitted to have been made in due form, in satisfaction of a judgment by him recovered against David Webster and Daniel Burnham; so that the plaintiff may be deemed to have a right to recover against the defendant, provided either said Webster or said Burnham had such an estate in the premises levied upon as would pass by the levy. It appears that Webster had conveyed it to Burnham, and that the levy upon it was as his property. The plaintiff, to prove the title to have been in Webster, before his conveyance to Burnham, introduced a copy of a deed from the registry, which purported to have been made to Webster before he conveyed to Burnham, by Jonathan King and others, as the trustees of the Saco Bank; and also a copy from the registry of a deed of mortgage made by the defendant and his wife, in her right, of the premises to said Bank, which, with the premises described therein, appeared to have been assigned to said trustees, for the purpose of effecting a close of the concerns of that institution. And it appeared, that the Bank had entered for condition broken; and that

more than three years had elapsed thereafter before the making of the deed to Webster. Proof was introduced by the plaintiff tending to show, that Webster had loaned to the defendant a sum of money, being the amount necessary to pay the debt, to secure which, the said mortgage had been given, and which he paid to said trustees, and requested them to make the conveyance aforesaid to the said Webster; that the conveyance so made, together with the original mortgage deed and notes described therein, were delivered to the defendant, the said Webster not being present at the time; that the deed, so made by the trustees to said Webster, was, by the defendant, delivered to the said Webster, on receiving from him an agreement in writing, but not under seal, in which it was stipulated, on the part of said Webster, that, if the defendant should pay him $6017,60, with interest, within three years from the date thereof, he would convey, by a quitclaim deed, all his right to the premises to the defendant and his wife.

In the deed, made by the said trustees to Webster, is the following description and recital, viz.: — "In consideration of five thousand one hundred and ninety dollars and ninety-five cents, paid by David Webster, &c. the receipt whereof we do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quitclaim unto the said David Webster, his heirs and assigns, all the right title and interest in and to the land and buildings in said Saco, described in a deed of mortgage, made by John Spring and Olive, his wife, to said corporation, dated January 4th, 1830, and recorded in the registry for York County, book 135, p. 28, reference being had to the said deed for a more particular description, entry having been made to foreclose, and the right of redemption having expired, and said Webster having, at said Spring's request, paid the amount which would be due on said mortgage. This release is made to the said Webster at the request of the said Spring and wife, and is intended to discharge all title acquired by said corporation, the mortgage having been assigned to us in trust." There was much other evidence adduced at the trial, tending to prove, on the one hand, that the mortgage

had been foreclosed, and, on the other, that it had not, which we deem it unnecessary to take into consideration.

We think it clearly deducible from the testimony, that the deed, from said trustees to Webster, was made at the request of the defendant; and that it passed through his hands to Webster at the time he took from Webster the writing conditioned to reconvey, &c. Under such circumstances we think he must be estopped to aver against the plaintiff, however the understanding may have been between him and Webster, that the deed, so made and delivered by him to Webster, was inoperative, particularly, as the plaintiff does not appear to have any other knowledge of the transactions, between Spring and Webster, than such as he was enabled to obtain from the registry of deeds. We are not to presume that the defendant intended a fraud upon Webster and his assigns; and therefore must consider the plaintiff as having a perfect right to hold the estate against the defendant for the term of his life at least.

It is a principle in equity, if a man will stand by and see another make expensive erections on land claimed by him, and give no notice of his claim, he shall be enjoined from afterwards making claim to the same, to the injury of him who may have made such erections; and so if a man will stand by and see another purchase real estate, believing that he is acquiring a good title thereto, and gives no intimation that the land is his, he shall not afterwards be allowed to make claim thereto. *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. Ca. 344, and cases there cited; *Storrs & al.* v. *Barker*, 6 Johns. Ch. Ca. 166. And a similar principle has been recognised at common law, *Hatch* v. *Kimball*, 16 Maine R. 146. In this case the defendant, not merely stood by, but he procured the conveyance to be made, and was the go-between of the parties in accomplishing it. It would be a reproach to the law, if, in such case, he could be allowed to question the rights of third persons from thence, innocently, deriving title. There are numerous cases in which, if a party has so conducted, as wittingly and willingly to lead another into the belief of a fact, whereby he would be injured, if the fact were not

as so apprehended, the person inducing the belief will be estopped from denying it to the injury of such person.

The verdict, in this case, was taken subject to the opinion of the Court upon the correctness of the ruling, and instructions of the Judge, who presided at the trial. The Judge instructed the jury that they must be satisfied, that Mrs. Spring was apprised of, and assented to the arrangements or acts of the defendant, in order to render the conveyance to Webster effectual to pass the estate. This instruction, we cannot regard, as having been properly given. Her knowledge or verbal assent, could have had no effect upon the operation of the deed. Although the estate was held in her right, she could not have been bound by her verbal assent, or actual knowledge of the conveyance. This instruction, if regarded by the jury, and we cannot doubt that it was, must have tended to mislead them; for it is very clear, that there was no evidence in the cause tending directly to prove that she knew any thing about it.

A new trial therefore ought to be granted as well on account of the misdirection of the Judge, as because the verdict is clearly against the weight of evidence and the manifest justice of the case.

JOHN T. PAINE *versus* JONATHAN TUCKER *& al.*

Parol proof of an acknowledgment by a principal that an agent had authority under seal to enter into a sealed contract obligatory upon his principal, is not competent evidence of such authority.

DEBT on a bond to the plaintiff, dated Nov. 18, 1835, signed by Tucker and by Thomas J. Goodwin, the other defendant, by Amos G. Goodwin, stipulating to convey certain real estate, for a consideration acknowledged to have been received. The defendants pleaded that the obligation declared on was not their deed, and, by brief statement, performance on their part. On Nov. 24, 1835, the bond was assigned to John Gowen, and the action was brought for his benefit.

At the trial, before EMERY J. the bond was offered in evidence, and the execution proved, by the subscribing witness, on the part of Tucker, and that it was signed by "Amos G. Goodwin for Thomas J. Goodwin," the latter not being present at its execution. Amos G. Goodwin had deceased before the commencement of the action, and T. J. Goodwin had been appointed his administrator, but afterwards resigned the trust, and another was appointed.

The subscribing witness testified, that in June, 1840, before the commencement of the suit, and after the death of A. G. Goodwin, "in conversation with Thomas J. Goodwin as to his brother A. G. Goodwin's estate, as to its solvency or insolvency, speaking of claims against the estate, I named the bond to Paine assigned to Gowen; he said it was not against the estate, but that Amos signed it as his attorney and for him; he said it was not Amos' bond, but his, and signed by Amos for him as his agent or attorney; he said Amos had authority from him to sign the bond for him; that it was not a claim against the estate; I did not ask him whether Amos had a power of attorney; no writing authorizing Amos to sign was produced at the time of signing." Another witness testified, that he was in company with John Gowen and Thomas J. Goodwin immediately before the suit was commenced; "that Gowen, who held a paper in his hand they called a bond, asked Goodwin if that was his signature, if he acknowledged that signature; he admitted it to be good made by his brother; Gowen said he wanted a title; Goodwin said a bond was all that was meant for a title; Gowen asked if he admitted that signature, and he admitted it; and that the conversation was in T. J. Goodwin's office." The report of the case does not show, that any objection was made to the *admission* of this testimony.

After the statement of the testimony, the report states, that "the defendants objected to the *sufficiency* of this testimony to prove the execution of the bond by T. J. Goodwin, or the authority of A. G. Goodwin to execute the same for him.

But the Court admitted it." The bond was then read to the jury, and the same testimony was considered as before them.

After testimony in relation to performance, and as to the amount of damages, had been introduced, and after the arguments had been concluded, the report states, that "upon the question as to the execution of the bond declared on by Thomas J. Goodwin, the Judge instructed the jury, that as Thomas J. Goodwin was not present at the time it was signed by Amos G. Goodwin, as his attorney, that they must not be wiser than the law; and that the law does not authorize one to sign a deed for another, not in his presence, by any authority not under seal; and that the plaintiff must give the jury reasonable satisfaction, that Amos G. Goodwin had such authority to execute this deed."

The verdict was for the plaintiff, and was to be set aside, "if the instructions or rulings of the Court *to the jury* were erroneous." Objections were made to the instruction of the Judge in regard to performance, but they were not taken into consideration in the decision by the Court.

N. D. Appleton, for the plaintiff.

The sufficiency and competency of the evidence to prove the authority of A. G. Goodwin were objected to by the defendants at the trial. Parol evidence is not competent to prove an authority to sign and seal a bond. Story on Agency, § 49; Paley on Agency, 132; 7 T. R. 203; 2 Kent, 613; *Milliken* v. *Coombs*, 1 Greenl. 343; *Blood* v. *Goodrich*, 9 Wend. 68. The only exception is when the principal is present. Story on Agency, § 51.

Had there been an authority under seal, it should have been produced. Parol evidence cannot be substituted for written. 1 Stark. Ev. 387; Greenl. Ev. 98; 2 Stark. Ev. 31; 1 Esp. N. P. 115.

The necessity of showing an authority under seal is not superseded by any admission or acknowledgment. 1 Stark. Ev. 283, 320; Dougl. 216; 2 East, 187; 4 East, 53; 9 Johns. R. 136; 1 Mass. R. 482; 8 Mass. R. 440.

The testimony amounts to only a parol ratification, and this

is not sufficient. *Stetson* v. *Patten*, 2 Greenl. 358; Story on Agency, § 49, 252; *Hanford* v. *M'Nair*, 9 Wend. 54; *Milliken* v. *Coombs*, 1 Greenl. 343; *Blood* v. *Goodrich*, 9 Wend. 68; *Emerson* v. *Coggswell*, 16 Maine R. 77.

J. Shepley, for the plaintiff.

No question was raised at the trial, nor does any appear in the report, arising from want of taking any preliminary steps, such as giving notice to produce papers, or making search for them, prior to the introduction of the testimony. Had any such been made, the proof was at hand, and ready, to obviate the objection. Unless the objection is made before the introduction of the testimony, it is too late to do so afterwards. This is a principle familiar to all having the slightest acquaintance with the law of evidence, and is founded on the principles of common honesty — that a man should make his objections, when the other party has an opportunity to remove them by proof, or they are to be considered as waived. Nor do I understand the counsel for the defendants to take such ground now, but to insist that it was "insufficient" to prove the issue; that it was not the right description of evidence required by law. This was a mere preliminary proceeding to satisfy the Judge, that the paper should be read, in which no exceptions can be taken. By "*admitted it*" in the report, was intended the bond, not the evidence already in. The conclusion of the report was *thus purposely made* by the Judge to obviate the objections made by the plaintiff to the report as it stood, and states, that the verdict was to be set aside only in case "the instructions or rulings of the Court *to the jury* were erroneous." The only inquiry then is, whether the instruction was right. It is, "that the law does not authorize one to sign a deed for another, not in his presence, by any authority not under seal; and the plaintiff must give the jury reasonable satisfaction that A. G. Goodwin had such authority to execute this deed." The jury found that he had such authority under seal by finding for the plaintiff under that instruction. The proof was by parol, and the inquiry is, could it legally be done in that manner.

The question then is, whether it is competent to prove that his agent had an authority under seal, by parol proof that the defendant admitted the fact.

This question is entirely different from proving a parol ratification of the act of the agent, where it appeared that there was no valid authority originally. The case here presented has nothing to do with ratification, where there was originally no authority, but merely relates to the mode of proving that there was originally competent authority. The case, *Blood* v. *Goodrich*, 12 Wend. 525, is decided on this distinction. The same case had once before been before the Court, 9 Wend. 68, cited for defendants, and it was there held that a ratification of the act of an agent, acting without authority, must be by writing under seal. On sending the case to a new trial, the proof was by parol, that the defendant admitted that the agent had competent authority. The Court held this to be competent and sufficient proof of the fact, considering it a distinct question from the former. The counsel for the defendants admits, that when the paper is signed and sealed by the agent for the principal in his presence, that parol evidence is competent and sufficient to prove this fact, of his being present, and thus proving his authority by parol. Such doubtless are the decisions. But will he tell me, when the paper is signed in precisely the same manner, what is the difference in principle, between proving by parol, that the defendant was present at the signing, and proving in the same manner the admission of the defendant that his brother had sufficient authority to act for him? The case of *Jackson* v. *Livingston*, 7 Wend. 136, goes farther than our case requires. Greenl. Ev. § 96, 97; The *King* v. *Bigg*, 3 Peere. Wms. 427. To show that *Blood* v. *Goodrich* is in point, these words are cited from it. The Court, speaking of the authority of an agent to sign a paper under seal, say the proof was "an admission by parol, that the contract was originally legally and properly executed. Such evidence is proper, and if uncontradicted or unexplained, conclusive upon the party making the admission. The evidence offered in this case was sufficient, and should have been received."

As before remarked, the case now before the Court, is not parol proof to ratify the act of one assuming to act as the agent of the party without any authority, but parol proof of the admission by the party, that his agent originally had the authority. It is believed that no authority can be produced opposed to this principle. And indeed it is but the well known principle that even a conveyance of real estate, where the rights of third persons, have not intervened, may be proved by the admission of the party.

Here the plaintiff had a right of action against either T. J. Goodwin, or against the estate of A. G. Goodwin if he acted without authority. The plaintiff applied to the defendant to know to whom he was to look. He said the plaintiff's claim was against him, and not against the estate. After this the defendant should not be permitted to come into Court and say, that the agent acted without authority.

But were this a case of ratifying an act of the agent, under seal, when no authority existed at the time, by parol or by the acts of the party, the best authorities, as well as reason and principle, are in favor of its competency. I do not propose to enter into the argument, but merely refer to a few authorities.

The general rule is admitted to be that an agent or attorney may be appointed by parol, or proved by acts or implication. Story on Agency, § 47. Even where the statute of frauds requires that the contract should be in writing to be valid, the authority to sign may be by parol. Idem, § 50. It is true, that the author says there are exceptions to this rule, one of which is, that an authority to sign a deed must be by deed, "by analogy to the known maxim of the common law, that a sealed contract can only be dissolved or released by an instrument of as high authority or solemnity." The author admits that this principle has not been carried out; § 50, 51. But the very foundation of the exception has been overruled, and is no longer law. A sealed contract can be released or dissolved by parol. Greenl. Evid. § 303. The author of the work on agency states another exception, equally well

founded in authority, that ratification by a corporation must be by an act under seal of the corporation. § 52. This doctrine has long since been decided not to be law in this country. The opinion of the author, on the whole, it seems to me, is laid down in the commencement, that the exception to the general rule applies only to an authority to convey real estate, which should be by writing under seal acknowledged and recorded. Story on Ag. § 48. And such seems to be the opinion of Judge KENT. 2 Com. 3d Ed. 612, 4th Ed. 611. And where the authority of the agent should have been under seal, but was merely by parol, equity will compel the principal to confirm and give validity to the deed. Story on Ag. § 49. The mode of the appointment of an agent is a matter between him and his principal. And to hold that the principal may receive the benefit of such contract under seal, and then avoid responsibility because the party injured cannot produce a sealed authority, however clearly he may prove that the agent acted by direction of the principal, and that he had received the consideration, is but to permit an adherence to antiquated and technical, if not obsolete, rules to sanction injustice and legalize iniquity. The Court in Massachusetts, on a full consideration of the subject, have repudiated the doctrine here urged for the defendants. *Cady* v. *Shepherd*, 11 Pick. 400; *Hewes* v. *Parkman*, 20 Pick. 90.

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

WHITMAN C. J. — The bond declared upon in this case purports to have been executed by Jonathan Tucker in person, and by Thomas J. Goodwin, by Amos G. Goodwin. The defendants having pleaded *non est factum*, objected to the introduction of the bond to the jury, till the authority of Amos G. Goodwin, to execute it in behalf of Thomas J. Goodwin was proved. No power of attorney was produced for the purpose; nor did it appear, that any effort had been made to discover or obtain one, with a view to its production on the trial; nor did it appear, that any person had ever seen or witnessed one.

The Judge, who presided at the trial, admitted evidence to the following effect, viz. that said Thomas, at the time when the bond was executed, was absent; but that he had since said, on being shown a bond, resembling the one in suit, that he admitted it to be good; and that he admitted the signature; and said, Amos did it for him. And again, speaking of the bond in suit, that Amos signed it as his agent or attorney, and for him; and that he had authority so to sign it. Upon this evidence the bond was permitted to be read to the jury, as the bond of said Thomas.

The verdict having been returned for the plaintiff is, according to the report of the Judge, to be set aside, and a new trial granted, if the foregoing procedure was irregular, and unwarranted by the rules of law. In *Stetson* v. *Patten & al.* 2 Greenl. 358, Mr. Chief Justice Mellen, in delivering the opinion of the Court, remarked, "that no authority need be cited to show, that when an instrument under seal is executed by attorney, the attorney must be authorized by deed, under the hand and seal of the principal." It appeared in that case, that the indenture, then in question, had been executed by the plaintiff's brother, acting as his attorney; he being at the time, absent from the State; and that he received it from the hands of his brother; and three years afterwards, received a payment in part fulfilment of the stipulations contained in it, on the part of the defendants; and endorsed the same on the indenture. The Chief Justice, thereupon, further remarked, "that with respect to these facts, they cannot amount to any thing more than a sanction and ratification, made by parol; and such ratification could not be more availing than a parol authority, given before the instrument was signed, which we have seen is of no importance."

In *Hanford* v. *McNair*, 9 Wend. 54, Mr. Justice Sutherland, in delivering the opinion of the Court, in reference to a similar point, says, "I do not perceive how the circumstance, that a counterpart of the agreement, executed in the same manner as the original, was delivered to McNair, and received by him without objection, avoids the difficulty. It is but

a subsequent acknowledgment or ratification of the deed." And in *Blood* v. *Goodrich*, ib. 68, Mr. Chief Justice Savage says, to make it the deed of Goodrich and Champion "it must be shown that Kingsbury had authority to act for them; and as he professes to act by deed, an authority from them, under their seals, is indispensable." The Chief Justice goes on to remark, subsequently, in a manner seemingly scarcely reconcileable with his postulatum; and says, "but I should be unwilling to say that a subsequent written acknowledgment, accompanied by acts recognizing the deed as the deed of him, whose name had been used, was not proper evidence to be submitted to the jury." And if there were such written acknowledgment, he, still, seems to conclude, that it was incumbent on the plaintiffs to have given written notice to the defendants, to produce the power of attorney; and that, upon its non-production, secondary evidence, written as it would seem, might be given of its existence and contents.

The same case came before the Court again, 12 ib. 525. The Chief Justice then proceeded to examine the subject anew; and came to the conclusion, as it would seem, that any parol acknowledgment, that the instrument had been duly executed, might be submitted to the jury. And in reference to *Steiglitz* v. *Edgenton*, 1 Holt's N. P. 141, he holds the following language; "the Chief Justice (Gibbs) no doubt intended to say, that no subsequent *acknowledgment by parol*, could supersede the necessity of an authority under seal, by virtue of which the deed was executed; but he does not say, nor did he intend to say, that a *parol acknowledgment, by the party, of the existence of an authority under seal*, could not be admitted." The language of Mr. Chief Justice Gibbs, was used in reference to a proposition to prove, that one partner, who did not execute an agreement purporting to be executed by his partner for him, had acknowledged its execution, and is as follows: —"The authority to execute must be by deed. If one partner, who did not execute, acknowledge that he gave an authority, I must presume, that it was a legal authority, and that must be under seal, and produced. One man cannot

authorize another to execute a deed for him, but by deed." To me it is not readily perceivable, that the Chief Justice did not mean to say, that an acknowledgment, by the party, of the existence of an authority under seal, could not be admitted. He certainly says, if it be under seal, it must be produced. Does not this imply, that an acknowledgment by the party, of its existence, would not be sufficient? He is certainly very explicit, that no acknowledgment of the party, sought to be charged, that the instrument had been duly executed, would be sufficient. And can it be that he meant, nevertheless, to admit that a party's acknowledgment, that it had been executed under the authority of a sufficient power of attorney, would be admissible? His language is, further, that "no subsequent acknowledgment will do." How this can be understood otherwise, than as a peremptory negation of the validity of an admission to either point, is not obvious, to say the least of it.

The doctrine, at the former decision of the case of *Blood* v. *Goodrich & al.*, as laid down by the court, can hardly be regarded as otherwise, than as a relaxation of the former rules, in reference to the admissibility of evidence to prove the existence of an authorization, under seal, to act for another. Yet, it then seemed to be necessary, that the admissions or acknowledgment should be in writing. By the last decision it seems, that any parol acknowledgment will do. These advances in relaxation of former rules may have found their inducement in a proneness to approximate the rules, in reference to agencies, authorized by deed, to those by parol or implication. Inroads upon known and established rules are not always advisable. They tend to the increase of uncertainties in the law. If it be allowable for a Court at one time to encroach a little, by the same rule, at another time, it may go a step further. When once the ancient boundaries are broken down it will become difficult to know where we should make a stand. Innovations in the law are too frequently like inventions in the arts; but seldom to be regarded as improvements. They distract the mind, and tend more frequently to perplex-

ity and confusion, than to any substantial advantage. The ancient course has been to require the best evidence, of an authorization to act for another, to be produced. If it be to establish the authority to execute a sealed instrument, the power must be evidenced by writing under the hand and seal of the principal. Such writing must be produced, if not proved to have been lost, or in the hands of the adverse party, or otherwise inaccessible to the party required to produce it. Being proved to have once existed it is presumed to be still in existence, and should be sought for in the proper repository. If not there, but is proved to have got into the hands of the principal, he should have the legal notice to produce it. If not obtainable in either of these ways, secondary evidence may be admissible to establish it. The power, in this case, if it ever existed, should have been sought for in the hands of Amos G. Goodwin, or of the administrator of his estate. Nothing of this kind appears to have been done; and no evidence was adduced, that it had been lost, or that it was in the hands of the adverse party. If the power never existed, the execution of the deed, as to Thomas J. Goodwin, was a nullity; and the plea of *non est factum*, as to him, was supported. As to him, none of the legal preliminary steps were taken to authorize the reading of the bond to the jury. The verdict therefore must be set aside, and a new trial be granted.

Shepley J. — The first objection taken to the proceedings during the trial is, that "the defendants objected to the sufficiency of the testimony to prove the execution of the bond by Thomas J. Goodwin, or the authority of Amos G. Goodwin to execute the same for him; but the Court admitted it." That testimony tended to prove, that the principal had admitted, that the agent had authority from him to sign and execute the bond. One witness stated the admission in these words. "He said Amos had authority from him to sign the bond for him." The law requires, that the authority to sign and execute a sealed instrument for another should be conferred by an instrument under seal, unless the principal be present, when

the instrument is executed. How is the fact to be proved, that one, who has acted in such case as the agent, had such authority? The instrument may be proved by proving the handwriting of the agent and by a production and proof of the power of attorney conferring the authority. If the power of attorney cannot be produced, and there be proof of its loss; or proof that it has passed into the hands of the principal, who after notice refuses to produce it; the contents may be proved. May the authority be proved also by the admissions or declarations of the principal? The earlier cases were examined, and this question was fully considered, in the case of *Cady* v. *Shepherd*, 11 Pick. 400; and the decision was, that it might be so proved. In New York, after intimations of a different opinion in prior cases, the Court finally came to the same conclusion, in the case of *Blood* v. *Goodrich*, 12 Wend. 525. It is not perceived, that these decisions violate any legal principle. Every person is presumed to know the law; and when the principal admits, that the person who has acted as his agent in signing a sealed instrument, had authority from him to sign it, he must be considered as admitting, that such authority was communicated in a legal manner, that is by a sealed instrument; unless it should appear from his admissions or declarations, that it was not. All the cases cannot be reconciled. But the weight of authority does not appear to be opposed to this doctrine. And it is not suited to operate unjustly upon the party making the admission. The case of *Stetson* v. *Patten*, 2 Greenl. 358, is not opposed to it. In that case it was a fact agreed, that the agent had not any authority under seal. The only proof of authority was, that the principal had indorsed a payment of interest on the instrument executed by the agent. The objection in the present case was therefore properly overruled by the presiding Judge.

REUBEN J. WENTWORTH *versus* WILLIAM GOODWIN.

In an action upon a promissory note, given as the consideration of land conveyed by deed with the usual covenants of seisin, of warranty, and against incumbrances; and where it appeared on the trial, that at the time of the conveyance there was an attachment upon the land, and that afterwards judgment was rendered in the suit, and the execution levied upon the whole of the land conveyed; and where the grantee did not redeem, but suffered a title to be acquired under the levy; and where it was not shown, that the land was appraised at its full value, nor that the grantee had not received rents and profits: — *It was held*, that a total failure of consideration for the note was not shown.

A partial failure of title to the land would not, it seems, constitute a defence to the note, *pro tanto*.

THIS was an action of assumpsit on a promissory note dated May 10, 1839, for 15,00, payable in 30 days and interest, given by the defendant to one Sarah Morrison, and by her indorsed to the plaintiff.

The defendant alleged in defence, that there was a total failure of consideration of said note, and offered to prove, that this note, with another, was given by him to said Sarah in consideration of a conveyance of land by deed with the usual covenants of seisin and warranty from the said Sarah, then being seised in fee of the premises, to the defendant; that previous to and at the time of said conveyance, said land was under attachment in two suits, commenced by the creditors of said Sarah, on which judgments have since been duly rendered subsequent to the indorsement of this note to the plaintiff; that executions issued thereon, within thirty days after judgment, had been duly and legally levied upon the whole land conveyed by said deed, so that the defendant's title to the same had entirely failed; that the defendant at the time of said conveyance had no knowledge of said attachments; that said Sarah was at the time of said conveyance and now is without property; that the plaintiff at the time of the transfer of said note to him was aware of the circumstances under which it was made, and knew that said attachments had been previously made by the aforesaid creditors of said Sarah; and that said Goodwin had notified said Sarah that he should

not pay the note — but the Judge who presided at the trial ruled that the facts aforesaid offered to be proved by the defendant, were insufficient to show a total failure of the consideration of said note, and would not constitute a defence to this action; and rejected the testimony.

Whereupon a verdict was rendered in favor of the plaintiff. The defendant filed exceptions.

N. D. Appleton and *Paine*, for the defendant.

The defendant is entitled to the same defence in this case, as if the suit had been brought in the name of the payee. *Ayer* v. *Hutchins*, 4 Mass. R. 370; *Thurston* v. *McKown*, 6 Mass. R. 428; *Hemenway* v. *Stone*, 7 Mass. R. 58; *Webster* v. *Lee*, 5 Mass. R. 334; *Knapp* v. *Lee*, 3 Pick. 452; *Wheeler* v. *Guild*, 20 Pick. 550.

The facts offered to be proved by the defendant show a total failure of the consideration for the note, and the evidence was improperly rejected. The note was given on a contract for the sale of lands. The land was the object of the contract. The defendant has failed to get it, and this constituted an indispensable requisite to its validity. 2 Kent, 468.

In the present case, as well as in very many others of the like kind, if this defence cannot avail, the defendant has no remedy. He must pay over his money for nothing, and then seek to recover it back of a person wholly worthless. But the policy of the law is to avoid circuity of action. This is a highly useful and beneficial principle. A second litigation upon the same matter should not be tolerated, where a fair opportunity can be afforded by the first to do full and complete justice to the parties. By admitting this defence, this can be done most expeditiously and least expensively. The defence set up in this case, is based upon principles, it is believed, which have their foundation in the highest reason and justice; and is moreover sustained by a weight of authorities and decisions, which cannot be overruled or shaken. In Massachusetts. *Bliss* v. *Negus*, 8 Mass. R. 46; *Knapp* v. *Lee*, 3 Pick. 452; *Dickinson* v. *Hall*, 14 Pick. 217; *Rice* v. *Goddard*, ib. 293; and *Stone* v. *Fowler*, 22 Pick. 166. In New York. *Fris-*

bie v. *Hoffnagle*, 11 Johns. R. 50; *McAllister* v. *Reab*, 4 Wend. 483; *Hills* v. *Bannister*, 8 Cow. 31. In Connecticut. *Lawrence* v. *Stonington Bank*, 6 Conn. R. 521; *Cook* v. *Mix*, 11 Conn. R. 432; *McAlpin* v. *Lee*, 12 Conn. R. 129. In Pennsylvania. *Steenhauer* v. *Whitman*, 1 Serg. & R. 447; 5 Binney, 232. In South Carolina. *Gray* v. *Handkinson*, 1 Bay, 278; *Bell* v. *Haggins*, ib. 327; *Thompson* v. *McKoy*, 2 Bay, 76; *Steele* v. *Galliard*, ib. 11. In Vermont. *Chandler* v. *Marsh*, 3 Verm. R. 162. In New Hampshire. *Tillotson* v. *Grapes*, 4 N. H. Rep. 448. In Maine. *Homes* v. *Smyth*, 16 Maine R. 177. U. S. Courts. *Greenleaf* v. *Cocke*, 2 Wheat. 13; *Daniel* v. *Mitchell*, 1 Story, 172. The case *Lloyd* v. *Jewell*, 1 Greenl. 352, does not conflict with the authorities just cited. That was a case of partial failure of consideration only. Besides, the principle endeavored to be sustained in that case was there considered the settled law of Massachusetts, but subsequent decisions of the highest Court in that State have pronounced the law to be otherwise, so that one important ground on which that opinion rested entirely fails.

The extent of an execution, and the delivery of seisin and possession by the sheriff to the creditor, is an eviction of the defendant from the land. *Gore* v. *Brazier*, 3 Mass. R. 540; *Wyman* v. *Bragdon*, 4 Mass. R. 151; *Barrett* v. *Porter*, 14 Mass. R. 143; *Porter* v. *Newhall*, 17 Mass. R. 81.

Bradley and *Loring*, for the plaintiff.

Upon the question, whether a total failure of consideration, or of title, is a good defence to an action of assumpsit for the purchase money of land, when the grantee is secured by covenants, the opinion of the Court in *Lloyd* v. *Jewell*, 1 Greenl. 352, is clear and unequivocal, that such a defence is not admissible. So also is the opinion of the Court, in *Fowler* v. *Shearer*, 7 Mass. R. 14. The doctrines of these cases are, in the opinion of Chancellor Kent, within the strict rule of the common law. 2 Kent, 473. The objections to trial of title to land in actions of assumpsit, and the set-off of specialties in actions of assumpsit, noticed in *Lloyd* v. *Jewell*, present

the same obstacles now which they did in that case. 1 Chitty's Pl. 341; *Phelps* v. *Decker*, 10 Mass. R. 279; *Smith* v. *Lincoln*, 15 Mass. R. 171; *Read* v. *Cummings*, 2 Greenl. 86.

In the present case, there was a deed given with the usual covenants of seisin and warranty. The grantor, at the time of the conveyance, was seised both in fact and in law of a fee simple estate in the premises, which passed by her deed to her grantee. There has since been an eviction by levy of an execution, constituting a breach of the covenants against incumbrances, of quiet enjoyment, and of general warranty. Still, by virtue of the deed, the grantee became seised of the fee, of a right to redeem, of the right of possession until eviction, and of a remedy on the covenants for the damage caused to him by the incumbrances. The rules governing defences like the one now proposed may be made to harmonise with the different measures of damages applied to the breaches of the different covenants in a deed.

The covenants of seisin and of good right to convey are broken, unless the grantor be seised in fact, and nothing passes by the deed, if he is not. Here is a total failure of consideration, and the measure of damages is the consideration paid with interest. 2 Mass. R. 433. There can be no total failure of consideration unless one of these covenants is broken.

In the present case, the grantee became seised and so remained until he was finally evicted by title under an incumbrance at the time of the grant. In this case the measure of damages is the value of the land at the time of the eviction. This may be more or less, than the consideration money and interest. The grantee was in possession, and no one could recover from him the profits. There was no total failure of consideration, and indeed could not be, on account of the breach of these covenants. 14 Mass. R. 144; 3 Mass. R. 523.

In *Trask* v. *Vinson*, 20 Pick. 110, the Court notice a distinction between executed covenants, where the rule of damages is the consideration paid, and executory covenants, where the measure of damages is the actual loss sustained; and hold,

that a breach of the former is a good defence to an action on a note for which the covenants were the consideration; but that a breach of the latter furnishes no defence.

There is no case to be found in Massachusetts or Maine, or, as is believed, in England, wherein a partial failure of consideration has been held a good defence to a note given for the purchase money of lands, where the grantee has been secured by covenants. Many of the cases cited by the counsel for the defendant were examined, and comments made upon them.

The opinion of the Court was drawn up by

Shepley J. — The attachment and subsequent levies on the land conveyed were incumbrances upon the title, which was conveyed to the grantee subject to them. The grantee had acquired the legal right to pay off those incumbrances, and by doing so his title would have become perfect. If the effect may have been, that through neglect to redeem, the title of the grantee has been destroyed, that is a result, which may often happen from a like cause, when the title is more or less incumbered at the time of conveyance. It did not appear from the testimony proposed to be introduced, whether the lands were or were not appraised at their full value. A legal presumption does not arise, that the appraisal was for the full value, for the statute contemplates a still subsisting value in the right to redeem, which may be the subject of attachment and sale. Nor did the proposed testimony shew, whether the grantee had or had not received the rents or profits of the land from the time of conveyance to the periods of levy. And if any were received, he was entitled to retain them; for no other person could call upon him to account for them. The burden of proof was upon him. The ruling of the presiding Judge was therefore correct, "that the facts aforesaid, offered to be proved by the defendant, were insufficient to shew a total failure of the consideration of said note." And if he may be considered by the other part of the ruling as deciding, that a partial failure of the title would not constitute a defence to the

note *pro tanto*, this Court is not prepared to deny the accuracy of that position, and to decide, that the law is otherwise. Such ruling may be considered as authorized by the received law in England, in the Supreme Court of the United States, in Massachsetts, in Maine, and in other States of the Union. And although Courts of the highest character in several of the other States have come to a different conclusion ; there is little reason to change our own rule, until by doing so there may be hope of greater uniformity and symmetry in the law on this point than present appearances indicate. And so great is the value of having a certain rule, to which persons become accustomed, and to which they conform in the transaction of their business, that, when once established, it should not be changed, until it is made to appear to be clearly erroneous, or to be doubtful and more productive of mischief, than a change and the establishment of a new rule.

Exceptions overruled.

PETER FROST & *ux. versus* JONATHAN R. DEERING.

The practice of executing the deed by the wife, in order to bar her of her claim to dower, at a time many days subsequent to that on which the husband had executed it, is common and unobjectionable.

It is a well settled rule, that a deed, or other instrument, is well executed, if the name of the party be put to it by his direction and in his presence, by the hand of another person. And the wife may well so execute a deed releasing her right of dower.

And it is as competent for her to have her name so placed by her husband, by her direction, as by any other person.

The words in a deed, "In witness whereof I, the said C. L. and S. wife of the said C. L. in token that she relinquishes her right to dower in the premises, have hereunto set our hands and seals," are sufficient for the purpose.

Where the subscribing witnesses have been called, and have failed to prove the execution of the deed by her, wherein she relinquishes her claim, the admissions of the demandant in a writ of dower, made during her widowhood, of her having executed the deed, are admissible as the next best evidence of the fact.

AT the trial of this action of dower, before EMERY J., the subscribing witnesses to the deed from Caleb Lassell, jr., described as of Hollis, to the tenant, by which he claimed that Mrs. Frost, then the wife of Lassell, had relinquished her right of dower, stated that they did not see her sign it, as it was executed by the husband at the place where it was written, she not being then present, and carried away. The tenant then offered evidence to prove her declarations, "as to her having signed said deed, and as to her having requested her husband, said Caleb, jr., to sign it for her." This was objected to by the plaintiffs, but was received by the presiding Judge. Her admissions were proved, some made when her husband, the grantor, was present, some, during his life, when he was not present, and some made after his death and before her intermarriage with Frost. In some instances she stated that she had signed the deed, merely, and in others, that she requested her then husband to sign the deed for her, and that he so did. In these conversations she said that the tenant gave her three dollars at the time of signing. The closing words of the deed immediately preceding the date, were these: — "In witness

whereof I, the said Caleb Lassell, *junior*, and Susan, wife of said *Caleb Lassell*, in token that she relinquishes her right to dower in the premises, have hereunto set our hands and seals, this," &c. Another person, described as "Caleb Lassell of Waterborough," was mentioned in the descriptive part of the deed.

The verdict for the tenant was to be set aside, if the testimony was erroneously admitted, or if the defence was not made out.

Howard, for the plaintiffs, contended that a married woman cannot bar herself of dower, unless by a deed executed by her with her husband, at the same time, and part of the same transaction, or by a subsequent deed, reciting the conveyance of her husband. Here, if there was evidence of her signing, it was neither an execution with her husband of his deed, with apt words to bar her of dower, nor a subsequent deed of her own, referring to her husband's. *Fowler* v. *Shearer*, 7 Mass. R. 14; *Rowe* v. *Hamilton*, 3 Greenl. 63; Stearns, 289; *Powell* v. *Monson & Brimfield Man'g Co.* 3 Mason, 347.

If the testimony was admissible, it does not show, that there was any legal signing of the deed by her. She could not make her husband her agent or attorney to sign the deed for her. It is no deed of hers. And if she could make her husband her agent, it could not be done by parol. Nor is the parol consent of the husband, after the deed is executed by him, at another time, a sufficient assent.

A signing afterwards, did not adopt the covenants in the deed. They were no estoppel. At most it was a bare release of a right which did not exist at the time, and there is no estoppel to prevent her claiming dower, when it did accrue.

A power to execute a deed for another, must be in writing and under seal. The whole parole evidence was therefore erroneously admitted.

Bradley, for the defendant, said that the evidence was rightly admitted. It was the best evidence the nature of the case would admit. As the subscribing witnesses failed to prove the execution of the deed by her, other evidence to show the fact was admissible. Her own statements are the most satisfactory.

1 Peters, 596; 1 Greenl. 62, note; *Whitaker* v. *Salisbury*, 15 Pick. 544; *Pelletreau* v. *Jackson*, 11 Wend. 110, 123.

Her acknowledgment was the highest and most satisfactory evidence, when no witness who saw her sign could be produced. *Hall* v. *Phelps*, 2 Johns. R. 451; *Fox* v. *Reil*, 3 Johns. R. 477.

It is contended, that the evidence proved that the signing by her was a signing with her husband. The true rule is, that it is sufficient, if it be a signing of the same deed and for the same consideration, so as to make it a part of the same transaction. And the law is thus laid down in the case cited for the plaintiffs from 3 Mason, 347.

She did not make her husband her agent or attorney to sign the deed for her. She was present at the time, and because she could not write, requested her husband to write for her. It was her own act and own signature.

The opinion of the Court was afterwards drawn up by

WHITMAN C. J. The plaintiffs claim dower in right of the wife, in the premises described, she having been, before her intermarriage with Frost, the widow of Caleb Lassell, jr. The defendant claims under a deed from said Caleb, purporting to be signed by Mrs. Frost during the coverture of the said Caleb, releasing her right of dower in the premises.

The subscribing witnesses testified, that they did not see her sign the deed; and there was evidence tending to show, that the signature was not hers. But a witness was produced, who testified to her admissions, during her widowhood, that she did sign it, and that she received a gratuity for so doing. Another witness testified, that she in the time of her widowhood, stated that she did not sign the deed herself; but that she could not claim her dower in the premises, because her husband had put her name to it by her request.

The plaintiffs contended that the evidence, at the utmost, only shows, that her former husband put her name to the deed, at her request, some days after he had executed it himself; and, that this was not such a joint execution of the deed with

him as to bar her of her right of dower; and that she could not authorize him so to put her name to a deed; and furthermore, that the deed itself contains no apt words to convey the right of the wife to her dower.

The objections thus made, it is believed, are not tenable. It is no uncommon occurrence for joint obligors, and joint grantors to execute their deeds at different times; and it never, probably, occurred to any one to object, that their deeds were, thereby, prevented from operating conjointly; and the practice of executing the deed by the wife, in order to bar her of her claim to dower at a time, many days subsequent to that at which the husband had executed it, is equally common and equally unobjectionable.

The authorities are perfectly clear, that a deed, or other instrument, is well executed, if the name of the party be put to it by his direction, and in his presence, by the hand of another person. And no reason is apparent to us why the wife might not as well so execute a deed, releasing her right of dower; nor why it should not be as competent for her to have her name so placed by her husband, by her direction, as by any other person. As to the terms used in the deed, indicative of the relinquishment of the right of dower, we see no reason to believe, that they are not apt and appropriate for the purpose. They are such as are usual in such cases.

It is furthermore objected, on the part of the plaintiffs, that the admissions of Mrs. Frost, made during her widowhood, of her having executed the deed, are inadmissible. To this we cannot yield our assent. The subscribing witnesses had been called, and failed to prove the execution of the deed by her. Her admissions thereupon became competent evidence. They were the next best evidence of the fact. Such evidence, under such circumstances, is not liable to objection as showing better evidence attainable by the defendant. Judgment, therefore, must be entered on the verdict.

Benjamin Nason *versus* Joseph Grant *& al.*

When land is attached, and the attachment is preserved, and the execution, issued upon the judgment recovered in that suit, is legally levied on it; such levy operates as a statute conveyance of the land at the time of making the attachment, and places the creditor in the same position, as if the debtor had conveyed to him for value at the time of making his attachment.

When there proves to be an unrecorded mortgage of land attached, the proper course is to levy upon the fee, and not to sell the equity, if the creditor is entitled and intends to take the estate against the claim of the mortgagee.

The cancellation of an unrecorded deed by the consent of parties to it may operate to restore the estate to the grantee, if the rights of third persons have not intervened; but it cannot have that or any other effect against the rights of such third parties.

Writ of entry against Joseph Grant and Joseph Grant, jr., demanding a tract of land in Shapleigh. Grant, sen. pleaded non-tenure, and replication was made that he was in possession. Grant, jr. pleaded the general issue, which was joined.

The case was opened for trial, when the demandant proved, that the demanded premises were attached October 15, 1838, on a writ in favor of the demandant against Grant, sen.; that judgment was duly recovered in the action at the Oct. term 1839, Western District Court, for this county; that execution issued thereon, and was regularly levied on the demanded premises, as the property of Grant, sen. within thirty days of the time of judgment, and seisin delivered. The proceedings were recorded within ninety days.

The demandant then called R. Buck, who testified, that he once owned the premises; and on October 13, 1836, gave a deed thereof to Grant, sen. with other lands, constituting the farm on which the tenants now live and have lived since the Spring of 1837, and at the same time, took back a mortgage from him to secure notes amounting to $1025, part of the consideration, and the whole thereof, excepting about one hundred dollars, then paid him by J. Grant, jr. and W. Grant, sons of Grant, sen. and then both minors; that nothing had since been paid to him; that on January 12, 1839, neither the deed nor mortgage back having been recorded, at the request of Grant,

sen. and his two sons, he, having no knowledge of any attachment thereon, took back and cancelled the deed of the farm including the demanded premises, and gave up the notes secured by the mortgage to be cancelled, and made a deed to Grant, jr., the tenant, and W. Grant, and took back from them a mortgage to secure the payment of all the original purchase money, excepting the $100, paid; and that the deed from him to Grant was given back and cancelled, and a new one given principally to save expense.

The parties then agreed to take the case from the jury, and submit the same on this evidence as a statement of facts; and that the Court might render such judgment as the facts would warrant.

W. A. Hayes, and *F. B. Hayes* of Boston, for the plaintiff, contended: —

At the time of the attachment, the title in the premises demanded was, as to attaching creditors, in Joseph Grant, sen. He entered into and occupied the land under a deed to him, and was in such occupation at the time the attachment was made. 13 Maine R. 280; 1 Marshall, 280; 2 J. J. Marshall, 433; 2 Bibb, 423; 3 Marshall, 12. The occupation of the premises by Grant, openly and peaceably, was equivalent to the registry of the deed. *Webster* v. *Maddox*, 6 Greenl. 258; St. 1821. c. 36, § 1; *Priest* v. *Rice*, 1 Pick. 168; 7 Watts, 261; 10 Watts, 412. And as to attaching creditors, the estate was absolutely in Grant, and not merely the equity of redemption. A mortgage must be recorded to be valid against creditors who have no notice of it. 7 Dana, 258; 9 Dana, 390, 69, 77; 1 Wash. 319, 58; 3 Hen. & Munf. 232; 4 Hen. & Munf. 424; 3 Gill. & John. 426; Martin & Gerger, 385; 7 Cowen, 360; *Priest* v. *Rice*, 1 Pick. 168; *Trull* v. *Skinner*, 17 Pick. 213.

The cancellation of the deed from Buck to Grant, though done with the assent of both parties thereto, did not divest the property, if the rights of third persons, as in the present case, had previously attached to the estate. *Farrar* v. *Farrar*, 4

N. H. R. 195; Co. Lit. 225, b. note 136; 1 R. in Ch. 100; Gilb. R. 236; Sheppard's Touch. 69, 70; 3 T. R. 151; 2 Lev. 113; 1 Vent. 296; 7 Bro. Parl. Ca. 410; Cro. Jac. 399; 1 Atk. 520; Gilb. Ev. 109; 2 H. Black. 259; 3 Cruise Dig. Tit. 32, Deed, § 10; 2 Vern. 473; Ambl. 429; 6 East, 86; 4 B. & Ald. 672; 1 Johns. Ch. R. 417; 2 Johns. R. 86; 8 Cowen, 71; 7 Wend. 364; 4 Conn. R. 550; 5 Conn. R. 262; 4 Gerger, 375; 6 Mass. R. 24; 9 Mass. R. 312; 11 Mass. R. 332; 9 Pick. 105; 23 Pick. 231; 1 Greenl. 73; 17 Pick. 213; 16 Maine R. 158.

The entry into and occupation of the land by Grant under his deed from Buck is, as has been already remarked, equivalent to recording the deed. As the deed of mortgage was not recorded, and the plaintiff had no knowledge of it, as to him it did not exist. Buck could not set up this secret conveyance by a mortgage against creditors. It would be a fraud upon them, whatever the intention might have been. Fraud, in a legal sense, means an act unwarranted by law to the prejudice of a third person. Lofft's R. 472; 1 Cowp. 117; 1 Burr. 474; 3 Atk. 646; 1 Ves. 64; 8 Johns. R. 137; 10 Johns. R. 374.

Clifford and *Allen*, for the defendants, contended: —

There is not in the case the slightest pretence of fraud on the part of Buck, and he had no knowledge of the plaintiff's attachment. The only inquiry is, what are the legal rights of the parties?

The authorities cited assert the abstract principle, that the cancelling of a deed does not reconvey the premises. But in other cases, that principle is qualified and explained, and if not overruled, is entirely disregarded.

But if it did apply to the extent contended for by the plaintiff, it applies with equal force to the mortgage deed between the same parties, which was cancelled at the same time and was a part of the same transaction. This was so holden in a case similar to this. *Jackson* v. *Chase*, 2 Johns. R. 84. In accordance with that are *Tomson* v. *Ward*, 1 N. H. R. 9, and *Roberts* v. *Wiggins*, ib. 73. Let the effect of the can-

celling of the deed be what it may, it is the same upon the deed and upon the mortgage. The plaintiff then has mistaken his remedy, and by grasping at too much has lost the whole. The remedy of the plaintiff was by a sale of the equity of redemption, and not by a levy upon the land. *Bayley* v. *Bayley*, 16 Maine R. 151; 15 Pick. 84; 6 Greenl. 289; 13 Mass. R. 51; 9 Mass. R. 247.

Nor is it true, if the plaintiff is right in saying, that the land was not revested by cancelling the deed, that the mortgage became void by taking the notes of the young Grants. If the deed to Grant, sen. remains valid, then the deed to the sons conveyed nothing, the notes were without consideration, and cannot be enforced. The new notes then did not operate as a payment of the debt from Grant, sen. to Buck. Nothing but actual payment of the debt will discharge a mortgage, or prevent the mortgagee from having his remedy upon it. *Gray* v. *Jenks*, 3 Mason, 520; *Vose* v. *Handy*, 2 Greenl. 322; 8 Mass. R. 554; 9 Mass. R. 242; 7 Mass. R. 63; 11 Mass. R. 125.

The most that the plaintiff can contend for with any semblance of justice is, that the arrangement of Jan. 12, 1839, when the deed and mortgage were cancelled, did not affect his rights acquired by his attachment. This was but the equity of redemption. 10 Mass. R. 403; 13 Mass. R. 498; 6 Mass. R. 32; 1 Greenl. 73; 9 Pick. 105; 8 Cowen, 74. If he acquired any title by his levy, which is denied, he cannot hold a greater estate, than what belonged to his judgment creditor, the right in equity. 16 Mass. R. 400. And in such case the action cannot be maintained, as the fee simple is in Buck, the mortgagee, and the defendants are in possession under him. 6 Mass. R. 50; 11 Mass. R. 469; 13 Mass. R. 227; 2 Greenl. 132.

The opinion of the Court was prepared by

Shepley J. — It appears from the agreed statement of facts, that on the 13th of October, 1836, Reuben Buck conveyed to Joseph Grant a farm including the premises, and at the same

time took back a mortgage to secure the payment of most of the purchase money. Neither of these conveyances were recorded. Joseph Grant and Joseph Grant, jr. entered into possession of the farm in the spring of 1837, and have remained in possession since that time. On the 15th of October, 1838, the premises were attached on a writ in favor of the plaintiff against Joseph Grant. Judgment was duly recovered, and the execution issued thereon was duly levied on the premises as the property of Joseph Grant, on the 23d of November, 1839. On the 12th of January, 1839, Buck being ignorant of this attachment, and the purchase money remaining unpaid, consented to cancel the deed from himself to Joseph Grant and the mortgage deed and notes from Joseph Grant to him; and to convey the farm to Joseph Grant, jr. and Washington Grant, and to take a mortgage from them to secure the purchase money not yet paid.

The inquiries arise; what would have been the rights of the parties, if the first deeds had not been cancelled; and what was the effect of that cancellation upon their rights. The statute, c. 36, provided, that no bargain, sale, mortgage, or other conveyance of lands, "shall be good and effectual in law to hold such lands, tenements or hereditaments against any other person or persons, but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded." After Joseph Grant had entered into possession he might have conveyed the farm to a third person, who being ignorant of the mortgage deed to Buck might have procured his deed to be recorded before the mortgage to Buck, and have thereby acquired a good title against that mortgage; for the plain reason, that the statute had declared, that it should be good against Joseph Grant and his heirs, but not good against others, such as his creditors, and purchasers from him for value; because it was not recorded. When an estate is attached, and the attachment is preserved, and the execution, issued on the judgment recovered in that suit, is legally levied on it; such levy operates as a statute conveyance at the time of making the attachment. So that the plaintiff is in the

same position, as if Joseph Grant had conveyed to him for value at the time of making his attachment. And the result must have been, if Buck had retained his first mortgage, that the attachment and levy would have taken the premises before that mortgage, it being inoperative against the *bona fide* grantees of Joseph Grant and his attaching creditors, who had perfected their titles by recording them. The proper course is to levy upon the fee, and not to sell the equity, when the creditor is entitled and intends to take the estate against the rights of the mortgagee. The right in equity should be sold only, when the attaching creditor is obliged or consents to take the estate subject to the mortgage.

The effect might have been, that Buck would wholly lose his farm by neglecting to record his mortgage. But this is a result, which must have been intended, when the statute declared, that his mortgage should be good only against the grantor and his heirs, if not recorded. And Courts of law cannot relieve persons from those misfortunes, which are brought upon them by their inattention to the plain provisions of a statute.

The cancellation of the deeds might have operated to restore the estate to Buck, if the rights of other persons had not before that time intervened; but it would not have that or any other effect against the rights of such third parties.

Judgment for the demandant.

MAJOR H. FOLSOM *versus* JAMES PERKINS.

Where there is a battalion of artillery in one of the brigades of a division, commanded by a major, the brigadier general has no power to grant a warrant to a sergeant of one of the artillery companies.

To maintain an action to recover a fine of a private for neglecting to perform militia duty, the clerk must show that he had a legal warrant as sergeant at the time of his appointment as clerk.

The acquiescence of the commander of the battalion, by remaining silent on the subject for a year, will not make valid a sergeant's warrant, which had been illegally issued by another person.

If the clerk be not legally authorized *to commence* the suit, the commanding officer of the company is not authorized by the st. 1837, c. 276, to come in and prosecute the same.

ERROR to reverse a judgment of a justice of the peace in an action of debt brought by Perkins, as clerk of a company of artillery in the first division and second brigade, to recover a fine of Folsom for neglecting to perform militia duty as a private in that company, on the fourth day of May, 1841.

The error mainly relied upon was, that there is no evidence in the record, that Perkins was legally appointed sergeant or clerk of said company, whereas the justice decided that Perkins was sergeant, and was clerk.

The evidence appearing on the exceptions showed, that Perkins, to prove that he was clerk, produced a sergeant's warrant in common form, signed by James Thomas, Brigadier General, second brigade, and first division, dated Aug. 20, 1840, directed to Perkins, as sergeant of the B. company of artillery in said brigade. On the back of this warrant was a certificate signed by the captain of that company, appointing Perkins clerk of the company, dated Sept. 2, 1840; and also a certificate of the oath, of the same date. There were two companies of artillery in the brigade, forming a battalion, commanded by a major.

The defendant objected that the appointment of Perkins as clerk was void, because he was not a sergeant, the brigadier general having no power to appoint, or to grant the warrant. The justice overruled the objection, and adjudged that Folsom should pay a fine.

McDonald, for the plaintiff in error, cited the st. 1834, c. 121, in relation to the militia, § 8, 12, 17; and contended that the statute was imperative, that in a case like the present, the sergeants of companies are to be appointed by the captains of the companies, "who shall forthwith make return thereof to the commanding officer of their respective *regiments or battalions*, and they shall grant them warrants accordingly." The brigadier general had no legal authority to act in the matter, and the warrant signed by him was entirely void. No person can legally be clerk, who is not a sergeant. The nineteenth section applies only to commissioned, and not to warrant officers. Perkins failed of showing himself to be clerk of the company, and could not therefore maintain the action. The judgment then should be reversed.

Caverly, for the original plaintiff, argued in support of these propositions: —

1. The defendant in error, on the receipt of his warrant signed by the brigadier general, was duly authorized to act as sergeant. The authority of the brigadier general to grant warrants to the non-commissioned officers of volunteer companies raised at large, and not annexed to any particular regiment, is obvious from the general tenor of the statute, as well as from military usage. St. 1834, c. 121, § 4, 19.

2. If the warrant in question was granted by competent authority; the certificate thereon of the original plaintiff's appointment and qualification as clerk by the captain, is sufficient evidence of his appointment to that office. § 8.

3. If the brigadier general had not in the first instance the power to grant the warrant, although he was the superior officer, yet the battalion major, having expressed no dissatisfaction, had by more than a year's silence ratified the act, and had adopted it as his own. *Rollins* v. *Mudget*, 4 Shepl. 339.

4. In case the original plaintiff was not a sergeant at the date of his appointment as clerk, and the appointment therefore void, the captain, who is indirectly a party, has the right by statute to assume and continue the prosecution of this suit to final judgment; and the Court may permit an amendment

for that purpose. St. 1837, c. 276, § 9; st. 1834, c. 121, § 45.

The opinion of the Court was by

SHEPLEY J. — The non-commissioned officers of companies are to be appointed by the captains of their respective companies, who are to make return thereof to the commanding officer of their repective regiments or battalions; who is to grant them warrants. St. 1834, c. 121, § 8. When there are two companies of artillery in a brigade they are to form a battalion, and are entitled to a major. § 17. The clerk must be one of the sergeants. § 12. It has been decided, that the clerk must prove, that he had received a warrant from the proper officer as a sergeant, and had been legally appointed and qualified as clerk to enable him to maintain a suit for a fine. *Burt* v. *Dimmock*, 11 Pick. 355; *Tripp* v. *Garey*, 7 Greenl. 266. In this case the clerk produced a sergeant's warrant granted by the brigadier general, when there were two companies of artillery at that time, forming a battalion, and under the command of a major.

It is contended, that the commander of the brigade might legally grant the warrant by virtue of the nineteenth section, which provides, that companies raised at large shall be subject to the commanding officer of the brigade, in which they are raised, and shall make their elections of officers in the same manner as other companies, but shall make their returns of elections to the commanding officer of the brigade. There is nothing in that section inconsistent with the provisions of the eighth section. The elections referred to in the nineteenth, are those of the commissioned officers of the company and not the appointments of non-commissioned officers, the returns of which are required by the eighth section to be made to the commanding officer of the regiment or battalion. If the warrant were not regularly granted, it is said, that the commander of the battalion has acquiesced in and ratified the act; and a remark made in the case of *Rollins* v. *Mudget*, 16 Maine R. 340, is relied upon as authorizing such a conclusion. It is

there said, that "no disapprobation of this appointment on the part of the colonel appears, and the silence after this intelligence may well be deemed a ratification." In that case the warrant had been signed by the colonel in blank and delivered to the captain to be by him delivered to the person, whom he should appoint sergeant. And the ratification was applicable only to the delivery to the person holding it of a warrant issued from the proper officer. The case does not authorize the conclusion, that a person without a warrant, issued by an officer authorized to grant one, could by the acquiescence of his superiors become a legal non-commissioned officer. If the clerk be not legally authorized to maintain the suit, the counsel contends, that the commanding officer of the company is authorized by the act of 28th of May, 1837, c. 276, § 9, to appear and prosecute it. That section applies to cases, where actions have been commenced by a clerk legally appointed, who "shall die, resign, or refuse, or in any other way be disqualified to prosecute said suit," and not to cases, where there was no legal authority to commence them. The defendant in error failed to prove, that he had received a warrant as sergeant from an officer entitled to grant it, and he could not be legally appointed clerk. *Judgment reversed.*

THE STATE *versus* JOSIAH BERRY.

The location of a town or private way by the selectmen, or their order, must precede the issuing of the warrant to call the meeting for its acceptance.

A town or private way cannot be proved by parol, to sustain an indictment against an individual for obstructing it. The law on this subject was not changed by the Rev. St. c. 25, § 101.

The records of a town which are not admissible to prove the existence of a legal town way, cannot be admitted to show the limits, or outside lines, of the road, although it may have been proved that a road had been actually travelled somewhere within those limits for more than twenty years.

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

At the October term of the Court, 1841, there was an indictment found against said Berry, wherein the jurors presented, "that there is now, and long before and at the time of the obstruction and nuisance hereinafter named, there was a town way in the town of Buxton, in said county, leading from the Scribner schoolhouse, so called, southeasterly to the dwellinghouse of Elisha Woodman, of the length of one hundred rods, and of the breadth of three rods, for all the citizens of said town to go, return, pass and repass, in and along the same at their will and pleasure." The jurors also in the indictment presented that the defendant, on May 1, 1841, unlawfully, &c. erected a fence upon a part of said way, of the length of twelve rods, and continued the fence until the present time and thereby obstructed the way, whereby, &c.

At the February term of this Court, 1842, the trial of said indictment was commenced, and to support the same the County Attorney offered the records of the town of Buxton in relation to a way. The counsel for the defendant objected to the admission thereof, because there was no article in the warrant calling the town meeting, when the doings of the selectmen were accepted by the town, authorizing such acceptance; because the warrant calling the meeting preceded the laying out of the way by the selectmen; and because the laying out and acceptance was on a condition to be afterwards performed. The County Attorney then offered to prove, that said condition was performed so far as respected the money to be paid; that the way or road described in the indictment had been travelled and used as a road for more than twenty years next before the erection of said fence by said Berry, and that the private way described in the records of the town covered the same land described as a town road in the indictment; and that said town of Buxton had repeatedly, within the last six years and before, made repairs on said way. The alleged road extended from a public road near to the house of an inhabitant of said town, about one hundred and six rods, and there terminated, without communicating with any other road at that end.

The counsel for the defendant renewed his objections before made; and also contended, that if it were shown, that there was at the time a legal "private way" for the use of one or more individual inhabitants, that this would not be sufficient to maintain the indictment for erecting a nuisance upon a town road.

The counsel for the defendant further contended, that to maintain an indictment for the obstruction of a town way, it must be shown, that such town way was laid out and established, pursuant to the statute provisions of this State or of the State of Massachusetts, before Maine was a separate State, and that proof that the same had been travelled and used as such town way for more than twenty years next before the erection of the fence, was not sufficient evidence of the existence of the road set forth in the indictment to maintain the same; and that therefore such evidence was not admissible.

The District Judge presiding at the trial, thereupon ruled, that if it were proved, to the satisfaction of the jury that the town way described in the indictment had been used and travelled as a road for more than twenty years next before the erection of said fence, that this was sufficient evidence, with the other testimony offered, of the existence of the town way to maintain the indictment; and that the evidence offered for that purpose was admissible.

And the presiding Judge further ruled, that although the records of the town of Buxton, offered in evidence, *were not* sufficient to prove the existence of a legal town way laid out pursuant to the statute provisions, yet that they were admissible, with the evidence that the town way described in the indictment had been travelled and used as a road for more than twenty years next before the fence was erected, for the purpose of showing the limits, or outside lines of the road, if it should appear, that the road proved to have been used and travelled was within the limits of that described in the town records.

To the rulings of the presiding Judge, Berry excepted.

A meeting of the town of Buxton was regularly called on June 6, 1814. One article in the warrant was to see whether the town would exchange certain land with J. W., "for lands for a road from his house out to the county road leading to Saco." The subject of roads was not mentioned in any other article. This meeting was adjourned until the last Monday in November; and on that day it was voted to accept "the return of a road laid out by the selectmen." This return was dated Nov. 15, 1814, and states that: — "Pursuant to the request of J. W. and others, we have laid out a private way for his and their use as follows," describing the way. The return states, that the way is laid out on condition that certain land should be exchanged, but which has never yet been done, and on condition that a certain sum should be paid.

J. Shepley, for the defendant, contended: —

That the records of the town offered, are inadmissible to show that a "town way" was legally laid out.

Because there was no article in the warrant calling the town meeting, which authorized the acceptance of this or of any other road. *Keen* v. *Stetson*, 5 Pick. 492; *Rowell* v. *Montville*, 4 Greenl. 270. Because the location of a town or private way by the selectmen, or their order, must precede the issuing of the warrant to call the meeting for its acceptance. *Jordan* v. *Eldridge*, 16 Maine R. 301. And because the laying out was on conditions to be performed afterwards, and which have never been performed.

No indictment can be maintained against an individual for fencing up a "town way" by proof that the same has been travelled and used as such for more than twenty years. The indictment is for fencing in a part of the way, and preventing people from travelling there. The indictment does not allege that obstructions were placed to endanger the lives of travellers, or even that travelling in the usual place was prevented. *State* v. *Sturdivant*, 18 Maine R. 66; *Comm.* v. *Low*, 3 Pick. 408.

The ruling of the Judge does not place the question solely on the proof of usage, but says that, with the other evidence offered, was sufficient. No part of the evidence offered was admissible; and if admissible, could be of no avail to make an illegal transaction legal. The ruling at the trial was on the ground, that the Rev. St. c. 25, § 101, had altered the law as laid down in the case, *State* v. *Sturdivant*. It is unnecessary to give all the reasons obviously applicable, to show this ruling erroneous. It is enough to say, that although the statute may estop a county, town or plantation from denying the location of the road, if worked on by the town or plantation authorities within six years next preceding, the statute does not estop an individual. Although the word indictment is used in the first line, all the rest of the section shows that it applies only to actions for damages sustained by travelling on an actual road, whether legal or not. The working on the road is to be within six years, and may be within a month, a week, or a day. If the ruling of the Judge be correct, it necessarily follows, that if a highway surveyor should go, and open a road, and work upon it, through the field of one of the jurors while here attending Court, he would be subject to indictment, if he put up his fence on his return home.

But this was a mere straightening of the fence and it did not touch the travelled part of the road. Mere usage would not carry the road to the fence. To do this, the government offered the record of the laying out by the town to show the extent or side lines of the road, and thus bring the fence within it. For this purpose, the records were admitted by the Judge. The proposition seems to be this, that although no road was legally laid out, and the records are inadmissible to show the existence of a road, yet they are admissible to show where a road is. The same question was however raised once before, and the decision was against the admission. *Young* v. *Garland*, 18 Maine R. 409.

But if it were proved, that there was a "private way" laid out for the use of individuals, it would not support an indictment for obstructing a "town way." They are not the same

but different. The Rev. St. c. 25, § 27, varies a little from the statutes of Massachusetts and Maine, but in substance is the same. *Mann* v. *Marston*, 3 Fairf. 35 & 38.

Bridges, Attorney General, for the State.

The records are clearly admissible in evidence for what they are worth. The owners of the land were assenting to the road; and the assent of the owners cures the objections made in behalf of the defendant. The conditions were waived by the assent. The record was evidence of the extent of the claim. *Robinson* v. *Swett*, 3 Greenl. 316.

If we do not show a legal laying out of the road, it is clear that the town had a right to repair, and that they cannot deny that it is a road. It will not be denied on the other side, that the town would be liable for not keeping this road in repair. Now if this be true, there would be great injustice in not affording a remedy by indictment against an individual who has placed the nuisance in the road, which caused the indictment. The legislature have regard to the fitness of things in enacting laws, and could never have intended to subject towns to the burden of supporting roads, and to subject them to indictment for the omission, and still suffer individuals to do the acts, which occasioned the indictment, at their pleasure, without any power to punish them.

The case of the *State* v. *Sturdivant*, would have been differently decided, if it had come before the Court since the Revised Statutes took effect. The statute was intended by the framers of it to control that decision; and the cases referred to in the margin prove it.

On the last day of the same term, the Court, by TENNEY J. remarked, that the records offered in evidence were clearly inadmissible for several reasons; of which a sufficient one is, that the road was not laid out until after the meeting was called at which the report was accepted.

A town or private way cannot be proved by parol, to sustain an indictment against an individual for obstructing it. This is well settled, and not now an open question.

The records are inadmissible for any purpose; and of course, the extent of the travelled road cannot be proved by them.

But it is contended by the counsel for the State, that the law has been altered by the Revised Statutes. The section referred to cannot be extended farther, than its terms indicate. This case does not come within its provisions.

The exceptions are sustained.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD,

ARGUED AT MAY TERM, 1842.

TRUSTEES OF THE PARSONAGE FUND IN FRYEBURG *versus* EDWARD L. OSGOOD.

At the foot of a promissory note, at the left of the signatures of the promisors, was a memorandum that interest had been paid to a certain day; and below this memorandum, were written these words, "Attest J. S. B.," all being in his handwriting, but the signatures of the promisors. This does not bring the case within the exception of the statute of limitations as a witnessed note.

A payment of interest, indorsed on a note, which payment was made within six years before the commencement of the suit, although for a year's interest which had become due more than six years before that time, is sufficient to take the case out of the operation of the statute of limitations.

ASSUMPSIT upon a promissory note, dated Feb. 18, 1831, for $600,00, signed by J. W. Ripley, since deceased, as prinpal, and by the defendant as surety, payable with interest annually. The writ is dated Jan. 9, 1841. With the general issue, the statute of limitations was pleaded. On the left of the signatures of the promisors were words indicating that interest was paid up to a certain day, and below this memorandum were the words, "Attest, John S. Barrows." Thus far, the whole of the note, excepting the signatures of the promisors, was in the handwriting of Barrows. The original note

was referred to, the plaintiffs contending that the whole written by Barrows, was written with the same pen and ink, and at the same time. The Court were to inspect it, and to determine whether it was a witnessed note. On March 16, 1835, Osgood made a payment of the interest due on the note to June 1, 1834, and it was so indorsed on the note by H. C. Buswell, then treasurer of the trustees, to whom the payment was made. The Court were authorized to draw such inferences as a jury might draw, and were to determine whether the action was, or was not, barred by the statute of limitations.

S. H. Chase, for the plaintiffs, contended that it appeared by an inspection of the note, that the witnessing was to the whole note and memorandum, and therefore it was a witnessed note within the statute. It could not have been intended as a mere attestation to the memorandum of payment of interest. If he had intended to sign the memorandum only, he would not have used the word *attest*, that being the word used in all cases of witnessing a paper not under seal.

The indorsement of March 16, 1835, takes the case out of the statute of limitations. Partial payment, or a payment of interest, is sufficient for that purpose. Chitty on Con. 647; *Hunt* v. *Bridgham*, 2 Pick. 583; *Whitney* v. *Bigelow*, 4 Pick. 112; *Sigourney* v. *Drury*, 14 Pick. 391.

But had the payment been made June 1, 1834, it would have been sufficient to have taken the case out of the operation of the statute of limitations. The note was payable with interest annually. A new promise to pay the note, was to pay according to its tenure. The year's interest was to be paid, when it became due, and the six years did not commence running until that time. The action was commenced within six years of that time.

Howard, for the defendant.

This is not a witnessed note. Witnessing the memorandum is not witnessing the note.

The indorsement of the interest due to June 1, 1834, although under date of March 16, 1835, does not take the

case out of the statute of limitations. It admits that the interest was due June 1, 1834, and that it has been paid; but so far as the principal is concerned, it is not an acknowledgment of present indebtedness, nor a promise, express or conditional, to pay any portion of it. *Perley* v. *Little*, 3 Greenl. 97; *Porter* v. *Hill*, 4 Greenl. 42; *Exeter Bank* v. *Sullivan*, 6 N. H. R. 135; *Bell* v. *Morrison*, 1 Pet. 351; *Purdy* v. *Austin*, 3 Wend. 187; *Stafford* v. *Bryan*, ib. 536; *Hancock* v. *Bliss*, 7 Wend. 267; *Clark* v. *Dutcher*, 9 Cow. 676.

Each year's interest was a distinct sum, which could be sued for and collected, independently of the principal of the note; and if it had been collected by suit, it would not have taken the note out of the statute. Being paid without a suit, does not change the principle or effect of such payment. *Doe* v. *Warren*, 7 Greenl. 48; *Greenleaf* v. *Kellogg*, 2 Mass. R. 568; *Tucker* v. *Randall*, ib. 284; *Hastings* v. *Wiswell*, 8 Mass. R. 455.

Payment of the principal does not raise an implied promise to pay interest. *Collyer* v. *Wilcox*, 4 Bing. 315. *A fortiori*, payment of interest does not raise an implied promise to pay the principal.

The opinion of the Court was afterwards prepared by

Whitman C. J. — The statute of limitations is relied upon in defence of this action, which is assumpsit upon a note of hand. The note had been due more than six years before the commencement of this suit. The plaintiff contends, that it was a witnessed note, and, therefore, not within the statute. At the left of the signature of the defendant, to the note, a memorandum was placed, acknowledging that the interest on the note had been paid to a certain time. The name of J. S. Barrows, preceded by the word "attest," was placed under the memorandum. We think this does not, unequivocally, show that the attestation was intended to extend to any thing further, than to the correctness of the memorandum. If it had been intended that it should have been an attestation to

the signature it seems reasonable to believe that it would have been placed above the memorandum.

The plaintiff further contends that a payment of interest, indorsed on said note, which was made within six years before the commencement of this suit, although for a year's interest, which had become due more than six years before that time, is sufficient to take the case out of the statute; and it has been so often ruled, that the payment of any part, whether of principal or interest, within six years, has that effect, that we cannot entertain any doubt of the correctness of his position, *Sigourney* v. *Drury*, 14 Pick. 387.

The defendant, however, has cited a case from the 4 Bing. 315, *Collyer* v. *Wilcox & al.* which he thinks establishes an exception to the general rule. The claim set up in that case was for certain deposites, made by the plaintiff for a particular purpose, which had failed of being accomplished, and for the interest thereon. For the principal the defendant brought the money into Court, and there tendered it; but expressly refused to pay the interest; and interposed the statute of limitations as a bar to the plaintiff's right to recover it. It was insisted that the tender of the debt in Court, although more than six years had elapsed since the cause of action accrued, took the case out of the statute as to the interest. But the Court held, as there was an express refusal, at the time of the tender, to pay the interest, a promise to pay it could not be inferred from the tender of the principal. In that case there was no express promise to pay interest. In the case at bar there was originally an express promise to pay interest; and, at the time of paying the interest, there was no declaration, by the defendant, that he did not owe, or that he would not pay the residue of the debt. The defence, therefore, under the statute, is not made out; and the judgment must be for the amount due on the note according to its terms.

JOHN OWEN *versus* JOHN DANIELS.

A recognizance entered into by a party, conditioned "*to prosecute with effect an appeal, made by him at the Court of Common Pleas,*" at the next Supreme Judicial Court, when the statute in force at the time required that the party appealing should recognize "*to prosecute his appeal, and to pay all such costs as may arise in such suit after such appeal,*" not conforming to the provisions of the statute, is void as a statute recognizance.

It is denied, that a recognizance to prosecute an appeal is good here at common law.

If however it should be considered that the recognizance is good so far as it conforms to the statute, a condition "to prosecute his appeal," is performed by entering the action at the next Supreme Judicial Court, and afterwards becoming nonsuit.

SCIRE FACIAS on a recognizance. The declaration set forth that Nathan Foster, since deceased, as principal, and the defendant as his surety personally appeared before the Court of Common Pleas for the County of Oxford, on February 1, 1835, and acknowledged themselves to be indebted to the plaintiff in the sum of one hundred dollars, "if default should be made in the performance of the condition of said recognizance, which condition was, namely, that if the said Foster should at the Supreme Judicial Court, which was to be holden at Paris on the third Tuesday of May then next, prosecute with effect an appeal made by him at the Court of Common Pleas held in and for said county of Oxford, at Paris, on the fourth Tuesday of January, 1835, from a judgment then obtained against him by the said Owen, then said recognizance should be void and of none effect, otherwise to remain in full force;" that the recognizance was duly entered into before the clerk; that "Foster did enter said appeal at the said next Supreme Judicial Court, and afterwards became deceased;" that administration was taken out on his estate; that the administrator came in; "and that such proceedings were had in said action, that the plaintiff became nonsuit, and at the May term, 1838, the said Owen had judgment for his costs;" and that execution issued, and was returned unsatisfied.

The defendant demurred, generally, to the declaration.

G. F. Emery, in support of the demurrer, contended that the declaration was defective in substance in six different particulars, of which the last, and only one examined by the Court, was this.

6. The recognizance is fatally defective in itself.

It is so, because the Court did not order that Foster, the principal, should recognize in any sum. This should appear in the recognizance, but it does not so appear there, or in any part of the declaration.

And more especially, because the recognizance is not such as the statute authorizes and requires.

Appeals are regulated solely by statute; and if the recognizance to prosecute the appeal is not regular, and in conformity to the statute provisions, it is absolutely void. The Rev. Stat. c. 97, § 14, provides, that "the party appealing, before such appeal shall be allowed, shall recognize with sufficient surety or sureties to the adverse party, in such sum as the Court shall order, to prosecute his appeal with effect, *and pay all intervening damages and costs.*" The Stat. 1829, c. 444, which was the one in force at the time of this appeal, provides, that the party appealing, "before the allowance of such appeal, shall recognize with sufficient surety or sureties to the adverse party, in a reasonable sum, to prosecute his appeal, *and to pay all such costs as may arise in such suit after such appeal.*" The condition of the recognizance declared on, is merely, if Foster should, at the next Supreme Judicial Court, "prosecute with effect his appeal" from the Court of Common Pleas, then the recognizance should be void. There is no provision in this recognizance to pay "*all such costs as may arise in such suit after such appeal.*" The action therefore cannot be maintained. *Harrington* v. *Brown*, 7 Pick. 232.

Codman & Fox, for the plaintiff, contended that the declaration was good. The language of the act is, *to prosecute his appeal and pay all costs.* The recognizance is to *prosecute his appeal with effect.* So far as it goes therefore, it is in accordance with the statute, but does not in words go the length

of it. The amount of the defendant's objection therefore is, that the recognizance is not as onerous on him as it should be. If the plaintiff chooses to waive one of the terms of the recognizance, it does not lie in the defendant's mouth to object. The case cited from 7 Pick. seems to admit, that a recognizance is valid for that portion, which was within the statute.

The opinion of the Court was drawn up by

SHEPLEY J. — This is a writ of *scire facias* upon a recognizance set forth in the declaration; to which there is a general demurrer. What the recognizance actually taken was, can be known to the Court only by the allegations in the declaration; for it is not set forth in *haec verba* in the pleadings. The allegation is, that the principal was required by it to "prosecute with effect an appeal made by him at the Court of Common Pleas, held in and for said county of Oxford, at Paris, on the fourth Tuesday of January, 1835." The statute requiring the recognizance, c. 444, provided, that the party appealing should recognize "to prosecute his appeal, and to pay all such costs as may arise in such suit after such appeal." The statute does not authorize it to be taken to prosecute the appeal "with effect;" and does require it to be taken "to pay all such costs as may arise in such suit after such appeal." It is not therefore in words such an one, as the statute either authorizes or requires. The legal effect of a recognizance to prosecute an appeal with effect is different from that of one to prosecute an appeal. In *Barnes* v. *Worlich*, Yelv. 59, it is said, "to prosecute *cum effectu* is to follow the suit till judgment." The same case is reported in Cro. Jac. 67, under the name of *Worlich* v. *Massy*, where it is said, "if the recognizance should be only *ad comparendum et prosequendum cum effectu*" it is "only to prosecute without being nonsuited, or using delay." In *Covenhoven* v. *Seaman*, 2 Caines' Cas. 322, it was decided, that a recognizance to appear and his suit "prosecute with effect" was forfeited by the party submitting to a nonsuit.

In the *State* v. *Richardson*, 2 Greenl. 115, it was decided that a recognizance requiring, that "he should appear and prosecute his appeal at the said Court, and should abide the order of the said Court thereon, and not depart without license," was fully satisfied by his appearing, entering his appeal, having it continued, and abiding during that time; and the Court say, "this was all he engaged by his recognizance to do." In the case of *Paul* v. *Nowell*, 6 Greenl. 239, the recognizance appears to have been taken by virtue of the act of 1822, c. 193, § 4, and there is no intimation, that the language of the recognziance did not conform to that of the statute, which was the same, as that of the statute, on which this was taken; and the Court say, "as the defendant did not enter and prosecute his appeal the condition of the recognizance was broken." And the case also decided, that there could be no hearing in chancery after the forfeiture, and that judgment must be entered for the whole penalty. And until after the passage of the act of 1831, c. 497, the result was, that, when a party forfeited his recognizance by becoming nonsuit if taken to prosecute with effect, he must pay the whole penalty, and could not be relieved by paying the cost arising after the appeal. While such would not be the result when he entered the suit and it was continued, if the recognizance provided only that he should prosecute his appeal and pay the costs after appeal. Possibly this may account for the fact, that the statutes have provided for a long course of years in case of appeals from the Circuit Court of Common Pleas, and Court of Common Pleas, and District Court, that the recognizances should provide, that the party should prosecute his appeal and pay the cost, arising after the appeal. *Vide.* Acts of June 21, 1811; February 20, 1814; February 4, 1822, c. 193; March 4, 1829, c. 444; February 25, 1839, c. 373. While in cases of appeal from a justice of the peace, and in most other cases, recognizances have been required to prosecute the appeal with effect. And it is so in Rev. St. c. 97, § 14.

The recognizance set forth or described in the declaration cannot therefore be considered as taken according to the pro-

visions of the statute. In the case of *Regina* v. *Ewers*, 2 Salk. 564, it was decided, that one not in conformity to a statute was not good as a statute recognizance, but was good at common law. The doctrine in that country has been, that any Judge might take a recognizance at common law, in term, or out of term, in any county. *Fanshaw* v. *Morrison*, 2 Ld. Raym. 1140; 2 Saund. 8. (b.) n. 5. It is believed, that no power not granted by staute for such a purpose is admitted here. *Harrington* v. *Brown*, 7 Pick. 232. If however it should be considered, that the recognizance in this case is good, so far as it conforms to the provisions of the statute, the result is, that it only provides, that the party shall prosecute his appeal. The part, which provides, that he shall do it with effect, was not authorized by the statute. The provision, that he shall pay the costs arising since the appeal, is omitted. The declaration states, that "said Foster did enter said appeal," and that it was prosecuted by him and by his administrator after his decease until the May term of this Court, 1838. And there is nothing left in the recognizance obligatory on the defendant and unperformed. The declaration exhibits therefore no legal cause of action; and it is not necessary to decide the other points made in the case.

Declaration adjudged bad.

Mem. — TENNEY J. did not sit in the determination of this case.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN,

ARGUED AT MAY TERM, 1842.

JACOB BORNEMAN, Adm'r. *versus* CHARLES SIDLINGER *& al.*

A *donatio causa mortis* is good, although a chose in action, accompanied by a mortgage as collateral security therefor; and notwithstanding it were in trust for the benefit of others besides the donee.

A married woman may be the recipient of such a donation, provided her husband was assenting thereto, even if he was the debtor.

And if the donation has once vested for the benefit of the donees, it is out of the power of the husband to alienate it, to their prejudice.

In an action on the mortgage by the adminstrator of the alleged donor, the husband of a donee, who had released to the defendant all interest in and claim to the note and mortgage, reserving all claim upon the administrator for any money paid to him, was held to be a competent witness for the defendant.

THE plaintiff, administrator of the estate of John G. Borneman, deceased, brought this writ of entry on a mortgage, given by the defendants to the intestate to secure the payment of a note of hand. It has been heretofore twice before the Court on questions of law. The statements of the facts then before the Court, and the decisions of the Court thereon, may be found in the reports of the decisions in this State, Vol. 15, p. 429, and Vol. 18, p. 225. On this trial there was but little variation from the evidence in the prior trials. Any additional

proof is noticed in the opinion. The plaintiff never rendered an inventory of this note, and there were no debts against the estate. The husbands of the daughters interested gave to the defendants releases of all interest in the note and mortgage, reserving all claim against the administrator, and were offered as witnesses by the defendants. They were objected to by the demandant, but admitted.

Upon the testimony introduced, SHEPLEY J. who presided at the trial, instructed the jury, that if they were satisfied, that the deceased, during his last sickness and in contemplation of death, and with a view to make a final disposition of his estate, made a donation of the note and mortgage to the four daughters and the children of those of them deceased, and actually delivered them to his daughter Sally to carry that purpose into effect, and they remained in her possession until after his decease, the beneficial interest in them would vest in those for whose benefit the donation was made; and that if Charles Sidlinger, her husband, assented to her receiving them, he could not afterwards by any act of his, by surrendering them, divest the interest of the beneficial donees, or deprive them of the benefit intended for them. And further, that if the beneficial interest so passed, and there were no debts due from the estate, so that the administrator was not entitled to collect the note for the benefit of the creditors, he could not prosecute this suit against the will of those beneficially interested in the note and mortgage; and that if he, before he commenced the suit, knew that they were so entitled to the note and mortgage, and that it was against their will, that he should commence this suit, he could not maintain it.

The verdict for the defendants was to be set aside, if the instructions were erroneous, or the witnesses objected to were improperly admitted.

Bulfinch, for the plaintiff, argued in support of the following propositions.

1. The donees were incompetent witnesses.

2. The administrator is entitled to this note and mortgage for the purpose of paying the expenses of his administration.

3. The defendants are estopped by the tender by one of them to the administrator, and a payment by the other of one half of the note and mortgage to the administrator.

4. The delivery of the note and mortgage to collect and divide, not being a gift completed, was arrested by the death of the donor.

5. There was no evidence from which the jury could presume the assent of the husband, but his assent was negatived by his tender to the plaintiff.

6. The terms of the gift were words testamentary, and amounted to a nuncupative will, and should have passed the seal of the Probate Court according to the statute.

7. The gift of one quarter of the note, to be collected, and intended for Catharine Robinson, was never vested in her, but was arrested by her death, and should go to the administrator for the benefit of all the heirs.

8. It would be dangerous doctrine, and against the policy of the law, to establish the principle, that on the delivery of the husband's note and mortgage to his wife, the promise of the wife to collect and divide it into four parts, and in four years to pay it to third persons, was a good *donatio causa mortis*.

9. The affirmance of the verdict would greatly impair the provisions of the statute of frauds, and establish doctrines dangerous and against law.

10. The promise of a *feme covert*, with the consent of her husband, to pay the note of her husband to a third person cannot be the subject of a *donatio causa mortis*, and is not susceptible of delivery.

He cited 5 Dane, c. 170, art. 2, § 28, 35; art. 4, § 1; c. 182, art. 6, § 22; art. 7, § 24; *Hatch* v. *Kimball*, 16 Maine R. 146; *Woodbury* v. *Bowman*, 14 Maine R. 154; 2 Kent, 446; Dane, c. 133, art. 3, § 6; 18 Johns R. 145; Bac. Abr. Will, &c. A.; 2 Ves. Sen. 431.

Reed, for the defendant, considered that this was but a mere attempt to try again the same questions, which had been

already decided by this Court in this very case, reported in 3 Shepl. 429, 6 Shepl. 225.

He denied that there was any tender. The demandant claimed the possession of the note and mortgage, and the defendant who then had them in his possession resisted this claim. A suit was brought, and he offered to give them up, but the demandant refused to accept them. Afterwards they were handed over to him, the defendant then and at all times denying his right to them. But had the facts been as his counsel now contends, it could not alter the case. When the property had once vested, the husband could not by any act of his divest it. 2 Black. Com. 293; *Scanlan* v. *Wright*, 13 Pick. 528.

He replied to the various grounds of argument urged for the demandant.

Ruggles replied for the demandant.

The opinion of the Court was drawn up by

WHITMAN C. J. — This case is now before the Court, the third time, upon exceptions to the ruling of the Judges presiding at the trials. Upon the exceptions taken at the first trial, it was decided, 15 Maine R. 429, that a *donatio causa mortis* is good, although of a chose in action, accompanied by a mortgage as collateral security therefor; and notwithstanding it were in trust for the benefit of others besides the donee. This decision was made upon the review of the authorities, then brought to the notice of the Court, which were somewhat in conflict with each other, and is sustained throughout by the case of *Coutant* v. *Schuyler*, 1 Paige, 316.

It is now contended, that such donation could not be made to a *feme covert*; and much less to the wife of the maker of the note and mortgage; and especially without his consent, which, it is contended, was not obtained in season, if at all, to render it effectual. The jury, however, under the instruction of the Court, seem to have found, that his consent was obtained, and in due season; and if they had not, his consent may

well be presumed, as the donation was tantamount to a release to him of one quarter part of the debt due from him.

That a *feme covert* might be the recipient of such a donation we cannot doubt, provided her husband was consenting thereto. A trust estate is under the control of a Court of equity; and the execution of the trust could, as well be enforced, if in the hands of a married woman, by bringing her husband into Court with her, as if it were in the hands of any one else. A single woman may surely take an estate in trust; and, if afterwards married, the execution of the trust might be enforced against her and her husband.

We cannot see that the circumstance, that the husband was the debtor in this case should make any difference. He was in effect the *cestui que trust* as to one quarter part of the debt, and, as to the other, he, with his wife, were the trustees. The debt might, by the operation of the principles of law and equity, be considered as virtually cancelled as to him, and the fund as in his hands for the benefit of the *cestuis que trust;* and he and his wife might compel the payment of the residue for the same purpose.

It is further insisted, that Charles Sidlinger, the husband of the donee, renounced the trust and tendered the notes and mortgage to the plaintiff, which, although at first refused, were afterwards received by the plaintiff; and that thereby the trust, if any existed, was annulled. It does not appear in the report of the evidence, or in the deposition relied upon for the proof, why or for what purpose the tender was made, or why it was refused. It appears however, that the plaintiff then had an action of trover, pending against the defendants for the note and mortgage, and the tender might have been made, and it is not improbable that it was, with a view to an effect upon the decision of that cause, favorable to the defendants; and may have been refused from an apprehension that it would be likely to have some such effect. The parties were, at the time, in a state of warfare, and might on either hand conduct unadvisedly. It does not seem to us that this transaction,

under all the attendant circumstances, was deserving of much consideration.

The Judge at the trial, upon this point, charged the jury in substance, that if the donation had once vested, for the benefit of the *cestuis que trust*, it was out of the power of Charles Sidlinger to alienate it to their prejudice; and we are satisfied that this instruction was correct. The jury seem also to have found that the donation was made in the last sickness of the deceased, that the note and mortgage were actually delivered over at the time, and with the consent of the husband of the donee.

But it is urged that the witnesses who were admitted to testify in the cause for the defendants, after filing releases, should have been excluded. To us it seems, that, after filing their releases, if they had any interest, it was in favor of a recovery on the part of the plaintiff. They had released all their claims excepting to a distributive share of what the plaintiff might recover. Their only interest, then, was that he should recover.

Judgment on the verdict.

DANIEL F. HARDING *versus* GEORGE W. BUTLER.

By the provisions of the poor debtor act of 1839, c. 412, the oath should not be administered to the debtor, who has on his examination disclosed "any bank bills, notes, accounts, bonds, or other chose in action," until he has performed all the duties which the statute requires of him, one of which is to choose an appraiser, "to appraise off sufficient property thus disclosed to pay the debt."

And in such case, where the debtor is not entitled to have the oath administered, if the justices proceed and administer it, it is illegally taken and wholly inoperative, and will not be considered as a performance of the condition of the bond.

And if the parties, in the suit upon the bond, submit the case for decision upon an agreed statement of facts, which does not show that an appraisement was made, such agreement must be presumed to state all the facts material to a correct decision of the case; and the Court cannot imply that any appraisement was made.

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

Debt on a poor debtor's bond, given to procure the release of Butler from an arrest on an execution in favor of the plaintiff, having as the condition thereof, that Butler should within six months from the date cite the creditor, and should appear before two justices of the quorum, and submit himself to examination, make disclosure of his business concerns and property and abide the order of the justices thereon, or take the oath prescribed by the statutes for the relief of poor debtors, or pay the debt, costs, interest and fees, or be delivered into the custody of the jailer. The facts were agreed.

Butler duly cited the plaintiff before two justices of the quorum, and within the six months made a disclosure, from which it appeared that he had notes to the amount of five hundred dollars, given for a farm sold by him, and that he had no other property. The plaintiff is to be considered as objecting to the admissibility of this disclosure. The justices thereupon decided that Butler was entitled to have the oath prescribed by the statute administered, and they did administer it, made the record of their doings, and made the certificate prescribed by the statute. These proceedings were within the six months,

and no objection is made to any of the proceedings, excepting to the decision of the justices that the oath should be administered, and to the administering of it. The defendant relies on a performance of the condition of the bond. If the Court should be of opinion, that the justices were authorized to administer the oath, the plaintiff is to become nonsuit; otherwise the defendant is to be defaulted, and judgment rendered for the plaintiff according to law.

The District Judge decided that the action could not be maintained, and the plaintiff filed exceptions.

Harding, *pro se*, contended that as the debtor disclosed property to the value of five hundred dollars, the justices had no authority to administer the oath, and that it was a void act. The performance must be legal, or it is no performance. By the statute of 1839, c. 412, § 2, when property is disclosed, the oath is not to be administered, but the property is to be appraised, in manner there prescribed, to discharge the debt.

G. Abbott, for the defendant, contended that one of the alternative conditions of the bond had been performed by the administering the oath by the justices. It is said that the justices had no power to administer the oath. The justices have the power to administer the oath, or to withhold it. Their record and certificate are the proper evidence. That the oath was rightly administered, has been settled by a competent jurisdiction, the justices, and their decision is final and conclusive. *Avery* v. *Betts*, 3 Fairf. 415.

The statute of 1839 does not prohibit the justices from administering the oath. The plaintiff might have taken the proper mode to have had the notes appraised, if he had chosen, and his neglect cannot take away the right to administer the oath. But here it does not appear, but that an appraisal was made.

The opinion of the Court was drawn up by

Shepley J. — This suit is upon a poor debtor's bond and is presented for decision on an agreed statement of facts. The act of 1835, c. 195, provided, that a debtor arrested or im-

prisoned on execution issuing on a judgment in a civil suit might give bond conditioned, that in six months he would cite the creditor and submit himself to examination and take the oath prescribed, or pay the debt, interest, costs and fees, or be delivered into the custody of the jailer within said time. And the tenth section provided for his discharge from the commitment upon proper proof, that he had taken the oath.

The supplementary act of 1836, c. 245, § 7, substituted another oath for that required by the former act. That oath appears to have been so framed as to allow the debtor to be discharged, when he disclosed truly the state of his affairs, although he disclosed, that he had property sufficient to pay the debt. And no provision was made by which the creditor could obtain satisfaction of his debt from the property disclosed, if the same consisted of choses in action, or other property not liable to be seised and sold on execution.

The second section of the act of 1839, c. 412, appears to have been designed to remedy this evil by providing, that when the debtor should disclose "any bank bills, notes, accounts, bonds, or other choses in action, or any property not exempt by law, which cannot be come at to be attached," three disinterested men should be selected, in case of disagreement between the creditor and debtor in appropriating the property to the payment of the debt, and that they should under oath appraise off sufficient property thus disclosed to pay it. The act then declares "and in case the creditor shall not appear at the disclosure of said debtor, or appearing shall refuse or neglect to choose an appraiser, the justices shall appoint a man for him to appraise such property as is disclosed as aforesaid."

It was not the intention to permit the oath to be administered to the debtor until he had performed all the duties, which the statute required of him. One of these was to select a person to make such appraisal. And the creditor was entitled to have the appraisal made, that he might voluntarily receive the property in payment of his debt, if he thought proper to do so. Whether the provision so far as it attempts

to discharge his debt without his consent be constitutional is not now the subject of inquiry.

It is said in argument for the defendant, that there is no evidence, that the notes disclosed were not appraised. The agreed statement does not show, that any appraisement was made, and such agreement must be presumed to state all the facts material to a correct decision of the case. It is on those facts, that the parties submit the case for decision.

Again it is said, that the defendant has performed one of the alternatives named in the condition of his bond by taking the oath. The answer to this argument is, that it was illegally taken, and that it was therefore wholly inoperative. He was not entitled to have the oath administered, until after an appraisement had been made, and he cannot plead an illegal act as a performance of the condition of his bond; and must be regarded as in the same position as if he had not attempted to take the oath.

Exceptions sustained and
judgment for the plaintiff.

THOMASTON BANK *versus* ELIZABETH K. STIMPSON.

A deed of land, absolute and unconditional in its terms, but made, as appears by minutes of the grantees in managing their own affairs, to secure the payment of a loan of money, is not by our statutes a mortgage; and when the time stipulated for the payment of the money has elapsed, and payment has not been made, the estate becomes absolute in the grantees; although a Court having general equity jurisdiction might regard such a conveyance as a mortgage.

Banks, incorporated under the laws of this State, may receive real estate as security for a loan, or in payment of debts due.

And if land be conveyed to a bank as collateral security for the payment of money, and the title has become absolute in the bank by the neglect of the grantor to make payment at the stipulated time; and afterwards, at the request of the grantor, the bank conveys the land to a third person, on payment by the latter of the amount due; this is not a redemption of the property, so as to restore the title to the original grantor.

And if a purchaser, *bona fide*, of the grantee of the bank without the knowledge of usury in any transaction in relation thereto, brings his writ of entry, demanding the land, against one who was not a party or the legal representative of a party to the usury, it is not competent for the latter to set up as a defence, that there was usury in the transactions between the person requesting the conveyance and the grantee of the bank.

The liability of one who had been a stockholder in the bank, but who had sold out his interest three months before he was offered as a witness for the bank, is too remote, uncertain and contingent to render him incompetent.

WRIT of entry to recover a tract of land in Thomaston. The demandants read in evidence an absolute and unconditional deed of warranty of the demanded premises from Elizabeth Sawyer and Brown Stimpson to themselves, dated March 10, 1828. The consideration of the deed was $1075. It appeared during the trial, from the stockholders' minutes under date of March 19, 1828, introduced by the tenant, that the land was received by the bank as collateral security for the payment of the note of Mrs. Sawyer and Stimpson to the bank for $1075. There was also read in evidence a deed of the same premises from the bank to S. E. Smith, dated June 4, 1838; a deed from S. E. Smith to John G. Paine, dated Sept. 3, 1838; a deed from John G. Paine to the bank, dated June 5, 1839, for the consideration of $1451,76. The actual consideration of the last deed was to indemnify the bank, as far

as it would, for his deficiencies as their cashier. The grantee of the bank had given Stimpson a bond to convey the land to him on the payment of a certain sum; Stimpson assigned the bond to John Paine, John Paine assigned it to John G. Paine, and on his paying Smith the amount due him, he conveyed to J. G. Paine. In one of these intermediate transactions the defendant contended there was usury, and the demandants that there was not. The tenant was the widow of Brown Stimpson and the daughter of Mrs. Sawyer. A witness was called by the demandants who had been a stockholder of the bank, and director, but had sold out his stock three months before he was called to testify. He was objected to as interested, but was admitted by SHEPLEY J. presiding at the trial. The Judge ruled, that as the defendant was not a party to any contract between B. Stimpson and the grantee of the demandants, and was not making the defence as his legal representative, she could not set up usury as a ground of defence. The defendant consented to be defaulted, subject to the opinion of the Court on the whole case.

Holmes, argued for the defendant, and among other objections to the maintenance of the action urged these: —

The whole transaction between Stimpson, Mrs. Sawyer and the demandants was a loan, and security therefor, and of course in law was a mortgage. 2 Black. Com. 296, and notes; 9 Wend. 296; 2 Mass. R. 493; 3 Mass. R. 138; 5 Mass. R. 109; 1 Salk. 192; 1 And. 196.

When the money was paid, the mortgage was discharged, and the land was revested in Mrs. Sawyer, the original owner. When the redemption was made, the equity did not go to Stimpson, but to Mrs. Sawyer. 1 Vern. 476; 1 Johns. Ch. R. 1; 1 Peere Wms. 268; 2 Atk. 494; Powell on Mort. 31; 2 Munf. 40; 5 Mass. R.117; 4 Johns. R. 186; 8 Mass. R. 157; 2 Desaus. 570; 2 Vern. 84; 1 Cow. 311.

The bank had no legal title to the demanded premises. The deed from Mrs. Sawyer and Stimpson to the bank was an absolute deed. If any thing, it is a purchase of real estate, and the deed was read as such. It was not a purchase for

banking purposes or for the convenient transaction of their business. They purchased this property, as appears by their own records, as a pledge for the payment of money, and in case of failure, to sell it, pay themselves, and return the surplus. Such a transaction is void as against the policy of the law, and the express terms of the charter of the bank. If the bank cannot hold, they cannot transfer the title to others, and when it comes back to them, they are in their original position. The deed to the bank was absolutely void, and the bank can derive no title under it. The powers of corporations are mere statute grants, and nothing can be done by them beyond the authority granted to them. The charter of the demandants does not authorize them to purchase lands for such purposes. To decide that they have more power than the charter gives them, is but judicial legislation.

The transaction was usurious, and as heir to Mrs. Sawyer, the tenant may set up this defence.

The witness was improperly admitted. Although he had sold out his shares, his liabilities to make good all deficiencies of the bank remained. He was directly interested, therefore, to increase the funds of the bank.

Ruggles and *M. H. Smith*, for the plaintiffs, were stopped by the Court.

The opinion of the Court was drawn up by

WHITMAN C. J. — The deed of Mrs. Sawyer and Brown Stimpson was made to the bank absolute and unconditional in its terms. It is contended, by the counsel for the defendant, that the bank could not take and hold real estate by a deed of this description, other than for its own accommodation and particular use. It appears on the minutes of the proceedings of the directors of the bank, sometimes called their records, that the deed was made to secure the payment of a loan, obtained by said Brown Stimpson of the plaintiffs; and no question is in fact made but that this was the real object of the transfer. No doubt can be entertained but that a Court, having general equity jurisdiction, would regard such a con-

veyance as a mortgage. But the statute of this State, concerning mortgages, has entrusted the Courts with very limited powers on this subject; and is specific as to the cases in which a right of redemption shall remain to the grantor, beyond the time stipulated in the mortgage. In the case of mortgages of this description no such right is saved to him; and when the time, stipulated for the payment of the money, had elapsed, and payment had not been made, the estate became absolute in the grantees, so that they might alienate the estate to reimburse the amount of the loan.

By the statute of 1831, c. 519, § 2 and 6, banks were authorized to hold real estate for their own accommodation; and such other real estate as they might "hold on mortgage, receive on execution, or take as *security* for, or in payment of any debts." The real estate in question was, in the first instance, received as security for a loan, and finally in payment, for a debt due. These purchases, in both instances, would seem to be within the very terms of the statute. No question therefore would seem to remain, but that the bank conducted, in both instances, within the scope of its legitimate powers.

In the sale of the estate the plaintiffs appear to have conducted with entire good faith. They allowed Brown Stimpson to find a purchaser, and to secure to himself all possible benefit from the sale, beyond the amount requisite to replace the money borrowed; and he received from the purchaser a stipulation to convey the land to him, within a certain term agreed upon between them, upon his paying to the purchaser the amount paid to the plaintiffs, being only the amount due them, together with the amount of a further loan obtained by him upon the same security, with interest on both sums.

The counsel for the defendant contends, that this transaction was tantamount to a redemption of the estate from the plaintiffs; and that it thereupon revested in Mrs. Sawyer, who was the real owner of it in fee at the time she joined her son-in-law, Brown Stimpson, in a conveyance of it to the plaintiffs. But we do not perceive any ground upon which it can be so

considered. The estate had become absolute in the plaintiffs, and irredeemable by our law. The grantors were unable to pay the amount for which it had become forfeited. It was sold and conveyed by the plaintiffs to a stranger to the original transaction, with the approbation, and indeed by the procurement, of Brown Stimpson, and without the slightest complaint, so far as appears, on the part of Mrs. Sawyer. The vendee of the plaintiffs therefore must be deemed to have acquired a perfect title to the estate.

The counsel for the defendant further contends, that the transaction, between Brown Stimpson and the plaintiffs' vendee, was usurious and therefore void. How that may have been it seems to us unnecessary to inquire. The estate must have vested in the vendee, and could not have been divested out of him by any usurious transaction between him and Brown Stimpson. Being thus vested, he conveyed it to one Paine, to whom Brown Stimpson had assigned his obligation for a conveyance to himself; and subsequently Paine, as cashier to the bank, having become a defaulter, conveyed the same to the plaintiffs, in part payment for the amount found to be due from him. It is not pretended that Paine or the plaintiffs were conusant of the supposed usurious transaction, or had any connection with it. We cannot doubt, therefore, that, in the hands of the plaintiffs, the estate is entirely clear of any taint of that kind.

It is further objected, that some of the facts in the case were proved by incompetent testimony, which, though objected to, was admitted by the Court. It is contended, that Edwin Smith, from whom this testimony was derived, had an interest in the event of the suit. It appeared that he had been a stockholder and director in the bank; but, some few months before he testified, he had sold his stock, and must thereupon have ceased to be a director. It was then contended, that he stood liable, for the term of one year after the sale, to be called upon to the amount of his stock, so sold, for the debts of the bank, in case of the mismanagement of the directors, and their inability to reimburse the loss, &c. This liability was re-

mote, uncertain and contingent. It depended upon such a loss of the stock, by the mismanagement of the directors, as rendered it impossible for the creditors of the bank to obtain remuneration therefrom, and upon the further contingency, that the directors should be unable to respond therefor; and still further, that a suit should have been commenced within one year, next after the sale of the stock, by any such creditor. But there is a still more incontrovertible answer to the defendant's exception to the ruling of the Judge in this particular. The statute of 1839, c. 418, § 1, and the Revised Statute c. 77, § 76, both provide, that a stockholder, so liable, may nevertheless, be a competent witness in any case in which the bank may be interested.

On the whole, it seems to us, that the default must remain undisturbed; and that judgment must be entered thereon.

Mary Mellus *versus* William Snowman.

Where the wife became entitled to the premises, as heir at law, during her coverture, and her husband conveyed his life estate therein, and his grantee continued in possession for more than thirty years, the husband still living; she may, after the decease of her husband, make an entry and recover the land.

Thus, where the demandant, on the death of her father, in 1800, became entitled to one fifth of the demanded premises, as an heir at law, she then being the wife of H. M. who soon afterwards conveyed "*his right to the estate, and gave a deed of it in which his wife did not join;*" and his grantee entered into possession, and he and those claiming under him, of whom the tenant is one, have since continued in possession; and in 1832 the husband of the demandant died, and in 1840 she made an entry, and brought this suit; *It was held*, that by the deed of the husband his grantee could hold his life estate; that the demandant could not lawfully enter or interrupt this possession during the life of her husband; that her rights were not barred by the statute of limitations; and that she was entitled to recover.

But if the demandant and her husband had been disseised during the coverture, they would have had a right to enter immediately upon the disseisor, and from that time the statute of limitations would have commenced running against the husband, and against the wife also.

If a division of the real estate of an intestate among the heirs be commenced by virtue of proceedings in the Probate Court, but do not appear to have been accepted or recorded in that Court, and the records are apparently entire, and no loss of any papers of the probate office is shown, and no assent of one of the heirs at law appears; the division will not be binding upon such heirs, although an occupation by others according to it has continued for more than thirty years.

Writ of entry, demanding a tract of land in Georgetown. With the general issue, the tenant put in a brief statement, alleging that he, and those under whom he claimed, one of whom was Benjamin Riggs, had held the premises peaceably and quietly for the period of forty years next before the bringing of the suit, and relied upon the statute of limitations.

Thomas Stephens owned a farm in Georgetown of which the demanded premises were a part, and died seised thereof, intestate, in the year 1800, leaving five children as his heirs, of whom were the demandant and Charles Stephens. Before her father's death, she was married to Henry Mellus, and remained

covert until his death, in 1832, less than eight years before the commencement of this action. Before the suit was brought she made an entry into the premises.

Soon after the death of his father, Charles Stephens, as the report of the case states, "took possession of the part of the farm afterwards set off, or attempted to be, to him and to the plaintiff, and, as he testified, purchased of Henry Mellus his right to the estate for forty dollars, and took a deed of it of him, in which his wife did not join, and that the deed is lost." On Sept. 6, 1804, Charles Stephens conveyed to Benjamin Riggs the tract of land in his possession, and the same has ever since been occupied under Riggs and his grantee unmolested until the entry of the demandant.

On Sept. 12, 1806, a warrant issued from the Probate Court for the division of the estate of Thomas Stephens among his heirs at law. The commissioners were sworn, and made, in writing by them signed, a division of the estate, bearing date Jan. 15, 1807, which was found on the Probate files, but was not recorded, and there is no memorandum to be found, that it was ever acted upon or accepted in the Probate Court. Upon this paper was this memorandum. "The undersigned heirs have consented to the division." This was signed by "Benjamin Riggs for Charles Stephens and Henry Mellus," and by the other three heirs. The occupation by the heirs, and those claiming under them, has corresponded with that return by the commissioners. The demanded premises are the same set off to Henry Mellus.

If upon these facts the demandant is entitled to recover, the tenant is to be defaulted, and judgment to be entered for such portion, as she may be entitled to recover; and if not entitled to recover, a nonsuit is to be entered.

Whitmore, for the demandant, contended, that she could not be disseised during the life of her husband. Her husband had a life estate commencing at the same instant as her reversionary right, and she had no right of entry during its continuance. There can be no possession adverse to the remainder man during the continuance of the life estate. *Jackson* v.

Sellick, 8 Johns. R. 202; *Jackson* v. *Cairns*, 20 Johns. R. 301; *Jackson* v. *Schoonmaker*, 4 Johns. R. 390.

But during the continuance of the life estate, the husband sold to Charles Stephens, and he to Riggs, under whom the tenant claims. A life estate only passes by the deed, whatever its form. Stearns, 9, 11, 47. Where a rightful title to the occupation is disclosed, the tenant cannot set up a title as acquired by wrong. 12 Johns. R. 365; 10 Johns. R. 446; *Stearns* v. *Godfrey*, 16 Maine R. 161; *Tinkham* v. *Arnold*, 3 Greenl. 120; 7 Wheat. 59. Riggs acknowledged the existence of the reversionary interest by signing for Henry Mellus alone. On the death of her father, the demandant took but a limited fee, the right to the land on the death of her husband.

The several occupations according to an illegal partition may operate as a partition among the tenants in common. 1 Cowper, 214, 217; 4 Johns. R. 202; 9 Johns. R. 270; 13 Johns. R. 367; 16 Maine R. 25; Greenl. on Ev. 24, citing 1 N. H. Rep. 310. But if not entitled to recover the whole, we may one fifth.

Mitchell, on the same side, cited Fitzh. N. Br. 211; Stearns, 326; 4 Coke, 8; Co. Lit. 342; *Butler* v. *Howe*, 13 Maine R. 397; Plowden, 363, 465; Cro. Car. 23; 2 Kent, 130; *Wallingford* v. *Hearl*, 15 Mass. R. 471; *Bruce* v. *Wood*, 1 Metc. 542.

Groton, for the tenant, said that the Mass. Stat. of limitations of 1781, and ours of 1821, c. 62, were the same, and therefore it was immaterial which was to govern. The demandant and her husband could have enforced their right at any time, but they have laid by for twenty years since the right accrued, and for an additional ten years, and more, without enforcing their rights, and the statute has become a complete bar. Where a person is a married woman, when her right accrues, ten years additional only are given to her by the statute to enforce her right. When the statute of limitations has once commenced running, no subsequent event can interrupt its progress, and after twenty years no writ of formedon can be supported. *Dow* v. *Warren*, 6 Mass. R. 328; 4 Dane, c.

114, Title, Remainder and Reversion. There is no more difficulty in this case, than there would have been, had the marriage taken place one year after her father's death instead of one year before. The statute is alike a bar in both cases.

Henry Mellus, by his deed of a part of the land held in common by metes and bounds, conveyed nothing to Riggs, not even a life estate. Jackson on Real actions, 250. The tenant and those under whom he claims, have occupied the land for forty years, claim the fee against every one, and the statute forbids his being disturbed.

Mitchell replied.

The opinion of the Court was drawn up by

Shepley J. — The demandant at the death of her father, Thomas Stephens, in the year 1800, became entitled to one fifth part of his estate. The possession of her brother Charles, after the father's death, does not appear to have been adverse to her or to the other heirs at law. As one of them he had a right to enter, and he soon after purchased of Henry Mellus, the husband of the demandant, "his right to the estate, and took a deed of it of him, in which his wife did not join." Charles Stephens conveyed to Benjamin Riggs, in 1804, who, in 1827, conveyed to the tenant and another. The estate has been occupied under these conveyances ever since the execution of the deed by the husband of the demandant. She was married to Henry Mellus before the death of her father, and continued under coverture until the year 1832. Since the death of her husband, she has caused an entry to be made upon the premises demanded. It is insisted, that her rights are barred by the statute of limitations. The statute, c. 62, § 3, provided, that no person, unless by judgment of law, should make entry into lands but within twenty years next after the right or title to do so first descended or accrued. And it allowed a *feme covert* ten years after the expiration of the twenty years. When did the right of the demandant to make entry upon these premises first accrue? Her husband

was entitled to the usufruct during life and could convey the the same. The entry of his grantee, Charles Stephens, was rightful, and he could legally convey to Riggs, who was entitled to possess and occupy the estate conveyed to him. The attempt of Charles Stephens to convey the whole fee did not deprive his grantee of the right to hold so much of it as he might legally convey. The demandant could not lawfully enter or interrupt that possession during the life of her husband. And she has entered within twenty years after her first right of entry accrued, and is entitled to recover. And such was the decision in the case of *Bruce* v. *Wood*, 1 Met. 542.

If she and her husband had been disseised during the coverture, they would have had a right to enter immediately upon the disseisor and from that time the statute would have commenced running against the husband; and against the wife also, as decided in the case of *Melvin* v. *The Proprietors of Locks and Canals on Merrimack river*, 16 Pick. 161. In that case it is said, "it is true, that if Kittridge [the disseisor] had held under the husband, the wife would have had no right to enter."

The division of the estate among the heirs, commenced by virtue of proceedings in the Court of Probate, does not appear to have been completed and accepted in that court, so as to become binding upon the heirs as a partition according to the statute. In the case of *Hathaway* v. *Clark*, 5 Pick. 490, the Court said, that "as the records apparently are entire and no loss of any of the papers in the probate office is suggested, we cannot, even after the lapse of more than thirty years, presume that any decree passed, or that any notice was given, which does not appear." There is no proof in this case of any loss of papers or records. Those who assented to it in writing and their grantees by the continued occupation accordingly may be bound by it. Riggs professes to sign for the husband of the demandant, but there is no reason to conclude that he had any other authority, than what he had acquired by the conveyances of his interest. And there is no assent to it by any one entitled to represent the rights of the demandant or to bind

her. No one can have acquired a title as against her by disseisin, and there is no legal division. She is therefore entitled to recover one undivided fifth part of the premises demanded.

WILLIAM K. BARNARD *versus* CUSHING BRYANT *& al.*

When the Revised Statutes went into operation, all the prior Statutes, which had been revised, were repealed, with certain exceptions and reservations as to crimes and vested rights.

All prior statutes for the relief of poor debtors, were repealed by the Revised Statutes.

If the time fixed in the notice for the examination and disclosure of the debtor, and for his taking the poor debtor's oath, was after the Revised Statutes went into operation, the proceedings should conform to those statutes throughout; the creditor has the right to select one of the justices, and the debtor has no right, in any event, to select more than one.

And if in such case the creditor claims the right to select one justice, and it is denied to him, and two justices, both selected for the purpose by the debtor, proceed in the examination and administer the oath, the proceeding is *coram non judice* and void.

In a suit upon the bond, where such proceedings only are relied upon as a performance, the defendants have not the right to have the damages assessed by a jury, in manner provided in the Revised Statutes, c. 115, § 78, but judgment is to be rendered in conformity to the provisions of the Revised Statutes, c. 148, § 39.

DEBT on a poor debtor's bond dated February 16, 1841. It was contended by the defendants, that the condition of the bond was performed by legally citing the creditor, disclosing the state of his affairs and taking the poor debtor's oath, in manner provided by law. Several exceptions were taken to the proceedings, in behalf of the plaintiff, but the decision of the Court rested wholly on the consideration of one of them. The facts and arguments in relation to the others are therefore omitted. The facts in relation to this point are stated in the opinion of the Court. It appeared by the papers, that the counsel for the creditor, after claiming the right of the creditor to select one of the justices, and after it had been denied, and after the justices selected by the debtor had pro-

ceeded in the examination, " and not waiving any legal objections," proposed certain interrogatories to the debtor. It was agreed, that if the proceedings constituted a legal defence, a nonsuit was to be entered; but otherwise judgment was to be rendered for the amount of the legal liability of the defendants; unless the Court should also be of opinion, that the defendants are entitled to have the plaintiff's damages assessed by a jury, in which event the case was to be sent to a jury.

H. C. Lowell, for the plaintiff, contended that the creditor should have been permitted to select one of the justices to take the disclosure of the debtor, and decide upon his right to take the oath, agreeably to the provisions of the Revised Statutes, c. 148, § 46. Because this right was denied, the justices had no power to act, no jurisdiction, and their proceedings are void.

The Revised Statutes had long before been published, and had been in operation five days before the attempt to take the oath. It might be sufficient to say, that whether the Rev. St. or the preceding ones are to govern, we are equally entitled to recover. If the former, the proceedings are void, because we were denied the right to select an appraiser; if the latter, then we should also recover, because the oath provided by those statutes was not administered, but a different one.

All the statutes in relation to poor debtors, before existing, were repealed by the Revised Statutes; and those alone regulated the rights of the parties. As the course pointed out in those statutes to constitute the Court, or tribunal, to act in the matter was not pursued, the justices had no power to act, and any adjudication made by them is entirely void. *Smith* v *Rice*, 11 Mass. R. 507; *Putnam* v. *Longley*, 11 Pick. 487; *Knight* v. *Norton*, 3 Shepl. 337; *Granite Bank* v. *Treat*, 6 Shepl. 340.

Putting interrogatives, reserving all rights, cannot make illegal proceedings valid. 1 Wils. 420; 1 W. Black. 451.

The defendants are not entitled to have the damages estimated by a jury under the Rev. St. c. 115, § 78. Here was no Court qualified by law to administer any oath, and of course,

no oath was administered according to law. To enable the debtor to have the damages assessed by a jury, the oath should have been administered by magistrates competent to act, and some error in the intermediate proceedings should have existed. Judgment should be rendered agreeably to the provisions of the Revised Statutes, c. 148, § 39. *Stone* v. *Tilson*, argued in this county, 1841.

Groton, for the defendant, said that the statutes of 1835 and 1836, on the subject, became dead letter matter, after July, 1841. The oath was administered five days after the Revised Statutes took effect. That provided by those statutes was therefore rightly administered.

The justices must be selected before the time for the examination of the debtor, and may be, as soon as notice is given. The law will not presume, that any act was wrong, until it is shown to be so. In the absence of proof, it will be presumed that the selection was made at least six days before the examination, when the debtor had by law the right to select both.

But the Rev. St. c. 148, § 46, do not necessarily give the right to the creditor to select. One justice *may be* selected by the creditor, or in some other mode.

The law makes the magistrates judges of the whole matter. They are to determine all these questions, and their decision is made final and conclusive. If the justices err in judgment, the sureties of a poor debtor, who sign his bond from motives of humanity, are not made by the legislature responsible for the payment of the large debt of a man wholly destitute of property. *Churchill* v. *Hatch*, 5 Shepl. 411.

Had there been any error in the selection of the justices, the act of the plaintiff in going into the examination of the debtor before them, and putting interrogatories, was a waiver of all objections.

However, in any view of the case, the damages, if any, are to be assessed by a jury. If there be any error in the proceedings, the damages are to be assessed by a jury in all cases where the oath has been taken, and the debtor thus shown to

be destitute of property. Such is both the letter and spirit of the law.

The opinion of the Court was drawn up by

WHITMAN C. J. — The bond declared upon was given by the defendants, conditioned that said Cushing Bryant, then under arrest on execution for debt, should, among other alternatives, within six months thereafter, cite the plaintiff, the creditor named in the execution, and disclose the state of his affairs, as by law provided, preparatory to the taking of the poor debtor's oath. The debtor caused the plaintiff to be cited to appear, &c. on the fifth day of August, 1841; and certain magistrates, all selected by the debtor, appeared at the time, for the purpose of attending to his examination and disclosure; and in case it should thereupon be thought proper, to administer to him the oath prescribed by law. The counsel for the plaintiff also attended; and insisted that, under the provisions of the Revised Statutes, ch. 148, § 46, the plaintiff had a right to select one of the magistrates, and stated that he had one there for the purpose of attending to the business, in conjunction with one to be named and selected by the debtor. To this the debtor objected. Whereupon the two so selected by the debtor proceeded to take the examination and disclosure, and finally administered the oath prescribed in the Rev. Stat.

The question is, was this a procedure warranted by law? The Rev. Stat. went into operation on the first of August, 1841. All the prior statutes, which had been revised, were repealed, with certain exceptions and reservations as to crimes and vested rights. Proceedings like those in question do not fall within either of the descriptions named; and, in fact, the magistrates must have so understood it; for they administered the oath prescribed in the Rev. Stat. And we think the proceeding should have conformed to those statutes throughout. None other, in reference to this subject, were in force. It was clearly the right of the creditor to have selected one of the magistrates; and the debtor had no right, in any event, to have selected more than one of them. The proceeding there-

fore was wholly *coram non judice* and void. The debtor, therefore, cannot be regarded as having performed the alternative in question, and not having performed either of the others, the defendants must fail as to this point of their defence.

It is then contended, that, if such be the case, they have a right to have the cause submitted to a jury, under the provision contained in the seventy-eighth section of ch. 115, of the Rev. Stat. The language there used would, according to its literal import, seem to embrace this case; and the literal import is not to give place to a construction differing from it, but upon palpable and satisfactory grounds. It may well be doubted whether the Legislature, if, at the time of this enactment, it had foreseen, that their language would have applied to a case like the present, would not have provided against such an application of it. If this case is to be submitted to the jury, debtors, it may be feared, will be encouraged in all cases, where the right to a discharge may be doubtful or hopeless, to take a similar course. In that way the penalty of the bond would be saved; and the debtor would have a chance to try an experiment upon the sympathies of a jury. Yet it must be confessed, that the same would seem to have been the case, under the operation of the statute of 1839, of which the section in question is but a re-enactment. Under that statute the debtor might, instead of selecting two justices of the quorum, the only legal and competent tribunal, have selected two justices *quorum unus*, and the result would have been, that the penalty of the bond would have been saved, and the cause would, on motion of the defendants, have been referable to a jury to say whether the defendants should be subjected to the payment of any thing or not, and if any thing how much.

Since, however, the two provisions are now incorporated into the same statute, it is reasonable to suppose it was intended, that the latter provision should not be rendered wholly nugatory by the former. It cannot well be believed, that the Legislature intended to open a door to fraudulent contrivances; and provide the means whereby a debtor, by a seeming ad-

herence to the literal import of language, should escape from a liability, which he had voluntarily incurred.

According to the agreement of the parties, judgment must be entered for the plaintiff in conformity to the Rev. Stat. ch. 148, § 39.

BENJAMIN STINSON *versus* WILDES P. WALKER.

Where the seller sends to the purchaser a different article from that contracted for, and on learning the fact, directs it to be sent back by the first ship, and it is sent coastwise in conformity with the directions, but is lost at sea; the purchaser may recover back the consideration money paid, although no bill of lading was taken, or letter of advice sent.

Neither the st. 1821, c. 85, nor the Rev. St c. 133, authorizes the taking of a deposition during the sitting of the Court, to be used at that term, because the deponent wishes to go out of the State.

Where a Judge, in his discretion, grants a commission to take a deposition in term time, because the witness is about to go out of the State, with the express reservation that the admission of the deposition should be subject to the discretion of the Court, he has the power to reject the deposition, when offered in evidence.

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

Assumpsit to recover back of the defendant $20,10, the price paid him by the plaintiff for a small cask of wine. The plaintiff kept a store in Bath and the defendant one in Boston. Some months after the wine had been received by the plaintiff at Bath, the defendant was there, at the store of Stinson, and was there notified, that the wine was bad. Walker examined it, and said it was not the wine he intended to send, and directed the plaintiff to return it. A witness, called by the plaintiff, testified, that the defendant directed the plaintiff to send the wine back by the first opportunity, and that it was sent about two weeks afterwards by a Cathance packet. The master of the packet, also called by the plaintiff, testified, that the plaintiff put the wine on board his vessel, verbally consigned to the defendant at Boston; that his vessel was called the "Eagle of Bath," and was a regular packet between Cathance and

Boston, always touching at Bath; that the wine was put on board, when she touched at Bath on her way to Boston; that before her arrival at Boston, a severe storm came on, whereby his vessel, with the wine on board, as well as about thirty other vessels, was lost on Cape Ann; and that he went to Boston, and notified the defendant of the loss within four days after it happened. The defendant called a witness, who testified, that in a conversation between the parties after the loss, the defendant said he ordered it sent back by a Bath vessel. No letter of advice was sent by Stinson to Walker, when the wine was shipped back, and no bill of lading was taken.

The defendant contended that the plaintiff could not recover because no bill of lading was taken, and no letter of advice of the shipment was sent. The Judge ruled that those acts were not necessary.

The jury were instructed, that the plaintiff must prove, that the wine had been sent within a reasonable time, and by such mode of conveyance as the defendant had prescribed; that these were questions for their decision; although it was his own opinion, that this was such a mode as would answer the defendant's directions.

A few days before the case came on for trial, the clerk of the defendant was in attendance as a witness for the defendant. The counsel for the defendant several times moved for a commission to take the deposition of the witness, and at length the Judge appointed a commissioner to take the deposition, giving notice and certifying the cause; but the appointment was made with the express reservation, that the admission of the deposition should be subject to the discretion of the Court. The caption stated, that the deponent was about to leave the State and that the plaintiff was notified. The deposition was objected to on the part of the plaintiff. The defendant offered to prove, that the deponent had left the State. The deposition was rejected by the Judge.

The verdict was for the plaintiff and the defendant filed exceptions.

J. S. Sewall, for the defendant, contended that the plaintiff was bound to take a bill of lading, and to notify the defendant of the shipment of the wine. Custom among merchants requires it; and unless it is done, the consignee is not able to effect insurance upon the goods consigned to him, not knowing by what vesssl they are sent, or when they were shipped.

The deposition should have been admitted. The commissioner certified that the deponent was about leaving the state, and the defendant offered to prove, that he had left it. The rule is believed to be, that when these facts are shown, the deposition should be admitted. 1 Stark. Ev. 263; Roscoe on Ev. 58. The plaintiff too waived all objections, which otherwise he might have had, by appearing and putting interrogatories. 16 Pick. 401.

The reservation of the right to admit or reject the deposition, amounts to nothing. After an unqualified commission has once issued, and the deposition has been taken; and the deponent in consequence of it has left the State, the Court cannot reject the deposition, unless upon legal grounds. No *legal* objection was urged against the admission, and none existed.

Randall & Whitman for the plaintiff.

The laws applicable to freighters are the same as to common carriers, with the exception, that ships are exempted from certain risks, to which other common carriers are liable. If the absence of a bill of lading would at all vary the liability, it would only be to increase it by the absence of exemptions, usually inserted in a bill of lading. Holt on Shipping, 359, 377. It is not the custom to take bills of lading in shipping small articles coastwise, but the reverse of it.

No letter of advice in this case is necessary. The wine belonged to the defendant, having been wrongfully sent to the plaintiff, who was not bound to be at the expense or risk of returning it. Special instructions were given, and the jury have found that they were followed. A letter of advice would be useless, as the vessel would ordinarily arrive as soon as the

letter. No one would be at the expense of insuring this very small quantity of worthless wine.

The deposition was properly rejected. If taken under the statute, the cause of taking is clearly insufficient, as that authorizes the taking only where the deponent is about to go out of the State before the sitting of the Court to which it is returnable. If taken under the rule of Court, the reasons must be satisfactory to the Court. In this case they were not. It was for the Court, in its discretion to determine this, and it was a just and discreet exercise of it in this case.

The opinion of the Court was drawn up by

TENNEY J. — The Judge instructed the jury that it was not incumbent on the plaintiff, when he put the cask of wine on board the vessel at Bath, to take from the master a bill of lading, or to advise the defendant by letter of what he had done. Whatever may be the usages of factors and general commercial agents in this respect, when they make shipment of goods to their principals, we are not satisfied that the plaintiff here failed in his duty. His agency was of a special character, consisting of power to do a single act, and the jury have found that he did all, which the terms used by the defendant in his directions required. But had it been otherwise, we do not perceive, how the exceptions to this part of the Judge's charge can be sustained.

This action is to recover the consideration paid by the plaintiff for an article of merchandize, which he never received, but instead thereof, one entirely different and inferior in value, and which he did not use. This the defendant admitted, saying, "it was not the wine he intended to send." It was then the property of the defendant, and he was liable for the amount received for that which he never delivered, and this liability did not depend upon condition, that the wine actually sent was to be returned, for no such condition was alluded to, when the defendant acknowledged the mistake made by him. How then can the rights of the plaintiff, as involved in this action, depend upon the performance of his

duty, when he undertook to put the wine on board a vessel and send it to Boston? His engagement to do this was altogether a different matter, and as independent of the claim now asserted by the plaintiff, as would be a contract to transmit any other merchandize belonging to the defendant.

Exceptions are also taken, that the deposition of Jacob Stanwood, a witness, who had been in attendance at the term of the Court when the action was tried, and wishing to leave the State, was excluded. This deposition was taken under a commission issued by the Court with the express reservation, that it should be subject to the discretion of the Court. The right of a party to use depositions depends upon the statute and the rules of Court. If he bring himself within either, the Court have not the power to exclude them, for they are bound equally with parties by both. Did either authorize the taking and using the deposition in question? The cause certified is, that "the deponent was about leaving the State." Is this a cause for which the statute permits the use of a deposition? By the Revised Statutes, one cause is, when the deponent "is about to go out of the State by sea or land, before the session of the Court," Rev. St. c. 133, § 4. The language of the statute of 1821, c. 85, § 1, is, "or be about to go out of the State and not to return in time for the trial." The terms used in the Rev. Statutes, which are plain and unequivocal, will not embrace this deposition; and as the new law is a revision of the old, we cannot doubt that the alteration was intended. We do not see, that a deposition of one about to go out of the State after the session of the Court commences, can be used with any more propriety, then if taken for a cause not mentioned in the statute.

The 19th rule of the District Court, for the Middle District provides, "that depositions may be taken for the causes and in the manner by law prescribed in term time, as well as in vacation." Here no authority additional to what the law contains, as to the cause, is given. Doubts may be entertained whether the Court had the power to admit this deposition, if objected to.

If our construction of the language in the statute be correct, it was only in the exercise of a discretion of the Judge that this deposition was taken, and if he in that exercise authorized the caption with the reservation of the power to reject the evidence in that form, we do not see why the reservation does not exist in equal rigor with the order for the commission.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC,

ARGUED AT MAY TERM, 1842.

The Northern Bank *versus* Reuel Williams.

If a bank, having discounted an indorsed bill, sends it to another bank for collection, and that bank to a third for the same purpose, by which a demand is made on the acceptor through a notary, who makes his protest and prepares a notice to the indorser, which is sent with the protest back to the second bank; the protest must be regarded as containing notice of the dishonor of the bill, and the keeping them on hand till the second day after the receipt thereof, without forwarding any notice of the contents to the indorser, is an unreasonable delay which discharges his liability as indorser.

Assumpsit on two drafts, or bills, each dated July 2, 1836, drawn by J. P. Lee on R. M. N. Smyth, payable in ninety days from date and to the order of Lee, indorsed by him, by Jesse Aiken, and the defendant, accepted by Smyth and discounted by the plaintiffs. They were afterwards indorsed by the cashier of the plaintiffs and of other banks. Smyth, the acceptor, lived at Bangor. The parties agreed upon a statement of facts, the substance of which will be found at the commencement of the opinion of the Court.

In relation to the point on which the decision rests: —

Emmons, for the plaintiffs, argued, that it was competent for the notary, who made the protest, to prepare and send

the notices to the respective parties. 3 Kent, 107 ; Bayley on Bills, 205, 269. An agent for collection is to be treated in all respects, as to giving and receiving notice as the real holder of the bill or draft. It is not necessary that the bill and the protest and notices, or either, should go together. If the papers are seasonably put into the right post office, with proper directions, it is sufficient. The risk of failure is upon the other party. Bayley, 275; 3 Kent, 108 ; 2 H. Black, 509; 1 Pick. 401 ; 6 Mass. R. 316 ; 15 Maine R. 207. The cashier of the Fulton Bank was entitled to one day to send to the next party to the bill. Bayley, 263 ; *Farmer* v. *Rand*, 16 Maine R. 455. He however did send by the first mail, and that was on the day following.

J. H. Williams, for the defendant, argued that it was the duty of the Fulton Bank to have put the notice of the dishonor of the bill into the post office in season for the next mail after receiving it. This should have been done immediately on the reception of the protest. This is sufficient evidence of the dishonor of the draft, and indeed the best evidence. They were not entitled to retain the notice prepared by the notary a day ; first, because the Fulton Bank were the mere agents of the plaintiffs, and are not to be considered as a party ; and second, because they transmitted no notices of their own, but merely forwarded the notices prepared for their hand by the notary, and sent to them from Bangor. *Freeman's Bank* v. *Perkins*, 6 Shepl. 292 ; 3 Kent, 108 ; 5 Shepl. 365 ; 8 Pick. 51 ; 4 B. & A. 454 ; Chitty on Bills, (8th Am. Ed.) 523 ; 2 Johns. R. 254.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiffs discounted the drafts declared on, and claim to recover the amount of them of the defendant as an indorser of them. He resists payment upon the ground, that he was not duly notified of their non-payment by the acceptor. The facts agreed upon between the parties are, that the drafts were accepted by one Smyth, of Bangor, and indorsed in blank by the defendant ; and were, after

being indorsed by the cashier of the plaintiffs, sent to the Fulton Bank in Boston for collection; and were by the Fulton Bank, after being indorsed by their cashier, forwarded to the Commercial Bank at Bangor for the same purpose; where when at maturity they were, by a notary selected for the purpose, presented to the acceptor for payment; and being dishonored were duly protested. On the third of October, 1836, the day of the protest, the notary prepared notices for the drawer and indorsers; and, on the same day, put them into the post office at Bangor, directed to the cashier of the Fulton Bank in Boston; but were post-marked as mailed on the fourth of the same month. The protest and drafts were enclosed in a letter, on the same fourth of October, and put into the same post office on that day, and marked as mailed on the fifth of the same month. This letter reached the Fulton Bank one day earlier than the one enclosing the notices. On the day following the receipt of the notices, being the eighth of October, the notices, drafts and protest were despatched, by the cashier of the Fulton Bank, to the plaintiffs at Hallowell, where they arrived on the tenth of October; and the notice to the defendant was, on the same day, delivered to him. The mail from Bangor for Boston was despatched daily; and passed through Augusta, where the defendant lived, and through Hallowell, the seat of business of the plaintiffs.

Upon this state of facts, two questions have been presented for our consideration; First: — Was the transmission of the notices and protest to the Fulton Bank, and thence to the plaintiffs, a course of procedure recognised by mercantile law and usage, as sufficient to secure the liability of the defendant? Second: — Was the omission by the Fulton Bank to forward notice, on the receipt of the protest, till the second day after it had been received, an unreasonable delay? As to the first proposition, we have not thought it necessary, that we should come to any conclusion concerning it; being of opinion that the defence is clearly maintainable upon the latter. The protest must be regarded as containing ample notice of the dishonor of the drafts; and the keeping it on hand till the

second day after the receipt of it, without forwarding any notice of its contents to the defendant, was an unreasonable delay, which discharges the defendant from his liability as indorser of the drafts. The citation of authorities cannot be necessary to sustain this position.

Plaintiffs nonsuit.

JONATHAN NELSON *versus* JACOB BUTTERFIELD *& al.*

When land has been flowed by means of a dam erected for the use of a watermill; while the owner of the land suffers no damage, and can therefore maintain no suit or process, or in any way prevent such flowing, he cannot be presumed to have granted, or in any manner to have surrendered or relinquished any of his legal rights; and no prescriptive right to flow his lands without payment of damages can be acquired against him.

But where damages have been occasioned by the flowing, and the owner of the land flowed has had the power to maintain a process to recover them, a prescriptive right to flow the land without payment of damages may be acquired.

If a dam be erected which retains the water of a pond and causes it to overflow the lands of others, but no mill is carried by the fall of water thus created; and such dam is only necessary to raise and preserve the water for the use of mills, lower down on the stream and carried by other waterfalls, at certain times when the water usually flowing in the stream has become diminished; the only remedy is by proceedings pursuant to the statutes for the support and regulation of mills.

One who is neither the owner or occupant of a watermill for the use of which the water has been raised or continued, nor the owner or occupant of the milldam, is not liable to the owner of the land flowed, although he may be benefitted by the flow of the water.

If a blacksmith's shop in which the bellows is worked by a waterfall, can be considered a mill, yet if there is only a right to use the water for that purpose at the will of the owners or occupants of the dam, and at such times and under such restrictions as they may please to prescribe, the owner of such shop is not liable to the payment of damages for the flowing of the water. It would not be a mill for whose use the water was either raised or continued.

In a complaint under the statute to recover damages to land, occasioned by its being flowed by a dam erected for the use of mills, the question whether the complainant has *suffered any damages*, is to be determined only when the *amount* of damages is under consideration.

Nelson *v.* Butterfield.

A lot of land was conveyed, and described as bounding on one end upon a pond; and it appeared that there was a narrow cove or arm of the pond extending from the pond across the lot; and that if the land conveyed was limited by this cove, that the lines would not correspond with those of the adjoining lots, and there would remain a portion of land not conveyed, between the cove and the pond. *It was held*, that the land granted extended across the cove to the main body of water called the pond.

THIS was a complaint under the statute for flowing the complainant's land in China, being the south part of lot No. 15 on Jones' plan, from the first day of May, 1830, to Aug. the 8th, 1833, brought against Jacob Butterfield and Thomas Greenlow.

The complainant proved that there was a stone dam at the outlet of twelve mile pond, which raised the water of said pond. It was proved that said dam was erected on the land of Francis M. Rollins by Joseph Southwick and the mill owners in 1817, as a reservoir dam to save the water for the use of several dams and mills on different parts of the stream, running from that pond to the Sebasticook river. It was proved, that Greenlow, in 1828, was employed by those who erected the dam, to put in a new sluiceway, the old one having become rotten, and that by their consent he put in a water wheel, to be propelled by the water as the mill owners wanted it to run, which wheel was used to work his bellows in his blacksmith's shop, and for no other purpose, the said Greenlow being a blacksmith, and working at his trade in his shop near the dam, and not owning any interest in any mill on said stream or pond, and being tenant at will in the use of said wheel.

Butterfield, it was proved, was a part owner in a dam and mills which were about seventy-five rods from said stone dam, down the said stream, and Butterfield's dam did not raise the water in the pond, there being a head and fall of water at his privilege of about fourteen feet; and the said stone dam was not necessary to the enjoyment of his privilege, except to raise and preserve a reservoir; that Butterfield on one occasion assisted James Wiggin in sluicing logs through the stone dam; that prior to said first day of May, said Butterfield was heard to say that one Bragg, who wished to have the water stopped

to repair his mill, could not have it done, unless he should be at his proportion of the expense of resisting the lawsuit commenced by the town of China; that neither Butterfield nor Greenlow had any interest in the land on which said stone dam was built, nor did they aid in building the same, nor had they since acquired any interest in it, unless it appears from the facts herein stated.

The foregoing is all the evidence which was produced against the respondents in relation to their connection with the stone dam.

The respondents requested the Court, then holden by WESTON C. J. to instruct the jury, that they were not liable to this process upon the foregoing testimony, and that a complaint for flowage under the statute would not lie for a reservoir dam, used only to save the water, and not to create a head and fall of water to carry the mills; and that said Greenlow's blacksmith's shop was not a mill; but the Court, for the purposes of this trial, instructed the jury, that they would determine from the evidence, whether the respondents had not an interest in said stone dam; that said facts had a tendency to prove such an interest in said stone dam; and if so, they were liable to this process; that said stone dam, although it were used only to save the water and not to create a head and fall for the mills, was such a dam as was embraced within the statute, for the erection and maintenance of which, a person would be liable to this process; and that for this trial and with a view to settle other facts, said blacksmith's shop might be considered a mill under the statute giving this process; that the putting in the wheel was evidence that Greenlow was interested in said stone dam; and that the benefit which Butterfield derived in having the water saved, with the other facts, was evidence that he had an interest in said stone dam.

The lot on which said stone dam was built, was number 18, according to Jones' plan, and was granted Jan'y 8, 1794, by the Proprietors of the Kennebec Purchase to Nehemiah Getchell. The lot on which Butterfield's dam and mills were built,

being No. 34, was granted to John Getchell, with the mill privilege thereon, Dec. 28, 1796. John Getchell, in 1779 or 1780, had erected a dam and mills on said lot, No. 34, about 20 rods below the stone dam, and about 50 rods above Butterfield's dam and mills, which dam, called the Getchell dam, remained until about the year 1800 entire, when the sluiceway was taken out, and the water was allowed to pass through. The saw-mill of John Getchell having been burned down, he built the dam and mills now owned by Butterfield, in 1796. The dam called the Livermore dam was built by the said John Getchell in 1800 on the same site, where the stone dam now stands, and the pond continued to be flowed by the Getchell dam until the Livermore dam was finished; the Livermore dam flowing the pond, as did the Getchell dam, but not to the same extent; and the said John erected the new dam below as aforesaid, to obtain the head and fall of fourteen feet, keeping up the pond as aforesaid by the Livermore dam. It was proved that said John Getchell, in erecting the dam called the Butterfield dam, and in building the Livermore dam, did not abandon the right of flowing the pond, which he had possessed by means of the Getchell dam, as aforesaid. It was further proved, that the Getchell dam, being the oldest dam, was nine or ten feet high, and flowed the pond higher than the Livermore or stone dam, and that the Livermore dam was between two and three feet higher and flowed the pond more than the stone dam.

The complainant proved that said proprietors having employed John Jones to survey said township, upon the petition of said John, he being an alien, the grant of said lot 15, was made to Timothy Jones in 1790. But Nelson did not connect himself with the grant to Jones, nor claim under it. Said Nelson introduced in evidence two deeds from David Spratt to him, one dated March 8, 1828, the other April 10, 1828, conveying the premises described in the complaint. Nelson proved by Samuel Ward, that one Parker Burgess cut a few acres of trees on that part of No. 15 which Nelson owns, about 1780; that after him one Jabez Lewis cut some trees;

that Abijah Ward succeeded Lewis, and built the first house on the lot in 1790; that Abijah continued on said lot till he was succeeded by said David Spratt in 1799; and said Spratt remained on the same until he conveyed to said Nelson as aforesaid. Nelson did not introduce any other deed as evidence of his title, than the deed of said Spratt, nor any deeds as evidence of the title of prior occupiers of said land. There was no evidence that any portion of said lot 15 had been fenced until it was owned by Nelson. Said Spratt, a witness for said Nelson, testified that while he was on said land, he cut down some ash trees on the land alleged to be flowed, and made staves of them. It was admitted, that Butterfield claimed title to his mills and dam under John Getchell through mesne conveyances. There was evidence tending to show, that the pond had been raised higher within ten or twelve years than before that time, and there was evidence tending to show, that such was not the case, but that it was higher when said Getchell dam was built, than at any time since.

The Court instructed the jury that the respondents could not justify the flowing of said Nelson's land described as aforesaid, by virtue of owning said lot No. 34, and the erecting said dams, nor by any facts in the case, because the proprietors parted with lot No. 15 before they did with lot 34; that the said Nelson had a right to such part of lot 15 as was described in his deed, as it was in 1774, when said Jones' plan was made; that if the land of Nelson, before described and alleged to be flowed, was covered with water by means of said dams, from the time of erecting the first dam to the date of said Nelson's deeds, still he was entitled to maintain this process and their verdict would be for him. It appeared in evidence that there was an elevation, or ridge of land on the eastern side of lot 15, where it strikes the pond, running up beyond the northern line of 15, and at its termination on lot 14 there was a cove into which the water flowed from the pond and then across lot 15, which was the flowing of which complaint was made.

The plans were referred to, but did not come into the hands of the Reporter. The respondents contended, that as they began to flow said land before any one acquired a title to it, and before any one commenced occupying any part of said lot 15, they had as good a right to flow it, as others, not claiming under said proprietors, had to occupy it. But the Judge instructed the jury otherwise, and further instructed them, that said Nelson being in the seisin of said land, had a right to hold it as delineated on said Jones' plan, and could maintain this process. And the Judge further instructed the jury, that if any part of said Nelson's land was flowed by said dam, the law presumed it was a damage to him, and that the proof introduced by the respondents to show there was no damage could not have the effect to remove said presumption; that no length of time would give a person the right to flow without damages; nor be evidence of a grant or a license; and that the said Nelson was not under any obligation to request the respondents to reduce or abate said dam before commencing this process. The jury returned their verdict for the complainant. If the ruling or instructions were erroneous the verdict was to be set aside, otherwise judgment was to be rendered thereon.

Wells and *Bradbury* argued for the respondents, and contended, that the verdict should be set aside for the following among other grounds.

The complainant shows no title to the land flowed. He was bounded on the pond. His lot, No. 15, extended only to the pond, as it was when he took his deed, and did not include the land flowed. The part of the pond called a cove is as much a part of the pond, as any other. *Bradley* v. *Rice*, 13 Maine R. 198. As the complainant does not connect himself with the original title, but takes his deed from a mere trespasser, and so late as 1828, he takes the possessory right only to the land, as it then was. *Waterman* v. *Johnson*, 13 Pick. 261.

This process cannot be maintained against either of the re-

spondents in consequence of the erection of the reservoir dam. Such dam is not one contemplated by the statute respecting mills and flowing of lands. The dam there contemplated is one to raise a head of water necessary to the working of the mill; and one erected at a distance to feed the ponds forming the power to carry the mills does not come within the statute. The process cannot be maintained by the erection of a dam without mills. *Baird* v. *Hunter*, 12 Pick. 556. Butterfield was in no manner connected with the dam. Neither he, nor his grantor, had any thing to do with the erection, use, or continuance of that dam, and owned no part of the land on which it stood. The mere fact that others above him on the same stream improved the privilege, whereby he as well as all others below derived a benefit, does not subject him or them to the payment of damages by reason of a dam so erected. Greenlow is not liable to the process, because his blacksmith shop is not a water mill; and because he had not even the right to use the water at his shop, saving by the verbal permission to take it as it run, to blow his bellows, until he had notice to desist.

The jury should have been permitted to inquire and find, whether the complainant had been injured by the flowing. If he has sustained no damage, the process cannot be maintained. *Lowell* v. *Spring*, 6 Mass. R. 398. In *Hathorne* v. *Stinson*, the opinion of the Court goes on the ground, that this question was to be submitted to the jury.

The complaint cannot be sustained, because the land had been overflowed to the same extent for more than forty years by the owners of the mills without payment of damages. Unless a prescriptive right can be acquired by the actual use of the water in the same manner, and occasioning the same damage, for some period of time, the law must be different as to this description of property from what it is in all others, and the evils attending it will last for ages. The doctrine laid down at the trial was questioned, in its full extent, in the cases of *Hathorne* v. *Stinson*, and the decisions in Massachusetts are directly opposed to it. *Williams* v. *Nelson*, 23 Pick. 141; *Borden* v. *Vincent*, 24 Pick. 301. The decision in *Siden-*

sparger v. *Spear*, was based on a ruling in the Court below, general, it must be conceded, and may be right or wrong, because the exceptions do not show, whether damage had been sustained for twenty years or not.

By the grant from the proprietors to Getchell, he had the clear right to flow this land. The Judge ruled, that the respondent, Butterfield, could not avail himself of this right, because the proprietors had made a prior grant of the Nelson lot. Had the complainant connected himself with that title, the ruling might have been right. But he did not, nor did he show any claim or possession extending back to the origin of ours. Ours therefore was good against each and every one, who could not claim under a prior grant from the owners.

N. Weston, for the complainant, contended that the reservoir dam was placed there under such circumstances as compelled the persons injured by the flowing to resort to the statute for their remedy. They could not treat the persons erecting it as trespassers. Not a single wheel, but Greenlow's, is turned by the waterfall at that dam; and yet there is not a mill between the pond and the river to which the water retained by the dam is not absolutely necessary at some seasons of the year. The dam was erected for the use of all the mills, all are benefitted by it, and the water is necessarily owned by all, and all are liable for the damages.

It has however been contended, that Butterfield is a mere stranger to the building of the dam, and does not claim under their title. The case however shows, that he succeeded to the interest of Getchell, one of the original builders of the dam, and has always been benefitted by it.

But this objection does not apply to Greenlow, whose wheel is carried directly by this fall. It is said however that his blacksmith's shop is not a mill. The mere rotation of the wheel would not blow the bellows, and there must have been machinery connected with it. It is immaterial by what name it is called. It is as much a mill as nail works, rolling and slitting mills, clapboard machines, or factories.

The complainant has shown title to the land flowed. His grant was described as lot fifteen, and must have been intended as fifteen on Jones' plan, as no other has been mentioned. That extends to the pond not to the cove, and to the pond as it was when the plan was made, and not as the pond is since the flowing. But independent of that consideration, bounding upon a pond, carries the grantee to the body of water commonly called the pond, and is not limited to where it may strike some small cove connected with the pond. If it was intended to stop at the cove, it would have been so expressed in the deed.

It is not necessary, that the complainant should carry back the chain of title through every link to Jones. The proprietors set up no claim to this lot; Jones sets up no title adverse to ours; the complainant and his grantor have been in possession more than twenty years; and he is entitled to be considered as owner of lot fifteen, as conveyed by the proprietors to Jones, with all the rights and privileges Jones had. The land was not flowed when the grant to Jones was made, and their grant afterwards to Getchell gave him no right to flow Jones' lot.

It is contended for the respondents, that they have acquired a prescriptive right to flow this land without payment of damages, by having done so unmolested for more than twenty years. This question is not a new one in this State. It has been decided, that the right cannot be so acquired. *Tinkham* v. *Arnold*, 3 Greenl. 120; *Hathorne*, v. *Stinson*, 1 Fairf. 224 and 3 Fairf. 183; *Sidensparger* v. *Spear*, 17 Maine R. 123. The case cited from Massachusetts may be good law there, where it is scarcely possible to flow land without doing an injury, and without the owner's knowing it; but ought not, and cannot for any reasons there given, authorize a reversal of our own decisions.

The instruction that it must be presumed that there was some damage, was based on the fact, that the land was improved, and was authorized by *Sidensparger* v. *Spear*, before cited.

The case was argued at the May term, 1842, and continued *nisi*. The opinion of the Court, TENNEY J. having been consulted as counsel and taking no part in the decision, was afterwards drawn up, and announced at an adjourned term in Cumberland, in Feb. 1843, by

SHEPLEY J. — Several important questions are presented for consideration. One is, whether the complainant has established his title to the land overflowed. He claims title of part of lot numbered fifteen, bounded upon the twelve mile pond in the town of China. There is a body of water denominated a cove running out on lot numbered fourteen from the pond, and continuing across lot numbered fifteen and separating the larger portion of it from a ridge of land remaining uncovered, with water between the cove and the pond. The objection to the title is, that the cove is but a part of the pond, and that according to the decision in the case of *Bradley* v. *Rice*, 1 Shep. 198, the complainant's title is limited to its margin. It appears, that the proprietors of the township caused their lands to be surveyed into lots, which were designated by numbers and ranges. And it is necessary, that the lines of lot numbered fifteen should be extended across the cove to the main body of water in the pond, to make it conform to the other lots. And if they were not so extended, there would remain a ridge of land between the cove and pond not included in any lot and unappropriated. If it should be considered, that a conveyance bounded on a natural pond is to be limited to the first portion of water connected with it, the effect would be to exclude from the conveyance land separated from the residue of the lot by such a body of water, although so small, that the surveyor, while running the lines of the lot, might step over and disregard it. A small body of water thus connected would not be referred to or designated in common conversation as the pond; but would have some other name, as a cove, creek, or arm of the pond. And this would continue to be the designation of any larger and like body of water, which by common consent would seem to require a designation by some term other than the pond. It is therefore

best to conclude, that the parties to the conveyance used language in its ordinary and usual acceptation to decide, that the intention was not to limit the lot to a body of water usually designated by a different name; but to that body of water designated usually by the term used in the deed. And as the intention of the parties is to be regarded, the complainant must be considered as acquiring a title to the lot including the cove and extending to the margin of the pond.

Another question is, whether the jury should have been permitted to find, that the complainant had not been injured. By the statutes as existing before this State was separated from Massachusetts, this was a proper subject for the consideration of the jury. But there can be no doubt, that it was the intention of the legislature of this State to require that defence to be first made before the commissioners, whose report may be impeached, and this question among others may then be regularly presented to a jury for decision. The difference between the statutes before the revision of 1821, and since, was noticed in the case of *Cowell* v. *The Great Falls Man. Co.* 6 Greenl. 282. By the additional act of Massachusetts, passed on the 28th of Feb. 1798, the complainant was required to state, "that he sustains damage in his lands by their being flowed in the manner mentioned in said act." And the owner or occupant of the water mill might, among other matters of defence, "dispute the statement made by the complainant." And the act of that State, passed on the 27th of Feb. 1796, did not authorize the jury which assessed the damages to decide, that the complainant had not suffered any damages. On a revision of these statutes in this State, in the year 1821, the words "dispute the statement made by the complainant," were omitted in the statement of the defences, which might be made before a jury on the first trial in Court. And there was a provision inserted "that if said jury (alluding to the jury authorized to view the land and assess the damages) shall find and so return in their verdict, that no damage is done to the complainant by flowing his land as aforesaid, the respondent shall recover his costs." The additional act passed

on the 14th day of February, 1824, c. 261, also provided, that the commissioners appointed to view the land and assess the damages, should determine, whether the complainant had suffered damage, subject to a revision before a jury. The statutes in Massachusetts did authorize the jury in the first instance to determine, whether the complainant had suffered damage; but the statutes in this State have taken from such a jury that power, and transferred it to the jury or commissioners authorized to assess the damages. The presiding Judge was therefore correct in excluding the testimony tending to prove that the complainant had not suffered damage from the consideration of this jury. The question, whether the complainant has suffered any damages, is to be determined only, when the amount of damage is also under consideration.

Another question is, whether the dam, which retains the water of the twelve mile pond and causes it to overflow the land of the complainant is protected by the provisions of the statutes. It is only necessary to raise and preserve the water for the use of the mills on the stream, when the water, which usually flows in it, has become diminished. And it may be inferred from the report that it is necessary to enable the owners to work their mills at all times during the year. The first section of the statute does not prescribe the manner, in which a suitable head of water is to be raised. It only requires, that it should be found necessary to raise it. The means, by which the object is to be accomplished, appear to have been left to the mill owner. There is nothing in the statute to prohibit him from doing it by one or more dams situated at a greater or lesser distance from the mill; or by a dam on or near to which no mill is erected. The water may be raised and retained and conducted in a channel to any distance from the dam for use at the mill. And the owner is by the statutes authorized "to continue the same head of water to his best advantage." The design appears to have been, to authorize the mill owner to raise a suitable head of water and to control and use it in such a manner, as to enable him to employ his mill to the best advantage during the whole year. And that he should be

restricted only by the jury or commissioners, who are authorized to find, during "what portion of the year the said lands ought not to be flowed." It is the owner or occupant of the mill for the use of which the head of water is raised, who is especially made responsible in damages. And it is only in those sections of the statute, which authorize tenders or offers of compensation, that the owner or occupant of the mill dam is named. The only proper question therefore for consideration is, whether it be necessary, that the waters of the pond should be raised and caused to flow over their natural bounds for the purpose of raising a suitable head of water for the use of the mills. And the facts reported lead to the conclusion, that it would be necessary to enable the owners to work their mills to advantage during certain portions of the year. The statute appears to have received a like construction in the case of the *Wolcott Woollen Manufacturing Company* v. *Upton*, 5 Pick. 292.

Another question is, whether the fact, that the lands of the complainant have been overflowed for more than forty years to the same extent, can, under the circumstances presented in this report, be considered as an effectual bar to the process. It does not appear from the report of the case of *Tinkham* v. *Arnold*, 3 Greenl. 120, whether the owner of the lands would have suffered any damage during the earlier portion of the time while they were overflowed. The reasoning is general and not limited to any such state of facts. In the case of *Hathorne* v. *Stinson*, 3 Fairf. 183, it appeared, that the lands overflowed "were first brought into cultivation about the year 1790, prior to which time they remained in a state of nature overgrown with bushes and affording no profit." And the question presented for decision was, whether by flowing the lands in that condition from 1760 to 1789, without payment of damages, a legal presumption might arise, that the owners of the milldam had a license irrevocable to flow them to that extent. The Court say, "if the owner of the land sustained no damage by the flowing, then his acquiescence ought not to be construed into an admission of right, or taken as evi-

dence against him either of grant or license." The opinion then proceeds to prove that under such circumstances, "his hands are tied. He can neither resort to his action at common law nor to process under the statute. The mill owner can flow in perfect security without license and free from all liability to legal process; and so long as he can do this, no grant or license is to be presumed in his favor."

In the case of *Sidensparger* v. *Spear*, 5 Shepl. 123, the question, whether under such circumstances a license to flow without payment of damages might be presumed, was again presented in connexion with another question, whether when a conveyance of real estate is made, a reservation to flow without payment of damages might be proved by parol testimony and be effectual. In that case the opinion states, that no damage was sustained by the flowing until the year 1835; and the ruling of the Judge against the validity of that defence was approved.

In the present case the report states, that "there was no evidence, that any portion of said lot fifteen had been fenced until it was owned by said Nelson." He purchased it in 1828, and there is no testimony tending to prove, that any profit could be derived from the land, or that it could be injured by the flow of the water before that time. It falls therefore within that class of cases, upon which this Court has, after mature consideration, decided that while the owner of the land suffers no damage and can therefore maintain no suit or process, or in any way prevent such flowing, he cannot be presumed to have granted or in any manner to have surrendered or relinquished any of his legal rights. It is indeed true, that a Court eminent for learning and ability has expressed an opinion, that the case of *Tinkham* v. *Arnold* was not correctly decided. And some remarks were made, in delivering the opinion in the case of *Williams* v. *Nelson*, suited to introduce doubts, whether the later decisions in this State could be sustained. And the question to be now considered is, whether the principles of law, or the decided cases require, that an acquired or purchased right to flow should be presumed from

the facts presented in this case. And to prevent misapprehension, the facts material to the decision of it are considered to be, that the flowing has been continued for more than forty years without payment of damages and without occasioning any damage earlier than the last five years. All presumptions rest upon the experience, and are founded upon a knowledge of man and of his motives of conduct. If a person for a long course of years claims the right to possess or enjoy estates or easements, and exercises that right without being molested, it is to be presumed, that he has done so lawfully. And if another person permits it, when it would be injurious to him, without interruption, it is to be presumed, that he knows, that the person has a legal right to do so. It would be against man's experience and contrary to his motives of conduct to account for it so satisfactorily in any other manner. *Omnia rite esse acta* is a maxim of the law; and it also attributes such conduct rather to the exercise of a legal right, than to an encroachment. If this be the true foundation of presumptions, it will follow, that if the continuance of the possession or enjoyment can be accounted for without presuming any thing to favor it, and without imputing a conscious want of right or negligence to him, who does not interrupt it, the presumption cannot arise. It has no foundation to rest upon; or in the language of the law, it is rebutted. These positions are not inconsistent with the best administration of justice. They will work no wrong; and will secure to all their rights, unless they have been guilty of negligence in asserting them. And this is believed to be the doctrine relating to presumptions in the decided cases.

In the case of *Knight* v. *Halsy*, 2 B. & P. 206, the ground, on which a deed is to be presumed, is stated to be, that "it cannot be supposed, that any man would suffer his neighbor to obstruct the light of his windows and render his house uncomfortable; or to use a way with carts and carriages over his meadows for twenty years respectively, unless some agreement had been made between the parties to that effect."

In the case of *Fenwick* v. *Reed*, 5 B. & A. 232, Abbott C. J. states, that conveyances may be presumed, "in cases where the original possession cannot be accounted for, and would be unlawful, unless there had been a grant."

And Mr. Justice Holroyd in the same case says, "in cases of rights of way, &c. the original enjoyment cannot be accounted for, unless a grant has been made; and therefore it is, that from long enjoyment such grants are presumed." In the case of *Gray* v. *Bond*, 2 B. & B. 667, Dallas C. J. says, "mere lapse of time will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." "And the presumption in favor of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed without the consent of the owner of the land." In the case of *Daniel* v. *North*, 11 East, 374, Lord Ellenborough says, "the foundation of presuming a grant against a party is, that the exercise of the adverse right, on which such presumption is founded, was against the party capable of making the grant." And in the case of *Barker* v. *Richardson*, 2 B. & A. 579, it was decided, that a grant of an easement could not be presumed, when it appeared, that the presumed grantor was incapable of making it. In the case of *Cross* v. *Lewis*, 2 B. & C. 686, which was an action for obstructing the plaintiff's light and air, Bayley J. says, "I do not say, that twenty years possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of a right; and ever since the decision of *Darwin* v. *Upton*, (2 Saund. 175) it has been held, that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it." In *Ricard* v. *Williams*, 7 Wheat. 109, when speaking of presumptions relating to grants, Mr. Justice Story says, "they are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an adverse title in, the party in possession. They

may therefore be encountered and rebutted by contrary presumptions; and can never fairly arise, when all the circumstances are perfectly consistent with the non-existence of a grant. *A fortiori*, they cannot arise, where the claim is of such a nature, as is at variance with the supposition of a grant." The doctrines asserted may well be permitted to rest, so far as authority is concerned, upon these cases and names without further reference. In *Williams* v. *Nelson*, 23 Pick. 145, it is said, "if such flowing were not originally rightful on the mill owner's own land or by permission of the land owner, it seems not easily accounted for, that such owner should acquiesce for a long series of years, without any claim to damage. The inference therefore is, that his consent was given voluntarily, or purchased by some deed or other act, which is lost by lapse of time." However correct this reasoning may be when applied to cases, where the owner of land has suffered damage, and may assert his rights, it must be restricted to such cases, before it can be received and acted upon. For where the owner of the land has not suffered damage, and cannot therefore maintain any action at common law or process under the statute, there is no difficulty in accounting for his acquiescence for a long series of years. It would not only be perfectly consistent with the non-existence of a grant or other purchased right, but it would be contrary to the ordinary course of human affairs to expect any thing of the kind, while the law enabled him to accomplish all his purposes without it. It is not therefore necessarily true, "that the enjoyment of the right, free from all claim for damages, for forty years, was a right beyond that conferred by statute." The positions, that "the statute, strictly speaking, does not confer on the mill owner the right to flow the land of another, it conveys no interest in the nature of leasehold or easement, or otherwise, or any authority to make any actual use of the other's land as a pond or reservoir. The owner may still embank against the water, if he pleases, and thus preserve his own land from being flowed," if correct, can be of little value in the practical affairs of life. It is not impossible to conceive of such a state of things, that it would

not be possible to raise a suitable head of water, if the owner of the lands might embank against its flow. And yet the statute authorizing one to raise a suitable head of water, gives the right to use the means necessary for its accomplishment. And the notion of employing one person legally to raise such a head of water, although he may thereby injure others, and of legally employing the others to prevent his doing it, is not very satisfactory.

When it is said, that "he may by force of the statute raise and maintain his dam without grant or license of the owner of the land flowed by it, but he cannot maintain it free from all claim for damage," the statement must be considered as applicable to those cases only, where the flow of the water occasions damage. And cases of a different description, as the books show, are not of very unfrequent occurrence in this State. To presume one person to have obtained a grant or other acquired right to flow the land of another from an enjoyment of it for more than twenty years, while the law gave him such right of enjoyment, and deprived the other of all remedy and right of interruption, is irreconcilable with one's sense of moral right, or with the principles of justice. And such a position, it is believed, cannot be maintained upon authority. If the language used in the case of *Tinkham* v. *Arnold* may require to be limited and applied to the time, during which no damages have been occasioned by the flow of the water; the language used in the case of *Williams* v. *Nelson* must also be limited and applied to cases where damages have been occasioned by it, before it can be admitted to lead to a correct conclusion.

Another question is, whether the respondent, upon the facts proved in this case, can be considered liable for the damages caused by the flow of the water occasioned by the stone dam. The owner or occupant of the mill, for the use of which the water is raised, is by the statute made liable for the payment of the damages. And the ninth and tenth sections of the act would seem to require such a construction, as would make the owner or occupant of the milldam, which raised the water for

the use of the mills, also liable. One, who is neither the owner or occupant of a watermill, for the use of which the water has been raised or continued, nor the owner or occupant of the milldam, is not made liable, although he may appear to be benefitted by the flow of the water. It appears, that the dam "was erected on the land of Francis M. Rollins by Joseph Southwick and others, mill owners, in 1817, as a reservoir dam to save the water for the use of several dams and mills on different parts of the stream." But it does not appear, that the mill partly owned by the respondent, Butterfield, was one of those several mills. There are certain facts stated, which might lead to such a conclusion. It was not however upon this ground, that his liability was presented to the consideration of the jury; but upon the ground, that he might be interested in the dam. The instructions on this point were, "that they would determine from said evidence, whether the respondents had not an interest in said stone dam; and if so they were liable to this process."

The phrase, interest in said stone dam, may not have been suited to communicate to the jury a clear perception of their duties; yet if the testimony would properly authorize them to find, that the respondents were either owners or occupants of the dam, there can be no just cause of complaint. They cannot be considered as owners of the dam; for the report states, that they neither "had any interest in the land, on which said stone dam was built, nor did they aid in building the same, nor had they since acquired any interest in it, unless it appears from the facts herein stated." There is nothing stated to authorize the conclusion, that Greenlow was a part owner of the dam. The only testimony tending to prove, that Butterfield was an owner or occupant of it is, that on one occasion he assisted another person to sluice logs through it; and on another occasion said, that one, who wished to have the water stopped to repair his mill, could not have it done, unless he should be at his proportion of the expense of resisting the lawsuit commenced by the town of China. The last remark implies, that he had some authority to control the flow of the

water, and might, if alone considered, authorize the conclusion, that he was then an owner or occupant of the dam. But when considered in connexion with the other facts, that he was not an owner of the land or a builder of the dam, and that the builders in the year 1828 put in a new sluice and exercised an entire control of it, by permitting Greenlow to use the water for a certain purpose at their pleasure, and that such actual exercise of control over the dam and flow of the water, for aught that appears, has been continued, and that by virtue of it Greenlow still continues to use the water, it would seem to be too slight, and too nearly disproved, to authorize the conclusion, that he was an owner or occupant at the time, when this process was commenced. It is not necessary to determine, whether Greenlow's shop can be considered as comprehended by the term watermill, first, because his liability was not presented to the jury as arising out of his being the owner of such a mill; and secondly, because it clearly appears, that if it were to be regarded as a mill, it was not one of those mills, for whose use the head of water has been raised or continued. There is only a right to use the water for it at the will of the owners or occupants of the dam, and at such times and under such restrictions as they may please to prescribe. If it were a corn mill, the owner, as such, would not be liable in damages for flowing the water; for it would not be a mill, for whose use the water was either raised or continued. And it appears from the report, that whatever act Greenlow may have done upon the dam, or control he may have exercised over it, has been by the employment of others, who have erected it, and as against him at least have had the entire control and occupation of it. He can only receive such a portion of water, as the occupants of the dam are pleased to permit. Such a use of the water has a tendency rather to disprove than to prove, that he was an owner or occupant of it. Occupancy implies the present right of possession or control, and the testimony shews, that he could have no such right.

The verdict is set aside and a new trial granted.

LUTHER R. LAMB *versus* AMES FOSS *& al.*

Where a mortgage of lands was made to S. F. and wife, during their lives, on condition that the mortgagor should "render and deliver unto the said S. F. and wife, and survivor of them, one third part of all the produce, which may be raised on said farm, for and during the said term annually, or support and maintain the said S. F. and wife, whichever way they or either of them may elect, on said farm for said term;" — *it was held*, that the mortgagor was entitled to the possession until the condition should be broken.

The mortgagor, therefore, in such case must be considered as the actual tenant of the freehold, although his right to the possession was liable to be defeated by a failure to perform the duties required of him by the condition.

If the occupant admits in writing, that the land on which he lives belongs to the proprietor, it is a voluntary submission to that title, and a surrender of any rights acquired by prior possession; and from that time, he must be considered as the occupant of the land in submission to that title, until there be proof of some new act of disseisin; and by his subsequent possession, he will not acquire any title to the soil, or to the improvements upon it.

The conveyance of the land to another, where the deed has not been recorded, and where no change in the possession has taken place, is not evidence of a new disseisin.

WRIT of entry demanding against Ames Foss and Silas Foss fifty acres of land in Winslow. Ames Foss pleaded a special non-tenure on which issue was joined. Silas Foss disclaimed the west half of the lot, and defended the other half. The disclaimer was accepted by the plaintiff, and issue joined as to the part defended. He also put in a claim for betterments, and the demandant put in a claim to have the value of the land estimated with the improvements.

The demandant read in evidence Robert A. Cony's quit claim deed of the land demanded to him, dated July 23, 1838. Ames Foss read in evidence Silas Foss' deed of the premises demanded to Ames Foss, dated Nov. 6, 1837, but not recorded until August 6, 1839, and Ames Foss' deed of the same date, recorded at the same time, to Silas and his wife and the survivor, to have and to hold the same during their lives and the life of the survivor, on condition that he should support Silas Foss and his wife during their lives. The demandant proved that the premises were set off in 1816, on an execution in favor of Samuel Cony, against Joseph T. Wood; that Sam-

uel Cony died in 1835, and his son, R. A. Cony, was appointed his administrator. R. A. Cony testified, that he sold this lot as administrator, and procured one Brooks to bid it off for him; that he gave a deed as administrator to Brooks, who afterwards gave him a deed. He also testified, that he found a paper among his intestate's papers, signed by Silas Foss, dated in 1829, in which he promised to pay the taxes on this lot, No. 1, belonging to Samuel Cony. The demandant also proved that Samuel Cony was taxed that year for lot No. 1, and that Silas Foss told the collector that he would pay the tax on lot No. 1, and did so pay, saying he paid it in consequence of his agreement with Samuel Cony. The condition of the mortgage deed from Ames Foss to Silas Foss and wife was: — "that if the said Ames render and deliver unto the said Silas and Sarah, and survivor of them, one third part of all the produce which may be raised on said farm for and during the said term annually, or support and maintain the said Silas and Sarah, whichever way they or either of them may elect, on said farm for said term, then this deed shall be void; otherwise to remain in full force."

Silas Foss proved, that he had been in the notorious and exclusive occupation of the land for more than thirty years, having during all that time lived on the lot, and having fenced and improved it.

Weston C. J. who presided at the trial, instructed the jury that the writing given by S. Foss to S. Cony was a recognition of Cony's title to the lot; that it amounted virtually to a lease; that the relation of landlord and tenant existed between them, Foss paying the taxes by way of rent; that his possession from that time ceased to be adverse; and that R. A. Cony's deed to the demandant passed the title of the land to him; that said Foss was not entitled to betterments; and that if A. Foss knew that S. Foss had acknowledged Samuel Cony's title, and gave a deed to S. Foss of the life estate, it was an act of disseisin, and he had not supported his plea of *non-tenure.*

The verdict for the demandant was to be set aside if any of the instructions to the jury were erroneous.

At May Term, 1842, it was agreed, that this case should be argued in writing, and the arguments were afterwards sent to the Court.

Boutelle, for the tenant.

1. Silas Foss conveyed the premises to Ames Foss, and on the same day Ames conveyed the same to Silas Foss and his wife to hold during their lives and the life of the survivor, on condition, that he, A. Foss, should support S. Foss and his wife during their lives, and so is not tenant of the freehold, and disclaims all right to the land till after the decease of S. Foss and wife. The demandant replies, that he is tenant of the freehold. It was proved that S. Foss, in 1829, agreed with Samuel Cony to pay the taxes on the premises, and that afterwards he did pay the same to the collector in 1831. The Judge instructed the jury, if A. Foss knew that S. Foss had acknowledged S. Cony's title, and then gave a deed of the life estate to S. Foss, it was an act of disseisin, and he had not supported his plea of non-tenure. Of this instruction of the Judge we complain. The substance and point of the plea is, that the tenant is not tenant of the freehold, the particular interest set forth in the plea not being by law traversable. The case does not show that the demandant ever made an entry on the land, claiming it; or that A. Foss was ever in the actual possession or occupation of the same. He had not then ever actually disseised the owner of the land. The question then is whether he had *constructively* so done; or in other words, whether by taking a deed of the land of S. Foss, and at the same time giving to him and his wife a deed to hold the same during their lives on condition that he would support them during their lives, he, A. Foss, at the same time, knowing that S. Foss had acknowledged Cony's title to the land, thereby *constructively* disseised the owner. S. Foss and wife owned the land during their lives, and S. Foss was the proper tenant of the freehold. A. Foss had only a reversionary estate after the death of S. Foss and wife. "A disclaimer in our practice is not unfrequently pleaded instead of non-tenure, and is considered as having the same effect." Jackson on Real Actions

99; Stearns, 202, 3. Under our statute a plea of disclaimer is considered as substantially the same as a plea of non-tenure. Rev. Stat. c. 145, § 10. "If the person in possession have actually ousted the demandant, or withheld the possession of the premises, he may, at the election of the demandant, be considered a disseisor for the purpose of trying the right, though he should claim therein an estate less than a freehold." This, it is supposed, is nothing more than the common law provision incorporated into the statute. Where a man enters unlawfully on the right owner, he cannot qualify his own wrong by saying that he claims only a certain particular estate, but may, at the election of the owner, be treated as a disseisor and as having acquired the fee simple." Jackson on Real Actions, 96, 7. If the tenant hold over after the expiration of his term, it is a disseisin at the election of the landlord, and he may maintain a writ of entry. But the case of A. Foss, it is insisted, is not embraced in the provision of our statute as above cited, nor within the principles of the common law in relation to disseisin by election. He has not "actually ousted the demandant or withheld the premises," nor has he "entered unlawfully on the right owner," nor has as lessee held over. He has not had the actual occupation and possession of the premises.

2. It will perhaps be said that A. Foss, having knowledge that S. Foss had recognized Cony's title, and having given a deed to S. Foss of a life estate in the premises, was an act of disseisin at the election of the demandant. It then becomes necessary to ascertain the situation of S. Foss in relation to the premises, and the extent and effect of what is said to be a recognition of S. Cony's title. The case finds, that S. Foss had had exclusive and notorious possession of the premises for more than thirty years; that in 1829 he gave a writing to Cony by which he promised to pay the taxes on the lot. In 1829, then, when this agreement was made, Cony's right of entry had gone, and S. Foss had acquired a good title by a possession of more than twenty years. Would such an equivocal writing as this, under such circumstances, have the effect to

divest his title thus acquired? It ought not to be so construed, unless it appears, that S. Foss did deliberately intend to give up all claim to hold the land, or even to claim betterments. Is the agreement to be construed an agreement to pay the taxes for one year only, or as continuing as long as he might continue to occupy? S. Foss had paid the taxes for more than twenty years before this time, and his promise to pay the taxes amounted to no more than what he had done every year for more than twenty years before. It was necessary for him to do it in order to preserve his rights as owner of the land. It was not then such a recognition of Cony's title as would purge the disseisin. Even a proposal to purchase of the owner, if not accepted, does not have this effect. *Small* v. *Proctor*, 15 Mass. R. 495, 499; *Blanchard* v. *Chapman*, 7 Maine R. 122; *Baylies* v. *Bussey*, 5 Maine R. 153; *Ewing* v. *Barrett*, 11 Pet. 41. In *Penniman* v. *Hollis*, 13 Mass. R. 429, the Court decided, that the plea of non-tenure could not avail a mortgagor of a reversion, living the tenant of the life estate, in an action brought by the mortgagee of the reversioner, and this on the ground of the peculiar relation existing between mortgagor and mortgagee; thereby admitting that but for this peculiar relation, the plea of non-tenure would have availed the tenant.

3. But the Judge instructed the jury, that this agreement created the relation of landlord and tenant. If it had this effect, it undoubtedly purged the disseisin. Of this instruction we also complain. The agreement, neither in its terms, nor by implication, amounted to a lease. It was a mere naked promise to pay the taxes. Cony might have supposed he had some interest in the land, and perhaps was apprehensive the land might be sold for non-payment of taxes, and S. Foss promised to continue to pay the taxes as he had done for twenty years before, not for Cony's benefit, but for his own. It does not appear, that Cony agreed that S. Foss might continue his possession, and take the rents and profits; and if the disseisin was purged, Cony might have sued him off the next day; and if the relation of landlord and tenant existed, Cony might have

sued and recovered in an action for use and occupation. A mere contract with the owner of land to raise a crop *on shares*, does not constitute a lease. 4 Kent's Com. 95. And if the disseisin of S. Foss was purged by the agreement, so that the demandant might maintain his action against him, it does not follow that A. Foss, even if he had been in possession, taking the rents and profits, would be liable in this action unless a previous entry had been made by the demandant and resisted by A. Foss. On this point the case of *Pro. of No.* 6 v. *McFarland*, 12 Mass. R. 325, seems to be quite conclusive.

In the case of *Fox & al.* v. *Widgery*, 4 Maine R. 214, the Court decided, that where a disseisor took from the disseisee a release of all his interest in the premises, it was not in fact, nor was intended by the parties to purge the disseisin, or to operate a waiver or abandonment of the rights of the disseisor. The principle of this case, applied to the case at bar, shews, in a strong light, the inaccuracy of the position taken by the Judge.

4. The inquiry in this case was one of intention, whether the disseisin by S. Foss had been purged, or waived, by the subsequent conduct of the parties; and as such it ought to have been submitted to the consideration of the jury; more especially as the agreement was an exceedingly equivocal act. But the Judge took it away from the jury, and decided it himself. *Fox & al.* v. *Widgery*, above cited, and also *Tyler & al.* v. *Hammond*, 11 Pick. 193, 218. If then this agreement, did not purge the disseisin of S. Foss, and had in fact no effect on his rights, A. Foss's knowledge of this agreement could not make him a disseisor by giving a deed of a life estate in the premises to S. Foss and wife.

5. If S. Cony was disseised in his lifetime by S. Foss, though his administrator had a right to sell the land under a license, the purchaser could not maintain his writ of entry against S. Foss or A. Foss, unless he had previously entered on the land for the purpose of taking possession. *Willard* v. *Nason*, 5 Mass. R. 240. And though Brooks, who purchased the land of the administrator might have maintained such an

action after entry on the land, it is believed to be at least doubtful, whether Cony, who bought of Brooks, or the present demandant could, because nothing passed by Brooks' deed to Cony, or Cony's deed to the demandant, there being a disseisin existing at the time. But however this may be, it is certain the entry of Lamb was in operation for every purpose. His entry, to have been effective, must have been made with an intention to revest the title in him, or purge the disseisin of S. Foss and A. Foss, and this intention must have been indicated by actions or words accompanying the entry. *Robinson* v. *Swett*, 3 Maine R. 316.

Wells, for the demandant.

The question arises upon the instructions of the Court, whether Ames Foss was tenant of the freehold. Such facts only, in the case, as illustrate that question, are to be regarded.

If the deed of Ames is a deed upon condition, to be performed *by him*, the life estate having been conveyed to his father and mother, from caution for their better security, and the condition being subsequent, he clearly has the freehold. *Green* v. *Thomas*, 2 Fairf. 318. If he is a mortgagor, between him and the world, he is owner.

It might be considered, from what is stated, that Ames was in the actual possession ; and he claims no right, in the case stated, arising from the want of possession. There was nothing, therefore, for the Court to decide upon that ground. The same remark may be made in relation to the fact, whether there was an entry, before the suit, by the demandant.

If a disclaimer had been pleaded, under the statute in force when the action was commenced, upon the proof of possession by Ames, he would have been liable for costs. Stat. 1821, c. 59, § 20. He does not prefer to put in a plea, which should place his case upon a *denial* of possession. The argument of his counsel, in relation to a disclaimer, is inapplicable. The question he raises is, whether he has the freehold. By his plea, he does not deny he is in possession. He claims to own the fee, but does not wish to have his rights tested.

Silas's possession was not *adverse*. Cony's right of entry had not gone in 1829, because Silas was his tenant. He had not therefore acquired any title by possession. How long he had paid taxes we are not informed. He acknowledged the land was Cony's, in the paper found among Cony's papers; and also said he paid the tax to the town in consequence of his *agreement* with Cony. He therefore held under Cony. *Crane* v. *Marshall*, 16 Maine R. 27. The Court meant, if he held by consent, and not adversely, the relation of landlord and tenant arose. That relation may subsist by parol.

The counsel for the tenant *assumes* that no entry had been made by the demandant, before action brought. No question is made, in the case stated, on that subject. He pleads a special plea, denying the freehold to be in himself, but does not state specifically in whom it is, and issue is joined upon it. And the Court ruled, upon the facts in the plea, that if Ames knew that his father had acknowledged Sam'l Cony's title, when he gave a deed of the life estate, it was an act of disseisin. Ames received a deed of his father, and gave one back, on the same day. By the purchase of his father he claimed to own it, and by the deed back, he undertook to exercise absolute dominion over it. The presumption is, that he was in possession, and that the acts corresponded with the deeds. Thus he is shown to be a disseisor; and if so, he is admitted to be amenable to the action. He made his father tenant for life. Tenant to whom? He sets out those facts which of themselves show he is tenant of the freehold, and then denies he is so. But the Court was too liberal to the tenant in requiring the demandant to prove a disseisin. Where one exhibits his title, and says that from that title he is not tenant of freehold, and by the title he is in fact tenant of the freehold, that is, he claims a freehold estate, — judgment must be rendered against him. No question of disseisin arises. *The plea implies, that he is in possession, claiming the estate to the extent set forth.* So it is, if he pleads nul disseisin. If he sets forth an estate less than a freehold, and the issue is in his favor, he prevails. A tenant may acquire a freehold by a

refusal to quit, when his tenancy has expired, at the election of the landlord; but this principle does not elucidate the subject in question.

The Court submitted to the jury all the facts in dispute. Silas having died, those facts, relating to his claim of betterments, become of no importance.

Silas being in possession, under Samuel Cony, he was so in 1835, when Cony died. Cony therefore died seised. Indeed the tenant cannot disseise his landlord, but at his election. *Alden* v. *Gilmore,* 13 Maine R. 178; *Stearns* v. *Godfrey,* 16 Maine R. 158; *Sacket* v. *Wheaton,* 17 Pick. 103; *Peters* v. *Foss,* 5 Greenl. 182; *Porter* v. *Hammond,* 3 Greenl. 188.

Ames claims the fee simple, which is greater than a freehold. There ought to be some mode of trying the claim of the reversioner, before the termination of the life estate. A judgment against tenant for life would not affect the reversioner, nor *vice versa.* To place the title beyond question, there must be judgment against both. And to effect this object, each one must claim a freehold. If he had not interfered with the property, he might have *disclaimed* and recovered his costs. But having in fact interfered with it, and still claiming ownership over it, when called upon, he attempts to free himself, not only from costs, but denies his liability to a suit, and claims costs. By denying he is tenant of the freehold, he admits he is tenant in some sense; and the facts show he has usurped the fee. He also told the demandant, that he and his father could hold the land.

Ames and his father were both wrongdoers. They cannot be allowed to modify or qualify their wrong. They are to be regarded in the same aspect in relation to the freehold. The defence of Ames is purely technical, and is not to be favored beyond what strict law would demand. *The reversioner and tenant for life* are both tenants of the freehold. Stearns on Real Actions, 2.

The opinion of the Court was afterwards drawn up by

SHEPLEY J. — The report does not fully set forth the conveyance from Ames Foss to Silas Foss and wife. It bears date on the sixth day of November, 1837, and was recorded on the sixth day of August, 1839; and it conveys a life estate in the premises on condition, "that if the said Ames render and deliver unto the said Silas and Sarah, and survivor of them, one third part of all the produce, which may be raised on said farm, for and during the said term annually, or support and maintain the said Silas and Sarah, whichever way they or either of them may elect, on said farm for said term, then the above deed to be void, otherwise to remain in full force." Ames Foss pleaded a special non-tenure, setting forth, that he had made this conveyance, and so concluded, that he was not tenant of the freehold. This plea and a part of the proceedings at the trial, seem to have been occasioned by an incorrect construction of this conveyance. Silas Foss seems to have been considered as legally entitled to the actual possession of the premises. The deed conveys a life estate in mortgage; and it appears from the condition, that the mortgagor was entitled to the possession until condition broken. He was to deliver one third part of the produce of the farm to them annually, or to maintain and support them upon it. This he could not do without being the actual occupant and receiver of its products. They could not expect to receive one third part of them from the hands of another, while they were receiving in their own right the whole. They could not have intended, nor could they rightfully claim, to occupy and improve the farm without an entry for condition broken. There is no proof of such an entry. Ames Foss must therefore be considered as the actual tenant of the freehold, although his right to the possession was liable to be defeated by a failure to perform the duties required of him. Whether the instructions on this point were strictly correct or not, becomes immaterial; for the plea and defence of non-tenure entirely fail.

The other points in the defence arose out of the alleged right

of Silas Foss to be considered as acquiring a title to the fee, or to the improvements, by an adverse possession for more than twenty or more than six years. It appears, that he had been in the exclusive possession of the premises long enough to have acquired a title, if that possession can be considered as adverse to the rights of the proprietor. To prove that it was not adverse, testimony was introduced by the demandant, that he made a written contract with Samuel Cony, in the year 1829, in relation to the premises. That contract has not been copied into the case or made a part of it; and the contents of the paper can only be ascertained from a statement of them in the report. That statement is, that the witness "testified, that he found a paper among his intestate's papers, signed by Silas Foss, dated in 1829, in which he promised to pay the taxes on lot No. 1, belonging to Samuel Cony."

If this be a correct representation of the purport and effect of the paper, it was a written admission, that lot numbered one, on which he lived, belonged to Samuel Cony. This would be a voluntary submission to that title, and a surrender of any rights acquired by any prior possession. And from that time he must be considered as the occupant of the lot in submission to that title, until there be proof of some new act of disseisin. The conveyance to Ames Foss might be so regarded, but it was not recorded and the change in his position made notorious until after the conveyance to the demandant. Whether the paper signed by him amounted virtually to a lease or not, it proved, that he had submitted to the title of the proprietor; and by his subsequent possession under such submission, he could not acquire any title to the soil or to the improvements upon it.

Judgment on the verdict.

GEORGE W. GORDON *& al. versus* AARON D. LOWELL *& al.*

When a man can readily remove difficulties standing in the way of his prevailing in a suit in equity, and does not do it, such difficulties become insurmountable.

Although the statutes provide, that any person, who should knowingly aid or assist in any attempt by a debtor to conceal his property from his creditors, should be liable to any creditor defrauded in a penalty, and that he should also be subject to be punished criminally; yet a court of equity will not aid in the infliction of penalties, but will endeavor that strict justice shall govern in the transactions between individuals.

A court of equity will assist a judgment creditor to discover and reach the property of his debtor, who has no property that can be reached by an execution at law, and especially when it is attempted fraudulently to secrete it.

When a creditor has, through the instrumentality of a court of equity, sought out and discovered the property of his debtor, which he had before been unable to discover and seise upon execution at law, he becomes entitled to a preference over other creditors, to have his judgment first satisfied, even under the insolvent laws.

THIS was a bill in equity, and came before the Court on bill, answers, and proof. The substance is given in the opinion of the Court.

This case was argued, it is said, at the May Term, 1841, when the present Reporter was not in office; and was again argued at the May Term, 1842, by *F. Allen*, for the plaintiffs, and by *J. Rand*, for the defendants.

Allen, cited *Buck* v. *Pike*, 2 Fairf. 9; *Conner* v. *Lewis*, 16 Maine R. 275; *Gardiner Bank* v. *Wheaton*, 8 Greenl. 373; *Powell* v. *Mon. & Br. Man. Co.* 3 Mason, 347; *Jewett* v. *Palmer*, 7 Johns. C. R. 65.

Rand contended, that the answers explicitly denied every material allegation in the bill, and that there was no sufficient proof in the case to contradict and destroy the effect of the answers.

The opinion of the Court, on June 3, 1843, was delivered by

WHITMAN C. J. — The bill sets forth, that, in 1835 and 1836, the defendant, Lowell, resided in Bangor; and did an

extensive business there as a dealer in merchandize; and, in the time, became indebted to the plaintiffs to a large amount; that in October, 1839, they obtained judgment against him, on account thereof, for $3965 debt, and $9,54, costs of suit; on which execution was issued, and returned unsatisfied, there being no visible property of said Lowell whereon to levy it; that said Lowell ceased to do business, as a trader, in 1836; and, to defraud the plaintiffs and his other creditors, that he ceased to be the ostensible owner of any property, although he had sustained no losses; and yet in fact was the beneficial owner of property to a large amount; and, early in 1837, removed to the town of China; and there became possessed of a farm of the value of $4000; and had ever since continued to hold, occupy and enjoy the same; that he procured a conveyance of the same to be made to his father-in-law, the defendant, Tukey, in trust for the benefit of him the said Lowell, who paid the consideration for the same; therein combining with the said Tukey to defraud the plaintiffs, and the other creditors of him the said Lowell, by causing the said Tukey to be the ostensible owner, when he himself was secretly the beneficial owner; that subsequently, in April, 1839, the said Lowell confederating with the said Tukey, and also with the defendants, Shaw and Lincoln, in furtherance of the said fraudulent intent, procured the same farm to be conveyed by the said Tukey, for the pretended consideration of $2500, to them the said Shaw and Lincoln, to be by them held secretly for his use and benefit.

To the bill the defendants have put in their several answers, denying all fraud and collusion. Shaw and Lincoln declare, that they were *bona fide* purchasers, and had no knowledge but that Tukey was the *bona fide*, as well as the ostensible owner of the farm, when they purchased it of him. And the evidence, though strongly presumptive against their innocence, is not deemed entirely sufficient to outweigh their declarations under oath, in their answers, to the contrary; especially, not so that a Court would be authorized wholly to disbelieve them.

With respect to the other defendants, Lowell and Tukey, the aspect of the case cannot be regarded otherwise than as strongly unfavorable to a conclusion that no sinister design existed between them. The evidence against them, though circumstantial, is such as cannot fairly leave a reasonable doubt that there was collusion in their negotiations in reference to the purchase of the farm. Their answers, under oath, so far as they are responsive to the bill, in the absence of evidence to the contrary, are to be taken as conclusive. But if circumstances be proved, by credible and disinterested witnesses, utterly irreconcilable with the truth of their statements, we must come to the conclusion that their statements are not entitled to our credence.

In the first place, it must be regarded as undeniable, that the sum of twenty-eight hundred dollars and over was paid by Tukey, by the hands of Lowell, or by Lowell for himself, between sometime in September, 1836, and the first of February, 1837, for the farm in China. Lowell, in his answer, does not say directly, that he had the money of Tukey. He only denies that he "advanced the money, or furnished the security for the consideration of said purchase;" or that the consideration, expressed in said conveyances and assignments, was "paid out of his own money." He nowhere says directly, that he received the same from Tukey. He undoubtedly means that it should be so inferred by the Court, from his other statements; and if it were proper in the present case, and under the allegations in the bill, explicitly stating the fact to be otherwise, for us to infer, that he did so receive it, without an express affirmation on his part, that such was the fact, we might feel ourselves authorized to make the inference. It is certainly a very material fact to be established; and must have been seen by him to be so. Should it then have been left to be inferred merely? We cannot but think, if Tukey ever furnished him with the money, that this allegation should have been direct and explicit to that effect; at the same time circumstantially setting forth the times when, the manner in which, and in what parcels, and under what circumstances he

received it, referring to documents evidencing the payments. It is surely not reasonable that we should believe, that such an amount of money was paid by Tukey to Lowell, the one living in Portland, and the other in Bangor, to buy a farm of such value, without some written evidence of the transaction. Yet nothing of the kind is alluded to as ever having existed.

Tukey's answer is equally barren of any such detail. He contents himself with merely saying, that he paid to the said Shaw and Garland, out of his own money, in consideration of this conveyance, two thousand eight hundred and ten dollars and forty nine-cents. That he did this by his agent, Lowell, who was duly authorized for the purpose. How was he duly authorized? No authorization is exhibited. Was it by letter, power of attorney, or verbally? He says furthermore, that this purchase was in execution of "a purpose or intention, long before formed by him, of spending his remaining years upon a farm." This farm, so purchased, and in execution of a purpose long before formed, of spending the remainder of his days upon, went immediately into the possession of Lowell, who occupied it precisely as if it had been his own, till April, 1839; when he sold it, as both of these defendants say, as agent for Tukey, to the defendants, Shaw and Lincoln. Tukey never saw it, either before the purchase or afterwards. Lowell, while so occupying it, built thereon an expensive barn, supposed to have cost at least four hundred dollars, besides making other improvements. It is not even pretended that this was done with money furnished by Tukey, or at his expense; or that any account was kept or charge made to Tukey for it. How does all this comport with the pretence that this farm was purchased for Tukey, or with Tukey's money, in pursuance of a design long since formed by him of spending the remnant of his days upon it? A farm he had never seen before the purchase! A farm while it stood apparently his, he never went to see; and which was sold without his ever seeing it!

His excuse for never going upon it, and for his final conclusion to sell it, is, that his health and strength, by reason of

long continued sickness, had become much impaired; and his ability to occupy, manage and carry it on, thereby seriously affected. As to this, the evidence, aside from his answer, is incontrovertible, that he, being by trade a mason, for years before the purchase of this farm, had been rendered unable to labor, by reason of a rupture; and had, in several years, claimed to have his poll taxes abated, which had been granted, on account of his inability to labor. There is no testimony, aside from his own declaration, that his infirmity had increased upon him in the years that the title to the farm stood in his name. If such a fact had existed, it must be believed that he would and could easily have proved it. It could not have happened without the knowledge of those in daily habits of intercourse with him.

Again; where, how, and when did he become able, in the short space of from some time in September, 1836, to the last of Jan'y, 1837, to obtain the sum of twenty-eight hundred and ten dollars, with which to pay for this farm? William Lord, who had been collector of taxes for ten years next prior to the time of giving his testimony, says, that if Tukey had been at any time during the five years next preceding, possessed of any personal property, his acquaintance with him and his affairs was such, that he thinks he should have known it; that during that time he had not been taxed for any, and he had no knowledge of his having any; that he had been unable, in any of those years, to obtain the payment of his taxes, all at one time, and he had invariably complained of being unable to get money wherewith to pay them.

Charles Fox, who had for twenty years, been one of the assessors of Portland, testifies to nearly the same effect. Tukey or his attorney or both were present at the taking of this testimony; yet not the slightest effort has been made to prove that he had any personal property whatever, or that he had in any way, raised the amount by borrowing, or by the sale of real estate, wherewith to pay for the farm. Did he own navigation, did he own stocks of any kind, had he debts due to him, how easy must it have been for him to have proved such fact? He

could but have seen that the stress of the case depended much upon obviating the force of this testimony. And where a man can readily remove difficulties, standing in the way of his prevailing in a suit at law, and does not do it, such difficulties become insurmountable. His unquestioned infirmities, with a family to support, with his continual complaints of inability to raise money to pay his taxes, the supposition, that he could, by his earnings or savings, have accumulated, and secretly have hoarded up the sum of twenty-eight hundred and ten dollars, without being able to make the slightest proof of it, to be suddenly placed in the hands of any one, however responsible, and much less in the hands of a son-in-law, who had just failed in business, living one hundred and thirty miles from him, to purchase for him a farm to retire upon, without previously seeing and examining it for his own satisfaction, cannot for a moment be entertained.

It moreover appears, that after the sale of the farm to Shaw and Lincoln, a claim was made upon it, on account of a prior incumbrance, which was adjusted by Shaw and Lincoln, with the concurrence of Lowell, and the sum of three hundred and seventy dollars was paid to discharge it. Have Shaw and Lincoln ever called upon Tukey for a reimbursement of the amount so paid? Have they pocketed the loss, and called upon no one for it? This can scarcely be believed, if the sale to them was *bona fide*, as is averred by all the defendants. It is but reasonable to conclude, and it can scarcely be doubted, that Lowell must have borne this loss out of his own funds.

Such a train of circumstances, so directly conflicting with the statements in the answers of the defendants, Lowell and Tukey, prove incontestably, and to our entire satisfaction, that the funds to purchase the farm must have come from Lowell himself; and that whether they were his own or not, he could not have derived them from Tukey; and that the transaction was in furtherance of a combination and confederacy between these defendants to defraud the plaintiffs, and the other creditors of the said Lowell, of their just debts.

The Legislature of this State, in 1835, by an act c. 195,

§ 13, provided, that any person who should knowingly aid or assist in any attempt, by a debtor, to conceal his property from his creditors, should be liable, in an action of the case, to any creditor, who might sue for the same, to double the value of the property concealed, not exceeding, however, double the amount of the debt due to such creditor. The same provision has been re-enacted into the Revised Statutes; with an addition, making it punishable as a criminal offence. We thus have an indication of the legislative sense of the enormity of such transactions. A court of equity, however, does not aid in the infliction of penalties; but endeavors that strict justice shall govern in the transactions between individuals.

It is undoubtedly a well settled principle, that a court of chancery should assist a judgment creditor to discover and reach the property of his debtor, who has no property that can be reached by an execution at law; *Hadden* v. *Spader*, 20 Johns. 554; and especially under the chancery powers of this Court when it is attempted fraudulently to secrete it. It is also a well established principle, when a creditor has, through the instrumentality of a court of equity, sought out and discovered the property of his debtor, which he had before been unable to discover and seise upon execution at law, that he becomes entitled to a preference over other creditors, to have his judgment first satisfied, even under the insolvent laws. *McDermutt & al.* v. *Strong & al.* 4 Johns. C. R. 687.

It appears by the admissions of Tukey, that, on the 24th of April, 1839, he received ample security for the payment of twenty-five hundred dollars, being the proceeds of the sale of the farm, purchased in the manner aforesaid, which sum we must regard as actually in his hands, of the property of said Lowell, and by him the said Tukey intended to be concealed from the plaintiffs, and the other creditors of the said Lowell. We, therefore, order and decree, that judgment be entered up, that the plaintiffs recover of the said Tukey, in part satisfaction of their judgment against said Lowell, the said sum of twenty-five hundred dollars, with interest thereon from the said 24th of April, 1839; and that a separate judgment be entered

up against the said Tukey and Lowell, and in favor of the plaintiffs, for their costs of this prosecution. And that the bill, as to Shaw and Lincoln, be dismissed without costs for them.

CHARLES PORTER *versus* LEWIS F. SHERBURNE.

For all the purposes connected with the performance of militia service, minority ceases at the age of eighteen; and therefore a person between the ages of eighteen and twenty-one is liable to the penalty incurred by unnecessarily neglecting to appear at a company training.

The enlistment of one over eighteen and within twenty-one years of age, into a volunteer company in the militia, without the consent of his parent, master, or guardian, is binding upon such infant.

If the soldier does not himself sign the book of enlistment, but gives another person the right to do it for him, by whom it is done, and he afterwards performs duty in the company; the enlistment will be regarded as binding upon him.

Where the record does not show that any question was made, in relation to notice to the commanding officer of the standing company, of the enlitsment of the soldier into a volunteer company, before the justice, or was decided by him; and does not show that there might not have been other facts proved in the case and not inserted in the bill of exceptions; the objection cannot be taken in this Court for the first time.

ERROR to reverse a judgment of a justice of the peace, brought to recover of the plaintiff in error a fine for neglecting to perform militia duty in a company raised at large by enlistment, of which the original plaintiff was clerk. Three objections were made to the right to maintain the action, but they were overruled by the justice, and judgment was rendered in favor of the plaintiff. These three objections were assigned, as causes of error.

E. Fuller, argued in support of the errors assigned.

The first was, that since the militia act of 1834, no action can be maintained against a minor. St. 1834, c. 121, § 33, was cited, and relied on.

The second was, that there was no proof, that the defendant ever joined the company.

The mere putting down of the name of a minor by another man on the company book, cannot be a legal enlistment. The minor could not make a valid appointment of another to act for him.

The third was, that the joining of an independent company, was a contract, which, if made with the usual formalities, was not binding on a minor.

It was also urged on the argument, although not made as an objection before the justice, or assigned as a cause of error, that there was no evidence found in the bill of exceptions, that the commanding officer of the standing company to which the original defendant belonged was notified of the enlistment.

Morrill, for the original plaintiff.

The law imposes upon the minor the obligation to perform militia duty, and if he enlist into a volunteer company, the law will hold him to perform that service there. *Comm.* v. *Frost*, 13 Mass. R. 491.

The case finds that the name of the plaintiff in error was on the book of enlistment; that he authorized the attesting witness to put it there; and that he afterwards knew it, and assented to it, and met with the company several times.

It has always been holden in Massachusetts, that a minor may be sued for neglect to perform the militia duty required by law. The reasoning is equally applicable here. *Winslow* v. *Anderson*, 4 Mass. R. 376; *Dyer* v. *Richardson*, 12 Mass. R. 271.

If the case does not find that notice of the enlistment was given to the commanding officer of any other company, it is also true that the case does not show that he ever belonged to any company, but that in which he enlisted.

The opinion of the Court was drawn up by

Shepley J. — The first error assigned is, that an action cannot be maintained against a minor for neglect of duty in the militia. And the third error assigned is, that the enlistment into a company raised at large, was a contract which the minor was incompetent to make, and that he might avoid it at pleas-

ure. Both these points have been decided. *Dewey, pet'r*, 11 Pick. 265; *Stevens* v. *Foss*, 6 Shepl. 19.

The second error assigned is, that there was no proof that the plaintiff in error ever enlisted into the company. When testimony is legally admitted, it is the duty of the magistrate to judge whether the fact be proved or not, and there is no appeal by writ of error from his decision on the fact, unless some question of law is involved in such decision. In this case, however, it appears from the record, that, although he did not sign the book of enlistment, he gave another person authority to do it for him; and that he met with and performed duty in the company two or three times; and this might be regarded as a full confirmation of the enlistment.

It is now objected in argument, that there was no proof of notice of the enlistment, given in writing, to the commanding officer of the standing company, as the statute requires. The record does not show, that any such question was made before the magistrate, or was decided by him; nor does it show, that there might not have been other facts proved in the case, which were not stated in the bill of exceptions. This objection cannot therefore be taken for the first time in this Court.

Judgment affirmed.

EMERY O. BEAN *versus* LEWIS F. SHERBURNE.

A soldier is subjected to the forfeiture for neglecting to perform militia duty only, when the mode of notifying him pointed out by the statute is followed.

If a soldier becomes informed of the time and place of parade of the company by being ordered to notify others, this is not sufficient to render him liable to the payment of a fine for non-appearance.

Where the order is "to warn and give notice to all the non-commissioned officers and privates in the company, a list thereof being hereunto annexed," the latter words restrict the former general words, and limit them to the names borne upon the list.

THIS was a writ of error brought to reverse the judgment of a justice of the peace, imposing a fine upon the plaintiff in error for neglecting to appear at a company training.

The evidence offered to prove that Bean was duly notified to attend, was a written order, directed to him, and ordering him "to warn, and give four days' notice to all the non-commissioned officers and privates enrolled in the company under my command, a list thereof being hereunto annexed." This order was signed by the captain of the company, and there was a paper annexed to it, on which were written the names of sixteen persons, the name of Bean not being among them. On the bottom of the order was a return signed by Bean, certifying that he had warned "all the non-commissioned officers and privates enrolled in the company aforesaid, as above directed." It did not appear, whether the order was handed to Bean by the captain, or sent to him. This was all the evidence to prove the warning. It was objected, that no legal warning was proved, but the justice overruled the objection, and rendered judgment against Bean.

E. Fuller, for the plaintiff in error, said that, as the law had clearly defined and directed the mode in which members of a militia company are to be notified and warned, in order to compel the performance of militia duty, the commanding officer is not at liberty to substitute any other mode; and much less to require of the soldier the performance of militia duty without any warning. Any deviation from the modes of warning pointed out by the statute, is fatal to an action for a fine. *Ellis* v. *Grant*, 15 Maine R. 191; *Howard* v. *Folger*, ib. 447.

Morrill, for the original plaintiff, contended that the warning was sufficient. The law does not require a list of the names to be annexed to the order. It is only necessary that it should appear on the order what part of the company is required to be warned by the person to whom the order is directed. Militia act of 1834, § 21. The return states, that he notified the person to appear at the time and place stated. He knew that he was a member of the company; he knew that the company were to perform militia duty; he knew the time and place of parade; and he was bound to appear there himself. It was not necessary, that his own name should have

been upon the list, annexed to the order. He could not warn himself. Besides, his name was upon the order, it having been directed to him as a member of the company.

The opinion of the Court was by

SHEPLEY J. — The only question presented in this case is, whether the plaintiff in error was duly notified. The order is not to warn all the non-commissioned officers and privates of the company. The words, "a list thereof being hereunto annexed," restrict the general words, and limit them to the names borne upon the list. The soldier was not therefore notified in any mode pointed out by the statute. He became informed by being ordered to notify others, that there was to be a company training at the time and place, when and where it is contended that he should have been present. To decide that a soldier is obliged to appear and perform duty in the militia, if he becomes informed in some other mode than that prescribed by the statute that he is required to do so, would be an effectual and practical repeal of the statute provision, and would allow the commanding officer to elect his own mode of doing it. The soldier is subjected to the forfeiture only, when the mode of notifying him pointed out by the statute is followed.

Judgment reversed.

JOSEPH P. DILLINGHAM *versus* DANIEL C. WESTON, *Adm'r.*

No action, commenced after the insolvency, on a demand which does not come within the exceptions in the statute, can be maintained against the administrator of an insolvent estate, unless the claim has been previously laid before the commissioners.

When an action is commenced against the administrator of an insolvent estate, on a claim which does not come within the exceptions in the statute, and which has not been laid before the commissioners, it is not necessary that the objection should be taken by plea in abatement, but it may be done by plea in bar or brief statement.

THE suit was brought on July 18, 1839, to recover the amount of a promissory note, for which, it was alleged, Samuel Weston, on whose estate the defendant was administrator, was liable as one of several persons associated as the Fairfield Mill Company. The defendant pleaded the general issue, and by brief statement, that the estate of his intestate was, before the commencement of this suit, represented to be insolvent, and so decreed, and commissioners appointed. The counsel for the plaintiff objected to its reception as a defence in this stage of the suit, but it was admitted by SHEPLEY J. presiding at the trial. In proof of the facts alleged in the brief statement, the defendant introduced copies from the records of the Probate Court, by which it appeared that the estate had been represented to be insolvent, and that commissioners had been appointed on May 7, 1839. The plaintiff did not produce any evidence that the claim, or note, had ever been laid before the commissioners of insolvency.

The Judge ruled that the action could not be maintained. The plaintiff submitted to a nonsuit, which was to be set aside, if the admission of the brief statement, or the ruling of the Judge, was erroneous.

Vose and *Lancaster*, for the plaintiff, contended, that the plea should not have been received, because the subject matter could only be pleaded in abatement. The brief statement, with the general issue, amounts to a plea in bar. This is a dilatory plea, and not to the merits. It is but delaying the remedy. The plea does not deny, that the plaintiff has no

cause of action in any mode, but merely that the present action cannot be maintained in the present mode. Com. Dig. Abatement, B. 2.; Bac. Abr. Abatement, N; *Hunt* v. *Whitney*, 4 Mass. R. 623. This is like the case of want of indorser on a writ, which must be taken advantage of only in abatement. It is, like that, the objecting of a statute disability.

Boutelle, for the defendant, said the object of the statute on this subject, St. 1821, c. 51, § 25, was to provide for an equal distribution of the estate, after payment of the privileged claims, among all the creditors, and all the claims are to be laid before the commissioners. The words of the statute forbid the bringing of the suit until after the claim has been laid before the commissioners and rejected. The plea could not give the plaintiff a better writ, for no action, in any form, could be maintained. The case relied on for the plaintiff, *Hunt* v. *Whitney*, does not apply, as that suit was commenced in the lifetime of the insolvent intestate, but this was not until after the estate had been rendered insolvent. *Ellsworth* v. *Thayer*, 4 Pick. 122; *Paine J.* v. *Nichols*, 15 Mass. R. 264; *Johnson* v. *Ames*, 6 Pick. 330.

The opinion of the Court was by

TENNEY J. — Whether the brief statement of the defendant was properly admitted, when objected to by the plaintiff, must be determined by the admissibility of the mattter therein contained in *bar of the action*. It is insisted that the contents are in the nature of a dilatory plea, do not go to the merits of the action, and show merely a statute disability, and therefore can be taken advantage of, only in abatement. It is true, that this defence is not a denial, that there was ever a cause of action upon the note in suit, but that the cause which might have existed at one time against the maker, has ceased by his death, and as it now stands against the defendant has no foundation. There are some matters which may be pleaded in bar or abatement, and it is not necessary for us to decide in this case, what would have been the result, had the defendant relied upon the latter, seasonably pleaded. It was not in

the power of the defendant to give a better writ, which is ordinarily the true criterion by which to distinguish a plea in abatement from a plea in bar. 1 Chitty's Pleadings, 434, 445; *Evans* v. *Stevens*, 4 D. & E. 227. The plaintiff has not taken the steps, which entitle him to maintain any action against the defendant at this or at any time upon the facts as they now present themselves. The statutes of this State, provide "that no action brought against an executor or administrator of an estate represented insolvent, shall be sustained, except for debts due to the State, debts due for taxes, for the deceased's last sickness and funeral charges." Laws of Maine, 1821, c. 51, § 25. The same statute has provided that commissioners shall be appointed for the consideration and allowance of claims, and a rejection of such a claim, as the one here presented, by them, is a prerequisite for the maintenance of an action, so long as the estate is apparently insolvent, and may be considered as an element in the cause of action against *an administrator.* The death of the maker of the note has changed essentially the remedy of the plaintiff. He can resort to his action against the defendant only after having taken the steps which the statute points out. The defendant can be liable in no other way; no cause of action exists against him, if there be wanting any material which the statute requires; and such a want is as fatal to an action against the defendant, as a want of maturity in the note would be in an action against the maker, were he living.

When an estate has been represented insolvent, and so declared by competent authority, this could be pleaded in bar of a suit against an administrator. *Coleman* v. *Hall, Adm'r*, 12 Mass. R. 573. But if other assets should afterwards come to the hands of the administrator, the original claims of creditors would not be discharged by the record of insolvency, if not fully paid, but a further distribution would be decreed. And we do not perceive why a plea in bar, or what is the same thing, a brief statement, may not be introduced in one case with as much propriety as in the other. In an action against one as executor, that he is not such, may be pleaded in abate-

ment or bar. 5 Com. Dig. Pleading, 2, D, 3 — 7. The authorities cited by the defendant's counsel, though this question was not distinctly presented to the Court therein, show that the practice sustains the ruling of the presiding Judge.

Nonsuit confirmed.

INHABITANTS OF FAYETTE *versus* INHABITANTS OF HEBRON.

A person living on a plantation and having his home there at the time of its incorporation into a town, prior to the Massachusetts settlement act of 1793, c. 34, thereby acquired a settlement in such town.

ASSUMPSIT to recover compensation for the support of Eliza Bumpus, the wife of Seth Bumpus, and her children, whose settlement was alleged to be in Hebron. Their settlement was derived from Seth Bumpus, and the only question made was where his settlement was.

It did not appear that Seth Bumpus had gained any settlement in this State in his own right; and the plaintiffs claimed to recover by establishing the settlement of his father, John Bumpus, in Hebron; and to do so, by showing that he was a resident in the plantation of Shepherdsfield at the time when it was incorporated as a town by the name of Hebron, March 6, 1792. The defendants contended, that if he was dwelling there as his home at that time, he would not thereby gain a legal settlement, because there was then no statute providing that a settlement should be gained in that mode. SHEPLEY J. presiding at the trial, instructed the jury that Bumpus would thereby gain a legal settlement, if so residing there.

The jury found, that John Bumpus was residing in Shepherdsfield when it was incorporated as the town of Hebron, in 1792.

If the instruction was erroneous, the verdict was to be set aside.

Vose, for the defendants, insisted that towns were liable for the support of paupers only by statute; and that there was

no mode of acquiring a settlement, but by the provisions of some statute. *East Sudbury* v. *Sudbury*, 12 Pick. 5; *New Portland* v. *New Vineyard*, 4 Shepl. 71; *Thomaston* v. *Vinalhaven*, 1 Shepl. 161.

Prior to the statute of 1793, there was no provision in any of the statutes, that any one should gain a settlement by residing on the territory at the time it was incorporated as a town. He examined the statutes severally, and said that no such provision was to be found in any one of them.

If it be said, that the very act of incorporation gives such settlement, without any statute provisions on the subject, it is enough, that it would equally apply to districts and plantations; and it has been decided, that the incorporation of a district into a town will not. *Walpole* v. *Hopkinton*, 4 Pick. 357.

The only two cases in which a contrary view is intimated, were rightly decided on other grounds, and so much as had reference to this subject was extrajudicial. He examined the cases of *Bath* v. *Bowdoinham*, and *Buckfield* v. *Gorham*, and said they were justly liable to his preceding remark, and that this Court, in *Thomaston* v. *Vinalhaven*, already cited, had so viewed them.

The words, "*or otherwise*," in the statute of 1793, do not imply that there were other modes of gaining a settlement than by statute; but merely enumerated some statute modes, and referred to other statute modes, by the term *or otherwise*.

Emmons, for the plaintiffs, said that the question to be decided between the parties was — can an individual, twenty-one years of age and a citizen of the United States, resident in an unincorporated territory at the time of its incorporation into a town, by the act of incorporation gain a settlement therein, so that the town shall become liable, if he subsequently becomes a pauper, prior to the law of 1794. The defendants affirm that he could not. The plaintiffs maintain that he could.

The settlement law, passed in 1794, repeals all prior settlement acts, but provides that all settlements already gained by force of said laws, *or otherwise*, shall remain until lost by gaining others. This shows, that it was then understood, that

there had been other modes of gaining settlements than by statute provisions. The settlement law of 1789, speaks of such as have obtained a legal settlement in such town or district, "by birth, marriage, *or otherwise.* The statutes anterior to the law of 1794, (which were examined,) do not speak of gaining a settlement by the incorporation of a town, and yet that must have been one of the modes.

Mere residence in an unincorporated place did not give a settlement. 2 Dane, c. 53, art. 3, § 17. If, therefore, persons residing in an unincorporated plantation did not by its incorporation into a town gain a settlement by the act, then at the time the plantation becomes a town, no inhabitant has a legal settlement therein. Unless by the act of incorporation, as the law then was, no person residing upon the territory, when the plantation of Shepherdsfield was incorporated into the town of Hebron, could gain a settlement therein within two years, excepting by vote of the town, voting each other in by turns. The act of incorporation, *ex proprio vigore,* gave a legal settlement to all persons residing on the territory at the time.

That prior to the settlement act of 1794, the incorporation of a plantation into a town gave a legal settlement in the town to all persons then residing therein, has been settled by a series of decisions in Massachusetts and Maine, from 1808 down to the present time. *Bath* v. *Bowdoinham,* 4 Mass. R. 452; *Buckfield* v. *Gorham,* 6 Mass. R. 445; 2 Dane, c. 53, art. 3, § 18; *St. George* v. *Deer Isle,* 3 Greenl. 390; *Bloomfield* v. *Skowhegan,* 16 Maine R. 58; *Marlboro* v. *Hebron,* 2 Conn. R. 22; *Westport* v. *Dartmouth,* 10 Mass. R. 341; *Great Barrington* v. *Lancaster,* 14 Mass. R. 256; *Windham* v. *Portland,* 4 Mass. R. 390; *Westboro'* v. *Franklin,* 15 Mass. R. 256; *Lancaster* v. *Sutton,* 16 Mass. R. 115; *Groton* v. *Shirley,* 7 Mass. R. 156; *Fitchburg* v. *Westminster,* 1 Pick. 146; *Shrewsbury* v. *Boylston,* ib. 106; *Walpole* v. *Hopkinton,* 4 Pick. 359; *Hallowell* v. *Gardiner,* 1 Greenl. 93; *Hallowell* v. *Bowdoinham,* ib. 129; *Dalton* v. *Hinsdale,* 6 Mass. R. 501; *Hamilton* v. *Ipswich,* 10 Mass. R. 506; *Newburyport* v. *Boothbay,* 9 Mass. R. 414.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a case arising under the settlement and pauper laws of this State. The question reserved, and elaborately argued, is whether a person living on a plantation, on its being incorporated into a town, in 1792, thereby acquired a settlement in such town. The instruction of the Judge, who presided at the trial, was in affirmance of this proposition; and the jury thereupon returned their verdict for the plaintiffs.

The counsel for the defendants argued, that the liability of towns to support their poor, is wholly dependent upon legislative enactment; and cites, in support of this proposition, the cases of *East Sudbury* v. *Sudbury*, 12 Pick. 5; *New Portland* v. *New Vineyard*, 16 Maine R. 71; and *Thomaston* v. *Vinalhaven*, 13 Maine R. 161. Mr. Chief Justice WESTON, in the latter case, in delivering the opinion of the Court in reference to the proposition first above stated, remarked, that "as the settlement of paupers depends upon the express provision of law, it might deserve very serious consideration whether a mode of settlement, so sweeping in its effect, should be established by construction," and that, "as no such provision existed in any former statute, this would seem to be a new mode of gaining a settlement." And suggests that the opinions, intimated by the Court, in *Bath* v. *Bowdoinham*, 4 Mass. R. 452; and *Buckfield* v. *Gorham*, 6 Mass. R. 445; were extrajudicial, and not necessarily connected with the decisions in those cases.

The counsel for the defendants further contends, inasmuch as it has been held in Massachusetts, that the settlement of those residing in districts, when incorporated into towns, was not altered; so the settlement, before the statute of 1793, of the inhabitants of plantations, could not be altered by their being incorporated into towns. This argument depends upon the supposed similitude of districts to plantations. Districts, by the statutes of Massachusetts, in reference to legal settlements and paupers, were placed upon a par with towns. They

were but another species of municipal corporation, created by the legislature, with powers, in some respects, inferior to those of towns; but in reference to paupers and acquiring legal settlements, the powers and liabilities of the inhabitants of each were placed upon the same footing. Hence, when raised from the condition of districts to that of towns, no change was produced thereby in the rights of the poor, or in the obligation of the same corporators to relieve them, when in need. The pauper laws were never extended to the inhabitants of plantations. By being such inhabitants, no liability was thereby created to support or relieve any one who might fall into distress therein; and no settlement, of the kind under consideration, could ever be acquired by being such inhabitant.

In regard to the gaining a settlement, before 1793, by living in a plantation, at the time of its incorporation into a town, the cases cited on the part of the plaintiffs, seem to exhibit a series of juridical opinions, tending very strongly to the support of the ruling of the Court at the trial in this case. That the liability, on the part of towns to support their paupers, depends upon legislative enactment, is undeniable. No town could otherwise be bound to afford aid to any individual in distress. The statute creates the duty; and renders the inhabitants of every town liable to relieve all such as within their towns, may fall into distress, and stand in immediate need of relief. When such relief is afforded, it becomes a question, whether the expense shall, ultimately, fall upon the town affording it, or be reimbursed by some other town. To determine this, it must be ascertained where the individual relieved has his legal settlement. With a view to this, the legislatures of Massachusetts and Maine have, at different times, determined prospectively, by their enactments, what shall be requisite to constitute a legal settlement in any particular town. The legislature of this State, by an act of the twenty-first of March, 1821, referring to statutes before enacted, made provision, that "all settlements already gained by force of said laws *or otherwise*," should remain until lost by gaining others.

The provision in the statute of Massachusetts, of 1794, is in the precise same language. From both these statutes therefore, it would seem to be clearly inferible, that modes of gaining settlements, other than those which had been before specified in any statute, had existed. If it were not so, the words, "or otherwise," would be without meaning. And the rule is, that all the words in a statute are to be considered as operative, if practicable.

The inhabitants of a plantation, who were under no obligation to relieve any of their number who might fall into distress; and who, of course, during such condition, could not claim any such relief; upon being incorporated into a town, became at once bound to afford such relief, whenever occasion might call for it. If such incorporation did not give to each corporator a legal settlement in his new town, it would follow, that, in every case of a pauper relieved, the inhabitants would have a remedy over against some other town for reimbursement; and this would continue to be the case until every inhabitant, who might become chargeable, had acquired a settlement therein, by some of the modes prescribed by statute; and this would be so, notwithstanding the inhabitants had enjoyed all the aids incident to a town from its inhabitants, in the mean time; and during which time they could not become liable to reimburse any expense incurred for the relief of any of their number, who might fall into distress in other towns. It would seem incredible, that the existence of such a state of things could ever have been contemplated as admissible by any legislative body, anterior to the passage of the statute of 1793. This renders it presumable, that, prior to the passage of that law, settlements must have been gained otherwise than by special enactments for the purpose; and that the incorporation of plantations *proprio vigore* accomplished that purpose.

Legal settlements in towns, by force of annexations thereto of parts of other towns, and the creation of one town out of a portion of another town, before the statute of 1793, have been repeatedly recognized as being thereby changed with the terri-

tory so annexed or erected into a new town. Judge Sewall, in delivering the opinion of the Court, in *Westport* v. *Dartmouth*, 10 Mass. R. 341, says, "upon that event (the incorporation of New Bedford, which took place in 1786 or 7) all persons, then having their legal settlement in Dartmouth, who actually dwelt and had their homes within the limits of the new town or district, gained, by force of the act of incorporation, a legal settlement in the new town or district." C. J. PARKER, in delivering the opinion of the Court in *Great Barrington* v. *Lancaster*, says "the pauper's original settlement was in Lancaster, that being his father's settlement at the time of his birth. On the annexation of that part of Lancaster, (in 1781) where the father dwelt, to Shrewsbury, his settlement was transferred to the latter town. For although no express provision, respecting paupers, appears in the act providing for their annexation, yet it is a necessary effect of such annexation, that the town, which acquires the new inhabitants and new territory, should also incur such burthens as may be incident to the new relations." And the same principle is distinctly recognized by Chief Justice PARSONS, in delivering the opinion of the Court, in *Windham* v. *Portland*, 4 Mass. R. 390; and again, in *Lancaster* v. *Sutton*, 16 Mass. R. 115; and by PARKER C. J. in *Westborough* v. *Franklin*, 15 Mass. R. 256; and in *Groton* v. *Shirley*, 7 Mass. R. 156; and in *Dalton* v. *Hinsdale*, 6 Mass. R. 501. A similar principle was adopted in *Mason* v. *Alexandria*, 3 N. H. R. 303.

The principle, that the incorporation of a plantation as a town, confers a legal settlement upon those, who, at the time, were settled upon it, seems but a corollary from the above cited decisions. And the direct avowal of it, in the two distinct instances, alluded to by Chief Justice WESTON, seems to add great weight of authority in favor of it. And it seems to have been referred to by Chief Justice MELLEN, in *Hallowell* v. *Gardiner*, 1 Greenl. 93, as being an acknowledged principle; and the same may be said of the opinion delivered in *Westport* v. *Dartmouth*, before cited. Judge Sewall says, in that case, "an act to incorporate, as a new town or district,

a territory with the inhabitants thereon, which are separated and set off from one or more ancient towns or districts, operates, in this respect, like the original incorporation of a plantation." The case of *Thomaston* v. *Vinalhaven* seems to have been decided upon other grounds, so that the remarks of Chief Justice WESTON were but *obiter dicta;* and cannot be regarded as having a controlling influence; and are unsupported by any prior authority or dictum. We think, therefore, on the whole, that we may well consider the rule, as laid down at the trial, in this case, as a well established principle.

Judgment on the verdict.

DANIEL GOULD *versus* SAMUEL WILLIAMSON *& al.*

In equity, to control the answer, the evidence against it must be equivalent to that of the testimony of two credible witnesses, testifying to the contrary.

This evidence, however, may in this, as in other cases, be by way of inference from circumstances, which are sometimes more convincing than direct testimony; and in the developement of fraud, furnish almost the only source to be relied upon.

When a person will, in his answer under oath, state that to be a fact, which he believes to be true, when he has at hand the means of ascertaining whether it be true or not, it is a circumstance strongly indicative of fraud, if it be not true.

THIS was a bill in equity against Samuel Williamson, Joseph White, Samuel Hutchins, and James L. Child; and alleged, that in August, 1834, White being the owner of certain land in Pittston, gave to one Dudley and his assigns a bond with condition to convey the land to Dudley on the payment of certain sums by March 9, 1838, and Dudley went into possession thereof; that on March 9, 1838, White commenced a writ of entry against Dudley; that this action was referred to W. Emmons, Esq. with power to determine what judgment should be rendered therein, and that the referee should give such redress to the parties, and make such award

as they would be respectively entitled to in a court of equity; that on the 13th of August, 1839, the referee made his award, that upon payment by Dudley of sixty dollars to White and the referee's charges, within three months, White should convey the land to Dudley, or his appointee, which award was accepted and judgment rendered thereon; that Dudley, for the consideration of $280, conveyed his interest in the bond to Gould, the plaintiff, who seasonably paid the referee and tendered the sixty dollars to White; that White said he had deeded the land to Hutchins, his son-in-law, and the money must be paid to him, and the deed come from him; that in October, 1839, Gould paid the amount to Hutchins, who gave a quitclaim deed of the land to Gould, the latter then giving up the bond to White; that White had not conveyed the land to Hutchins, and Gould obtained no title by his deed; that on April 4, 1840, White conveyed this with other lands to Williamson; that Williamson made a deed thereof to Nathaniel Moody, which remained in the hands of said J. L. Child to be delivered to Moody, on the payment of a certain sum of money; that Dudley has conveyed to Gould all right to the land; that the deed from White to Williamson was made without consideration, and to defraud the plaintiff and the creditors of White, and that Williamson knew that White was bound by the award to convey the land to Dudley or his assignee, the plaintiff. There was a prayer for injunction, for a decree for the conveyance of the land, and for relief generally.

Mr. Child, in his answer, admitted that a deed from Williamson to Moody was acknowledged in his office and left with him as an escrow until a certain sum of money should have been paid; and declared his ignorance in relation to all the other charges in the bill, and that he entered into no combination, &c.

The character of the answers of White, Williamson and Hutchins, as well as of the evidence in the case, sufficiently appears in the opinion of the Court.

Wells, in his argument for the complainant, advanced these principles of law. An award of referees, containing a condi-

tion, makes a valid judgment. *Comm.* v. *Pej. Proprietors*, 7 Mass. R. 399. If an award, in pursuance of an agreement annexed to the rule, be accepted, all preliminary arrangements by the parties are irrevocable, while the judgment remains in force. *Tyler* v. *Carleton*, 16 Maine R. 380.

As the plaintiff claims under Dudley, and the defendant, Williamson, under White, they stand in the place of the original parties, and are privies in estate. The judgment therefore binds them. 1 Stark. Ev. 192; *Adams* v. *Barnes*, 17 Mass. R. 365; 1 John. Ch. R. 566.

The remedy sought is appropriate. The plaintiff has paid for the property, and ought to be quieted in his title against the fraudulent attempts of White and Williamson. White was bound to convey to the plaintiff as assignee of Dudley, and Williamson, Hutchins and Moody have combined with White to defraud the plaintiff, and are equally liable with him. 2 Story's Eq. 129.

He contended that abundant cause was found in the answers and proof to sustain the bill.

Weston, argued on the facts, and contended that upon them, the complainant had not supported his bill. In the suit, *White* v. *Dudley*, the latter had no defence. The money had not been paid, and the bond had become forfeited. The award was merely that White should convey, on being paid a sum of money, but no provision was made in case he declined taking the money, and refused to convey. Neither the referee nor the Court had power to compel him to abide by the decision, and convey the land, and they did not attempt it.

It was however the plaintiff's own neglect, that he did not acquire a title. White supposed he had conveyed the premises to Hutchins, and Hutchins believed he had conveyed the same to Gould. The remaining land of White was afterwards sold to Williamson; and Hutchins, finding he had received no title, and therefore had conveyed none, offered to return the consideration money. There was no fraud in any of the transactions. The answers so state, and there is no evidence to weigh against even the testimony of one witness. The law,

however, is too familiar to require the citation of authorities, that in equity, an answer can be overcome only by the testimony if at least two credible witnesses.

Child, pro se, said he had been brought into Court as a party to this bill in consequence of the transaction of ordinary business, without the knowledge of any of the acts set forth in the bill; and that nothing took place to lead any reasonable man to suspect fraud or misconduct in the business. Whatever the decision of the Court might be with respect to the other parties, he ought to be allowed his costs.

The opinion of the Court was drawn up by

WHITMAN C. J. — Upon a careful review, and critical examination of the evidence in this cause, the Court are well satisfied of the truth of the allegations of the plaintiff. The defendant, Williamson, in his answer, has denied all such as impute a fraudulent combination between him and Joseph White. Having made oath to the truth of his answer, we are bound to take it to be true, unless the proof to the contrary be overwhelming. It is said, and truly, that, to control the answer, the evidence against it must be equivalent to that of the testimony of two credible witnesses, testifying to the contrary. This evidence, however, may in this, as in other cases, be by way of inference from circumstances, which are sometimes more convincing than direct testimony. In the developement of fraud it furnishes almost the only source to be relied upon. It is not often the case, that any but the participators in fraud are conusant of it; and the perpetrators of it will deny it. If fraud therefore could not be established by circumstantial evidence, even in opposition to the denial of the defendant in equity, under oath, the remedy, under a process in equity, would be, in almost every case, illusory.

What are the circumstances, then, to establish fraud and collusion in this case. The first is, that the land in controversy had, for some time anterior and nearly up to the time of the purchase of it by Williamson, been notoriously the subject of litigation between his grantor, White, and the person under whom the plaintiff claims; and a judgment had therein been

entered up, that White should convey to his adversary or his appointee, who was the plaintiff, upon certain terms, to which the plaintiff had conformed, so as to become entitled to his conveyance. Of this the defendant denies that he was consusant. But whether he was or not, the circumstances hereafter noticed may tend to show. The disclosures in his answer show that he must have been the confidential friend of White. He purchased of him all of his visible property, consisting of three parcels of real estate, lying remote from each other, two of which he avows that he was reluctant to purchase, and only purchased at the urgent solicitation of White, he admitting that he was about to go off, to be absent a long time. He admits further, that he paid for those parcels wholly in negotiable notes, amounting, as it appears, to seven hundred dollars, on a credit extending from one to seven years, in equal annual instalments. It is in evidence, and not controverted, that he was utterly destitute of property, and that White took, as collateral security, a mortgage only of one of the parcels of the real estate; and that one under a previous mortgage, made by him for its full value, leaving the other two parcels, including the premises in controversy, unincumbered. It further appears that said Williamson had never actually occupied either of said parcels. And he states in his answer, that a writing was given by him to White, evidencing an agreement between them, that the latter should have, within a specified time, a right to have a re-conveyance of the land, on surrendering the notes given for the consideration. What that specified time was he has not disclosed. Again, he says that he was to give four hundred dollars for the two parcels of land, which he at first declined to purchase, and gave his negotiable notes therefor, payable in four years. But the whole consideration for the three parcels, as appears by White's deed to Williamson, was seven hundred dollars; and, by the mortgage of the worthless parcel back, that the whole seven hundred dollars was divided into seven hundred dollar notes, payable annually, in from one to seven years. All this tends to show that but little reliance ought to be placed upon Williamson's statements in his answer.

In his answer, he further states, that, at the time of the conveyance to him, he was at the office of the registry of deeds, and examined the records, to see that White had a right to make the conveyance of the several parcels; yet he was content to take the parcel, incumbered with a mortgage, to its full value; and to give his notes for three hundred dollars, in payment for it, as would seem to be apparent from his mortgage deed, taken in connexion with what he says was the price of the two unincumbered parcels.

Again, he says, in his answer, that he has been informed, and verily believes, that before the 28th of October, 1839, the said White had conveyed, by deed duly recorded, the premises in question to Samuel Hutchins, and that the latter had conveyed the same to the plaintiff, according to the terms of the award set forth in the plaintiff's bill. This statement is made and filed within a few rods of the office of the registry of deeds, where the fact, which he, under oath, avers that he believed to be true, could have been verified, if there were any foundation for such belief; yet the registry of deeds, if examined, would have negatived the existence of any such fact. When a person will, under oath, state that to be a fact, which he believes to be true, when he has at hand the means of ascertaining whether it be true or not, he can scarcely be considered as many removes from the commission of downright perjury, if it be not true. He says, besides, that, before taking his deed from White, he examined the registry to see if White had a right to convey the parcels to him. Why did he not then discover this pretended conveyance to Hutchins, if it existed? and, if he did not, with what claim to be considered as having been innocently mistaken, in asserting his belief of the fact, can he present himself here?

Again, in his answer, he states, that, for the two parcels, which he was reluctant to purchase, he gave his negotiable note, payable in four years, for four hundred dollars; yet, in the deed of the three parcels, the consideration for the purchase is stated to be seven hundred dollars; and in his mortgage back, of one of the parcels, the seven hundred dollars

was secured in seven hundred dollar notes, payable annually in from one to seven years. Whence it is inferible that this statement is untrue.

On the whole, the conclusion seems inevitable, that there must have been, between White and the defendant, Williamson, a fraudulent conspiracy to enable White, among other things, to evade the making of the conveyance, which White had been ordered to make to Dudley, or his appointee, the plaintiff; and, furthermore, that the conveyance to Williamson by White was but colorable, and under a secret trust and confidence for the benefit of White.

It is therefore ordered and decreed, that the said Williamson do, forthwith, execute to the plaintiff, a good and sufficient deed, conveying to him and his heirs and assigns forever, the land set forth in the bill of the plaintiff, as having been ordered to be conveyed by the said White to the said Dudley or his appointee; and that the defendant, Child, do forthwith cancel the deed, in his possession, conveying the same land to said Moody; and that he recover of the plaintiff costs up to the filing of his answer, and including the costs of the same.

And as to the defendant, Hutchins, it cannot from the evidence, be questioned, that he was aiding said White, his father-in-law, in his endeavors to evade a compliance with the terms of the award of the said referee, Emmons, as set forth in the plaintiff's bill; and was in fact guilty of a deception in admitting the statement made by said White to the plaintiff, as set forth in the bill, to be true, when it was clearly otherwise; and by undertaking to convey the premises claimed by the plaintiff to him, in fulfilment of the award, when he must be believed to have known that he had no lawful right so to do; and thereby inducing the plaintiff to believe that he had acquired through him, a good title from White to the premises, when in fact he had not. It is therefore further ordered and decreed, that the plaintiff recover of the said Williamson and Hutchins his costs; including the bill of costs taxed and allowed to said Child.

Daniel Pike *versus* Jane Bacon, *Adm'x.*

Two debtors, P. & B. C., assigned, for the benefit of all their creditors, "all and singular the stock in trade, household goods, furniture, implements, excepting goods exempted by law from attachment, debts, sum and sums of money, books of account, notes, and other things due and owing the said P. & B. C., and all their real and personal estate and interest therein, as will appear by the schedule under oath and hereunto annexed, which is intended to give only a general description of the property assigned, subject to such further enlargement or diminution in value as a particular and minute survey of the property will justify." A schedule was annexed, containing a general description of the same property. The signature of the assignors was thus: "P. & B. C."—and but one seal. There was a certificate by a magistrate, bearing date the next day, that "P. & B. C." personally appeared and made oath, that the assignment embraced all their property, save such as the law exempted from attachment. *It was held*, that the assignment was to be regarded as conveying all the property of the assignors, which is required by the St. 1836, c. 239, concerning assignments.

When an assignment of the debtor's whole property has been made in good faith, for the benefit of all the creditors, its validity will not be impaired, if the assignor withholds a portion of the property actually conveyed.

If the assignor was induced to make the assignment through fear of, and to prevent, an attachment by one of the creditors, it would not thereby become invalid as against such creditor, if honestly and fairly made, according to the requisitions of the statute, for the benefit of all the creditors, and with an intention to comply with the statute.

But if the assignment is made in form according to the statute requirements, and yet not for the purpose of making an equal distribution of all the property among all the creditors, but to delay and defeat the attaching or other creditors, or to secure to the assignor a benefit by a reservation of any part of the property for his own use, it would thereby become fraudulent and void.

And if the assignor makes use of deception to induce a creditor to delay making an attachment until an assignment can be made, this is not conclusive evidence of fraud, but merely evidence to the jury, for their consideration in determining that question.

If an instrument be executed by one of a copartnership, in the name of the firm, and one seal only is affixed, and this by the consent of the other, or if there be a subsequent ratification, which may be proved by parol, it is sufficient to bind the firm.

This was an action of trespass brought against the defendant's intestate, as sheriff of this county, for an alleged trespass committed by Francis Davis, Jr., one of his deputies, in attaching a quantity of goods formerly owned by Patty & Betsy

Cromett, on writs against them in favor of William Legg & Co. and of S. E. & J. Brackett. It was admitted that the defendant's intestate was sheriff; that Davis was his deputy; that he attached the goods on those writs on the third day of July, 1840; and that judgments had been obtained in those suits in favor of the plaintiffs therein; and that the goods had been sold in due course of law to satisfy them. The plaintiff claimed title under an assignment bearing date the second day of said July.

The property assigned is described in the assignment as "all and singular the stock in trade, household goods, furniture, implements, excepting goods exempt by law from attachment, debts, sum and sums of money, books of account, notes and other things due and owing to the said P. and B. Cromett, and all their real and personal estate and interest therein — as will appear by the schedule under oath and hereunto annexed, which is intended to give only a general description of the property assigned, subject to such further enlargement or diminution in amount and value as a particular and minute survey of the property will justify." A schedule was annexed mentioning a large number of articles, a building standing on land of another, notes, accounts, &c. The signature by the assignors was thus, "P. & B. Cromett," and against it was one seal only. There was a certificate, bearing date July 3, 1840, by a magistrate, that "Patty and Betsey Cromett" personally appeared and made oath that the assignment contained all their property, save such as the law exempted from attachment.

There was testimony introduced at the trial before SHEPLEY J. tending to prove that the assignment was signed and executed by the plaintiff and by P. & B. Cromett, and the oath administered, and certificate made, and the goods delivered, before the attachment, and the contrary, which was submitted to the jury. The case does not show in what manner the signatures of the assignors were made, except as above appears. It was admitted that no one of the creditors had signed it before the attachments, and that they had signed within three months after the date, and that the assignment had been duly

advertised in a public newspaper. The defendant contended, that the assignment, if completed, was not operative as against the attaching creditors, because it did not purport to be a conveyance of all the property of the assignors, and because they had not in fact delivered to the assignee all the money and accounts, and evidences of debts due to them, but had detained some portion of them, and converted them, or caused them to be converted, to their own use; and there was proof of a debt of $15, having been so retained and converted, and testimony tending to prove that others were. The defendant also contended that the assignment was made to prevent these attachments, and in fraud of them and of other creditors, and in fraud of the law authorizing a general assignment of all the debtor's property for the benefit of all their creditors; and introduced testimony tending to prove these allegations. The testimony on these points was also submitted to the jury, and they were instructed, that for the purposes of this trial they would regard the assignment as purporting to convey all the property of the assignors which the law required; and that its validity would not be impaired, if not made fraudulently, by the assignors' withholding certain portions of the property which were actually conveyed; that if they should be satisfied, from the testimony, that the assignors were induced to make it through fear of, and to prevent, an attachment from one of the attaching creditors, it would not thereby become invalid or fraudulent as against them, if honestly and fairly made according to the requisitions of the statute, for the benefit of all their creditors, and with an intention to comply with the statute, because that was an act permitted by law; that if, from all the testimony, they should be satisfied that it was not so made, but was only made colorably and apparently in compliance with the statute, and yet for the purpose not of making an equal distribution of all their property among all their creditors, but to delay or defeat the attaching or other creditors, or to secure to themselves a benefit by any reservation of property, or the use of it, for their own disposition or control, it would thereby become fraudulent and void; that there must be a full

and fair compliance with the requirements of the statute. Joseph L. Harrington, a witness for the defendant, had testified to a conversation between him, acting as agent for Legg & Co., and the assignors, previous to the assignment, tending to prove that they intentionally deceived him by promises, and induced him to delay an attachment until they could make an assignment; and the defendant's counsel, after the above instructions were given, requested the Judge to instruct the jury, "that if any deception was used by Miss Cromett to Mr. Harrington in order to delay him until she could make an assignment, this would make it fraudulent as to him or the creditor he represented." This was declined by the Judge, but he stated to them, that such testimony was to be considered in connexion with the other testimony in the case, to enable them from the whole of it, to determine the character of the transaction. The Jury found a verdict for the plaintiff, which was to be set aside and a new trial granted, if these instructions were erroneous.

Vose & Lancaster, argued for the defendant, and cited *Driscoll* v. *Fiske*, 21 Pick. 503; *Shattuck* v. *Freeman*, 1 Metc. 10; *Perry* v. *Holden*, 22 Pick. 275; 7 T. R. 206; Gow on Part. 83; Story's Eq. 201.

Bradbury, argued for the plaintiff, and cited *Lamb* v. *Durant*, 12 Mass. R. 54; *Quiner* v. *Marblehead S. In. Co.* 10 Mass. R. 476; *Stevens* v. *Bell*, 6 Mass. R. 339; *Hatch* v. *Smith*, 5 Mass. R. 42; *Cady* v. *Shepherd*, 11 Pick. 400.

The opinion of the Court was afterwards drawn up by

Tenney J. — Assignments, to be valid under the statute passed April 1, 1836, must provide for an equal distribution among such of the creditors as become parties thereto, after the required notice and within three months, in proportion to their respective claims, of all the assignor's estate, real and personal, excepting what is exempt by law from attachment. They must be such, that no creditor shall in any respect stand preferred to another; they must be so made, that they effectu-

ally secure the object contemplated in the act; otherwise they are entirely void, and can have no legal operation.

It is insisted, that the Judge, who presided in the trial of the case at bar, gave an erroneous construction to the assignment, when he instructed the jury, that they would regard it as purporting to convey all the property of the assignors, which the law required. It is contended that it does not convey the whole, and an attempt is made to show that it comes within the principle established by the Court in the case of *Driscoll* v. *Fiske*, 21 Pick. 503. In that, the assignment was sufficiently broad in its terms, to embrace the property in dispute, which had been attached by the defendant. But certain classes of the assignors' effects, and only such, were referred to in the schedule; and when in pursuance of the terms of the instrument, more perfect schedules were made, after full opportunity was had to include and specify every thing, and when they were submitted to the creditors, the property in controversy was not referred to. No expectation on the part of the assignee, or the creditors, that any other than that specified and valued in the amended schedule was intended to be embraced, could be entertained from any thing in the instrument itself. The property described was all represented as partnership property. The goods in dispute belonged exclusively to one of the firm. The Court say, "If the separate property of each partner was intended to be included, it would seem a most unaccountable neglect, not to say so in the schedule there annexed."

In this case, that class of the effects of the assignors, which it is said was not embraced in the schedule, is expressly referred to in the assignment as being one class, viz. "Books of accounts." And in the schedule, purporting on its face, as well as in the assignment, to be imperfect, the same class is specified as being "sundry debts due P. & B. Cromett on their books of accounts, amounting to a small sum." Can it be doubted that it was the intention of the assignors, so far as that intention can be ascertained from the paper, to give to their creditors the benefit of these claims? Is there any thing indicative of a disposition to conceal them from the knowledge

of all, who were interested in their affairs, and to retain them for their own use, or for the benefit of favored creditors? Could there be any doubt that the books of accounts were a part of the fund appropriated for those who, as creditors, should become parties to the transaction? We think the assignment embraces this portion of the assignors' effects, and authorized and required the plaintiff, when he accepted the trust, to take them into his possession, and that the schedule itself is fully expressive of such an intention in the assignors.

There are indications of haste in the execution of the papers, but because there was provision made, that the description of the property assigned might be enlarged or diminished in amount and value, as a particular and minute survey thereof would justify, we do not think the conclusion is to be drawn *in law*, that the assignment did not embrace the entire property of the assignors. It was all put under the control of the assignee, and this provision seems to have been intended for the purpose of correcting any mistake which might have occurred. The haste of the transaction, and the imperfect state in which the business was left, were circumstances for the jury to consider, in ascertaining the intention of the parties.

If any thing referred to in the assignment or schedule, either generally or particularly, was retained by the assignors, as it is said there was, it could have no effect to render void the instrument previously executed in good faith. There could be no right in them to retain such property, and the assignee was vested with full power to take it into his possession, and his duty required him so to do. When the contract was executed by all the parties thereto, the rights of the creditors, whose names were affixed, had attached, and misconduct in either of the other parties, or both, could not defeat them, provided the transaction was *bona fide.*

If the assignment was duly made and executed, and was for the purpose intended in the statute, the law is answered. The inducements which may have led thereto, are not to be inquired into, if the ultimate object is secured. The wish of debtors to prevent expense by reason of attachments of their

property, previously entertained, cannot take from creditors, who execute the assignment, the advantages intended to be secured thereby. The benefit to them provided for in the statute, would be very uncertain, if the motives of the assignors, unknown to the other parties, when the instrument was executed, could deprive them of it. It could not have escaped the attention of the legislature, that those debtors, who would probably resort to the act, would be persons, apprehensive that their property might be attached, who would wish to avoid the expense consequent thereon. And it is reasonable to suppose, that the legislature intended at the same time to present to insolvent debtors the means and the inducements, to make an equal distribution of their effects among all their creditors. If this intention is fulfilled, the whole design is accomplished. It is with the *act* of the party, and not the secret springs which prompted it, that we have to do.

The jury were instructed, that if the assignment was not made for the purpose of securing an equal distribution among all their creditors, but was made to secure to themselves a benefit by a reservation of any part of the property, it would be void; that there must be a fair and full compliance with the statute. We think the instructions were unobjectionable.

Neither do we think the Judge erred in declining to instruct the jury "that if any deception was used to the agent of one of the attaching creditors, whom the defendant represents, by Miss Cromett, to delay him until an assignment could be made, it would make it fraudulent as to that creditor. If the assignment was legally and fairly made, and creditors obtained a benefit therefrom, we do not see how their rights can be divested by proof of any stratagem practised by the assignors to prevent attachments, till this object could be secured. If no attachments were made, a fraud even, practised by the debtors to prevent it, would give the creditor no lien upon the property; nothwithstanding the grossest dishonesty of this kind, it would remain as it was; and as long as it continued the property of the debtors, unaffected by any attachments, no fraudulent conduct, to impose upon a creditor, and keep him

at bay, would disqualify them from making a *bona fide* assignment under the statute for the benefit of all their creditors.

Another objection urged is, that the assignment purports to be executed in the name of the debtors' firm, and only one seal is affixed. If the evidence here stopped, we might conclude that only one of the partners was a party to the instrument, and that the firm would not be bound thereby. But it is acknowledged by both, as appears by the certificate of the magistrate before whom the acknowledgement was made. It is well settled, that an instrument executed by one of a copartnership in the name of the firm, and one seal only affixed, and this by the consent of the other, or if there be a subsequent ratification, which may be proved by parol, it is sufficient to bind the firm. All this appears, and this objection is overruled. *Cady* v. *Shepherd & al.* 11 Pick. 400, and the cases there cited.

Judgment on the verdict.

NOTE. — See *Paine* v. *Tucker*, *ante*, p. 138.

JAMES RAMSDELL & *al. versus* ABNER RAMSDELL.

The intention of the testator is to have a controlling influence in the interpretation of the language used in the will; but if he would have that intention, when discovered, fully carried into effect, he must conform to those rules of law, which establish and secure the rights of property.

It has become a settled rule of law, that if the devisee or legatee have the absolute right to dispose of the property at pleasure, a devise over is inoperative.

An exception, however, to this rule, is, that where a life estate only is clearly given to the first taker with an express power, on a certain event, or for a certain purpose, to dispose of the property, the life estate is not by such power enlarged to a fee or absolute right; and the devise over will be good.

The testator, in his will, provided, "First, I give and bequeath to my beloved wife, S. C., the use, during her life, of all my plate and household goods, also all my personal property and real estate, except as is hereafter excepted." Then made pecuniary bequests to seven different persons, to be paid by his executrix. Then says, "I give and bequeath to my wife, S. C., the sum of one hundred and fifty dollars, to be paid, if she thinks proper, $50 to my neice, A. R., and $100 to my nephew, B. R., otherwise it is to be disposed of as may best suit her." Next. "I give and bequeath, after the decease of my wife, all my property, if any remains, to my brothers and sisters and her brothers and sisters, to be divided equally between them." Then — "It is my desire that my executrix sell my farm, either at public auction or at private sale." And made his wife executrix. *It was held*, — that by the will, the widow had the absolute right to dispose of the entire property, for her own use and benefit, subject only to the payment of debts and legacies.

DEBT on a probate bond, in which the defendant was surety for Sarah Crumpton, now deceased, as executrix of the will of her late husband, Samuel Crumpton.

After the bond and will had been read, the plaintiff produced and examined sundry witnesses to prove that the executrix did not faithfully inventory all the personal estate. A part of this property was the produce of the farm, harvested after the death of the testator; and it was stated by the witnesses that money had been received by her on notes, which were not inventoried. The facts in the case are stated in the introduction to the opinion of the Court, and it is therefore unnecessary to repeat them here.

The plaintiffs contended, that they had made out a case sufficient to entitle them to recover. WHITMAN C. J. then

presiding, was of opinion that the action could not be maintained, and directed a nonsuit, which was to be taken off, if in the opinion of the Court the action could be maintained.

The case turned on the construction to be given to the will of Samuel Crumpton, who left no issue, the material parts of which follow.

"First. I give and bequeath to my beloved wife, Sarah Crumpton, the use during her life of all my plate and household goods, also all my personal property and real estate, except as is hereafter excepted.

Secondly. I give and bequeath to my mother, Martha Crumpton, the sum of one hundred and fifty dollars."

He then gives fifty dollars each to his six brothers and sisters, naming them severally.

"Ninthly. I give and bequeath to my wife, Sarah Crumpton, the sum of one hundred and fifty dollars, to be paid, if she thinks proper, fifty dollars to my niece, Adeline Ramsdell, and one hundred dollars to my nephew, Abner Ramsdell; otherwise it is to be disposed of as may best suit her. This and the other legacies above mentioned to be paid by my executor hereafter named, in one year after my decease.

"I give and bequeath, after the decease of my wife, all my property, if any remains, to my brothers and sisters, and to her brothers and sisters, to be divided equally between them.

"It is my desire that my executrix sell my farm, either at public auction or private sale.

"I do constitute and appoint my said wife, Sarah Crumpton, sole executrix of this my last will and testament."

The will was made in June, 1835.

Emmons, insisted, in a very extended argument, with much ability, that the plaintiffs were entitled to recover. Only some of the positions, with the authorities cited in support of them, can be given.

Certain rules of interpretation are well settled. One of these is, that the intention of the testator must determine the legal effect of his will, unless the execution of his intention would subvert an inflexible principle of law. It was manifest-

ly his intention, in disposing of his "plate and household goods," to give but the use during life. And he must also have intended to make the same disposition of his "personal property and real estate." "The use during life," was intended to apply equally to all the estate given in that part of the will. Those were the potent and controlling words, which restrain and tie down the property to a life estate in the widow. This estate was coupled with the power to appropriate and dispose of the same for the purpose, and for that purpose only, of her comfort and support. A limitation of personal goods and chattels, or money, in remainder, after a bequest for life, is good. Shep. Touch. 271; Powell on Dev. 43; Lovelace on Wills, 136; 2 Bl. Com. 393.

The words, "if any remain," in the devise over to the brothers and sisters, never could have been intended to alter or control the estate previously given, or to give the entire property to her. If such effect is to be given to them, the provision as to her selling the property would be nugatory. She might do it without, and on her death it would go to her then husband, or heirs, if not disposed of in her lifetime. The doctrine of necessary implication cannot legitimately be carried to such extent.

But the language which the testator uses in the bequest of one hundred and fifty dollars, to be paid to his nephew and niece, if she should think proper, negatives the intention of giving her an absolute estate.

If the testator gives his estate to his wife for life, with the power to apply the same to her own benefit, and after her decease, gives the same, or so much as should then remain, to certain persons, this is a good gift of the remainder, unapplied to these purposes. 5 Madd. 123; Powell on Dev. 352, note; Prec. Ch. 71; *Davison* v. *Gates*, 11 Pick. 250; *Larned* v. *Bridge*, 17 Pick. 339; 11 Ves. 205; 11 East, 220; 2 Atk. 102; 1 Peere Wms. 149.

The plaintiffs are entitled to a share of the estate under the provisions of the will. The counsel contended that the plaintiffs had taken the appropriate course to obtain what belonged

to them, under the peculiar state of this case; and cited St. 1821, c. 470; *Potter* v. *Titcomb*, 7 Greenl. 312; *Boston* v. *Boylston*, 4 Mass. R. 318; *Paine J.* v. *Gill*, 13 Mass. R. 365; 5 Dane, c. 149, art. 2, § 18; 9 Mass. R. 114; 6 Mass. R. 394; 13 Pick. 328; 20 Pick. 540.

Wells, argued concisely for the defendant.

The amount of property the widow was to have, after paying debts and legacies, does not appear. She could not perform the obligations imposed upon her in the will, without having an absolute power to dispose of the property to the extent of paying the debts and legacies. This power is given to her in the will. The testator does not state out of what fund the legacies are to be paid, but says, they are to be paid "by my executor." The intention manifestly was, that the property should be at her entire and uncontrolled disposal, provided she paid the debts and legacies.

The words "all my real estate," carries a fee. *Godfrey* v. *Humphreys*, 18 Pick. 537.

The rule of law is well established, that by the phrase "if any remains," the entire disposition of the property is given; and in such case, there can be no remainder over, to be taken by any one. Giving the right to dispose of the property, gives the property itself. *Burbank* v. *Whitney*, 24 Pick. 146, and authorities there cited; 4 Kent, 270; *Jackson* v. *Bull*, 10 Johns. 18; *Jackson* v. *Robins*, 15 Johns. 169; *Ide* v. *Ide*, 5 Mass. R. 500. Taking together the two clauses in the will, to ascertain its meaning, it is quite plain, that an absolute gift was made of all the property, subject to the payment of the debts and legacies. The Court will rather lean to a construction giving a vested, than a contingent interest. 2 Pick. 468.

There is no proof that any thing remains, of any description, of the property. Taking the language independent of the technical meaning, the words, "if any remains," imply a power to dispose of the whole. The defendant, her surety, is not liable for the exercise of that power, nor is he bound for the care of the property after her death. *Brazier* v. *Clark*, 5 Pick. 96.

But on no construction of the will can this action be maintained.

They have not shown themselves to be interested. St. 1830, c. 470, § 1. There should have been a decree of the probate court, fixing the *quantum* to be paid to each one, *by name.* St. 1821, c. 51, § 72; *Loring* v. *Steineman*, 1 Metc. 211. No action could be maintained until after a citation to account. 7 Greenl. 321; 18 Maine R. 55; 5 Pick. 96; 20 Pick. 535. If there were any property, the plaintiffs should have caused the administrator of the executrix to have settled an account, embracing her unfinished proceedings as executrix. 2 Greenl. 75; 6 Mass. R. 390.

The opinion of the Court was afterwards prepared by

Shepley J. — The rights of these parties may depend upon the construction of the will of Samuel Crumpton, deceased. He appointed his wife sole executrix, and directed her to pay all the legacies within one year after his decease. She accepted the trust, and this suit is brought against her surety on the bond. The breach alleged is, that she did not cause to be made and returned to the probate office, a perfect inventory of the estate. It appeared from the testimony, that the executrix sold and conveyed the farm, as she was authorized to do by the will, within a year after the decease of her husband; and soon after, all the stock upon the farm, and the principal part of the personal estate. That she had since deceased, and that administration had been granted on her estate, and also administration *de bonis non* on that of the husband; and that no property belonging to either estate could be found. Upon these facts, in connexion with the will, the presiding Judge expressed an opinion, that the plaintiffs were not entitled to maintain the suit, and a nonsuit was entered by consent, subject to the opinion of the Court upon their rights.

The intention of the testator, is to have a controlling influence in the interpretation of the language used in his will. If he would have that intention, when discovered, fully carried into effect, he must be expected to conform to the reasonable

rules for the regulation of the practical affairs of life, and to the fundamental laws, which establish and secure the rights of property. When an intention is discovered to accomplish two purposes so inconsistent, that both cannot be accomplished in accordance with those rules and laws, there must be a failure as to one of them. If estates be devised or property bequeathed to a person with or without words of inheritance, and with an absolute right to sell and appropriate the proceeds at pleasure to his own use, it is not perceived how there can be at the same time a vested interest imparted to another in the same estate or property. Such full dominion in the devisee or legatee is inconsistent with, and destructive of all other rights. For one cannot, according to the rules of sound reasoning, have any rights in that which another can at the same time appropriate at his own pleasure entirely and exclusively to himself. An attempt was indeed most ingeniously made by counsel in the case of *Jackson* v. *Robins*, 16 Johns. 542, to prove that these rights might be consistent. And the case of an entailed estate was presented as an instance of it. But in such case the tenant in tail does not, by the power existing in himself by the devise or grant, and to be exercised at his own mere pleasure, destroy the rights of the remainder man. He is obliged to admit the existence of his rights, as taking from himself the full dominion and entire right of property, and to apply for some judicial proceeding or legislative act to enable him to destroy them. Such arguments have failed to convince judicial tribunals; and the settled doctrine is, that if the devise over be a good executory devise, the first taker has not the absolute dominion, that being inconsistent with the devise over. And he cannot therefore dispose of the property and destroy the rights of the other. *Pells* v. *Brown*, Cro. Jac. 592; *Jackson* v. *Robins*, 16 Johns. 589. And it has become the settled rule of law, that if the devisee or legatee have the absolute right to dispose of the property at pleasure, the devise over is inoperative. *Attorney General* v. *Hall*, Fitzg. 314; *Timewell* v. *Perkins*, 2 Atk. 102; *Ide* v. *Ide*, 5 Mass. R. 500; *Burbank* v. *Whitney*, 24 Pick. 146; *Jack-*

son v. *Coleman*, 2 Johns. 391; *Jackson* v. *Bull*, 10 Johns. 18; *Jackson* v. *Robins*, 16 Johns. 586. In the latter case the chancellor states an exception to the rule, "where the testator gives to the first taker an estate *for life only, by certain and express words*, and annexes to it *a power of disposal.*" It may not be easy to reconcile all the cases bearing on this position, or exception, as it has been called. It is not the intention to refer to more than a few of them. In the anonymous case, 3 Leon. 71, the testator devised the estate to his wife for life, and at her decease she to give the same to whom she pleased. It was held, that the wife had an estate for life, with a power to dispose of the reversion. In *Thomlinson* v. *Dighton*, 1 Salk. 239, the testator devised the estate to his wife for her life, "and then to be at her disposal to any of her children, who shall be then living." The decision was, "that this was only an estate for life, and that the disposing power was a distinct gift." In *Reid* v. *Shergold*, 10 Ves. 370, the testator gave the estate in trust for the benefit of his niece "during the term of her natural life," and then to her daughter, when she should arrive at the age of twenty-one years, or on the death of her mother; and if she should happen to die before that age, he then gave the estate to such persons, "as his said niece, by her last will and testament, by her duly executed, should give and dispose thereof." The decision was, that the niece took a life estate only, with a power to devise it on the event of her daughter's death before the age of twenty-one years.

In the case of *Reith* v. *Seymour*, 4 Russ. 263, the testator made a bequest of personal estate to his wife for life, with a direction, that after her death one moiety should be at her entire disposal by will or otherwise. It was held, that she took only a life estate, with the power of appointment. The case cited by counsel from the 5 Madd. 123, was a bequest to the wife for life, with an express power to dispose of so much as might be necessary for the support of herself and of another person during minority. And it was held, that so much as was not disposed of under the power, passed by the

devise over. In the case of *Dorr* v. *Wainwright*, 13 Pick. 328, the devise was to the daughter for life, and there was an express power to sell for a specific purpose, and not confided to the devisee, but to the executor. And it was decided, that the devise over, under such circumstances, might be good. In the case of *Larned* v. *Bridge*, 17 Pick. 339, the devise to the wife was not, in express words, for life, yet being of the use and benefit with a provision, that "should the income prove insufficient for her comfortable support, she to dispose of so much thereof as shall be necessary for that purpose," it was held to be a devise for life, with a naked power of disposition depending upon a contingency.

The rule to be extracted from these cases would seem to be, that where a life estate only is clearly given to the first taker, with an express power on a certain event or for a certain purpose to dispose of the property, the life estate is not by such a power enlarged to a fee or absolute right; and the devise over will be good. The case of *Goodtitle* v. *Otway*, 2 Wil. 6, may be considered as opposed to this position. The devise was to Agnes Pearson, "for and during her life, to be enjoyed without molestation, and after her death to her lawful issue, and if she shall have no issue, that she shall have power to dispose thereof at her will and pleasure." The report states, that she died without issue, and that "the whole Court was clearly of opinion that Agnes had an estate in fee simple by the will, as the contingent remainder to the issue never vested." The report also states, that the case in the 3 Leon. 71, was denied to be law. That case however was cited as good authority by Sir Samuel Romily, and with the approbation of the Lord Chancellor, in the 10 Ves. 379. This case, however, if it be considered as good authority, would not have a tendency to make a change in the position stated, favorable to the plaintiffs.

It remains to apply these principles and rules to the case under consideration. In the second clause of the first bequest to the wife of "all my personal property and real estate," there are no words to limit it to an estate for life; and it is not a bequest of the use or income only, unless it can be connected

with, and inferred from the preceding clause. There is no express power in the will to authorize a disposition of it; for the power to sell the real estate and convert it into personal, is not of that nature. And the result would be, that the devise falls within the general rule, and not within what is called the exception, and the devise over would be inoperative. If it should be admitted to be the intention of the testator to connect it with the preceding clause, and to give only the use of the personal and real estate during life, the effect would be, that the wife would have, not an express power of disposition, but one to be inferred only from another clause in the will; and that power to be inferred, would be a general power not dependent upon any certain event, or limited to any specific purpose. That it was the intention to authorize her to dispose of the property named in the second clause, absolutely and without limitation, is clearly implied by the words "if any remains," in the devise over. It is said in *Harris* v. *Knapp*, 21 Pick. 416, that by the words "whatever shall remain," the implication is inevitable, that she had a power to make such disposition."

And it cannot be reasonably supposed, nor do the decided cases admit, that it could be the intention of the testator to give only an estate for life, unless there be words clearly declaring such an intention, when he gave the unqualified and absolute right to dispose of the entire property at pleasure. A literal exposition of the words does not require, that he should be considered as intending to do it. And it is not perceived, that there would be any thing absurd or very singular in the intentions of the testator, if his language should receive such an exposition. The intention thus exhibited would seem to have been, to give to his wife the use of his plate and household goods during life, and then to leave them to his relatives as memorials of his affection; and to apply the personal and real estate, first to pay to them certain legacies, and then for the support and comfort of his wife, to be disposed of at her pleasure; and if any of it should remain at her decease, that it should be divided equally between his and her brothers and

sisters. Nor is there any thing inconsistent with this position in the bequest of one hundred and fifty dollars to her. The purpose would seem to have been to declare, that if she did not think proper to dispose of the whole, still it was his desire, that so much of it should not fall into the fund to be divided among the brothers and sisters after her decease; but be disposed of by the wife, or go to his nephew and niece. If such were the design, to give the wife not a life estate, but the right to dispose of the whole at pleasure, and that not by an express power, that intention, so far as it would control the property after her decease, being inconsistent with the bequest, could not be legally effectual. But if this exposition be considered doubtful, and it be admitted, that she took only a life estate, with an implied power to dispose of it, and that the devise over might be good, how could the plaintiffs, on the facts in this case, be entitled to maintain this suit? As her right to dispose of the property was not limited to any specific purpose, or made to depend upon any particular event, she would not be required to make any formal conveyance, or to keep any account of its disposition. And to establish their title, it would seem to be necessary, that the plaintiffs should shew, that she did not dispose of the whole of it during her life. There is not only no such proof, but there is evidence that no part of the property could be found, undisposed of by the administrators on the husband's and wife's estates. And it would be immaterial to the plaintiffs, whether the inventory were made perfect or not, if they failed to establish any title to the property. It is contended, however, that they must, upon any reasonable construction, be entitled to maintain the suit on account of the plate and household goods. If the construction be adopted, that she took a life estate, and without any implied right to dispose of that portion of the property, the words in the devise over, of "all my property, if any remains," would not apply to or include it. The property in the second clause, only, would be comprehended. That included in the first clause, would belong, after the death of the wife, to the heirs of the husband, because not embraced by the devise over.

And the plaintiffs, claiming only as devisees, make no title to it. And if a construction be adopted, that would include it in the devise over, she would have the right to dispose of it under the implied power, and there would be no proof that she had not done it. And there is yet another difficulty to be encountered, if the claim be limited to the plate and household goods. They claim to maintain the suit against the defendant, on the ground, that the executrix did not make a full and perfect inventory of the property. But there is no proof, that the inventory of that portion of it was not fully and perfectly made. In whatever aspect the case may be presented, it is not perceived, that the plaintiffs can be entitled to maintain the suit upon this testimony.

Nonsuit confirmed.

THE INHABITANTS OF AUGUSTA *versus* THE INHABITANTS OF VIENNA.

Where it was proved, that a notification, stating the facts in relation to a pauper, as required by the act for the settlement and relief of the poor, St. 1821, c. 122, § 17, and properly directed to the overseers of the town where his settlement was alleged to be, was put into the postoffice on a certain day, and did arrive at the postoffice in the town to which it was directed, and was actually received by the overseers, but the precise day did not appear; *it was held*, that in the absence of all other evidence, the presumption of law was, that the notice was received in due course of mail.

The arrival of the notice at the postoffice in the town to which it is directed, is made by the St. 1835, c. 149, equivalent to a delivery to the overseers, and the two months within which an answer is to be returned back, commence from such arrival of the notice.

It is not necessary that the postage on the letter in which the notice is sent, should be paid by the town sending it.

After two years from the time a notice is given, where no judicial decision respecting the settlement has been had, and where no action, or process, is pending between the parties in relation to it, such notice becomes wholly inoperative, and cannot afterwards vary the rights of the parties.

THIS is an action of assumpsit for the support of sundry paupers' and for the expense of their removal. The plaintiffs, to support the issue on their part, proved that a notification

in due form, and properly signed, for the purpose of giving notice to the overseers of the poor of Vienna that said paupers had become chargeable to the plaintiffs, and requesting the payment of the charges incurred, and the removal of said paupers, was enclosed in a letter superscribed to the overseers of said Vienna, and despatched by mail on the 28th day of September, 1839; and that if it arrived in due course of mail, it must have reached the postoffice in that town on the same day. The reply to this notification bore date on the 2d of December following, and was received by the overseers of Augusta on the third of the same month. The defendants contended, that it did not appear that the said notification arrived at the postoffice in Vienna more than sixty days before the reply was received by the overseers of Augusta. But WHITMAN C. J. before whom the trial was had, in March, 1842, ruled, as the notification appeared to have been received, and as in due course of mail it should have arrived on the 28th of September, it might be considered that there was *prima facie* evidence that it did so arrive.

The defendants then introduced the postmaster of Vienna, who testified that he could not tell when said notification did arrive; that although it was required of him, by the postoffice regulations, to make regular entries of all letters arriving at his office, in a book kept for that purpose, there was no entry of the letter which contained said notification; that he had no doubt the letter did arrive, and was delivered out by him to some one, but when he could not tell, but had an impression that it arrived and was delivered out some eight or ten days after the said 28th of September; that his way bills, which accompany letters, are forwarded quarterly with his quarterly accounts to the general postoffice; that a quarter ended on the 30th of said September, and if the letter arrived on the 28th of September, the way bill accompanying it would be sent off the 1st of October following; that he could not tell whether he made search for the way bill in December following said 28th of September, or not, at which time he was called upon to examine and ascertain whether and when said letter arrived;

that letters did not arrive always in due course of mail, and sometimes not for a week afterwards; and that he made it a practice to send or deliver letters directed to the overseers of the poor, directly after their arrival, and thought he must so have delivered or forwarded the letter in question. The defendants then proved that the letter in question was not received from the postoffice in Vienna by the overseers of the poor there, till the eighth of October, 1839, when it was forwarded to one of them by a person by whom he had sent to the postoffice for his papers.

The plaintiffs then introduced a witness, who testified that he called at the postoffice in Vienna about the first of December, 1839, and requested the postmaster of that town to examine his books and way bills and ascertain when the said letter arrived there, and that the postmaster made search for an entry in his books concerning it, and also for the way bill which accompanies it, and could not find any such entry or way bill.

There was no proof other than from the supposed want of a seasonable reply by the defendants, tending to show that the settlement of the paupers was in either of said towns.

The defendants offered to prove that in 1825, the plaintiffs caused notice, signed by their overseers of the poor, to be served on the overseers of Vienna, informing them, that said paupers had fallen into distress in Augusta, and stood in need of supplies, and had received them; and requesting the overseers of Vienna to remove them; and that the defendants made a seasonable reply thereto, denying the settlement of said pauper to be in Vienna; and that no action was commenced for the supplies, nor any further measures taken relative thereto. And that the plaintiffs had furnished said paupers with supplies afterwards and before those for which compensation is claimed in this action. The plaintiffs objected to proof of the notification in 1825, without producing it. The defendants then produced one of the overseers of Vienna of that year, who now lives in Mount Vernon, who said the notification was filed away, when received, among other papers of the overseers,

and that he had not looked for it since; and the Court rejected the evidence so offered.

The Chief Justice thereupon instructed the jury, that the putting a letter, containing a notification, as proved in this case, into the mail, and proving when in due course of mail, it should have arrived, was presumptive and *prima facie* evidence, that it did arrive at that time. That in the present case, if they believed that the postmaster could not find the way bill accompanying the letter, despatched by the overseers of Augusta, when called upon in December, 1839, they would consider whether it did not furnish strong corroborative evidence, that the letter must have arrived before the close of the quarter preceding; and whether, if it had not been sent to Washington, at the close of that quarter, it was not reasonable for them to believe that the postmaster must have been able to find it. That if they should, on the whole, be satisfied that the letter must have arrived in due course of mail, the reply of the defendants not having been seasonably made thereafter, they must be liable to answer to the plaintiffs in the present action, supplies being proved to have been furnished.

The jury thereupon returned their verdict for the plaintiffs, and the defendants filed exceptions.

Wells, for the defendants, in support of his first objection, which is stated in the opinion of the Court, cited *Sutton* v. *Uxbridge*, 2 Pick. 436; *Hathaway* v. *Clark*, 5 Pick. 490; *Comm.* v. *Low*, 3 Pick. 408. The ruling of the Judge throws the burthen of proof upon us, to show that the letter did not arrive at the postoffice in due course of mail, when it should be upon the plaintiffs to show that it did. The statute of 1835, c. 149, does not make the putting of the letter into the office, equivalent to notice, but its actually reaching the postoffice in the town. The time commences with the reception in the town to be charged, and not at the time when the letter was mailed.

The fact that the postmaster did not find the way bill in December, is not strong corroborative evidence, that the letter

arrived before the first of October, but affords much stronger evidence of the reverse.

The postage of the letter should have been paid by the plaintiffs. The notification by letter, is a substitute for the actual notice required by the former statute, which was at the expense of the town giving the notice. The statute of 1835, does not require, that the town notified should pay the expense of the notice.

The testimony rejected should have been admitted. There can be but one notice for one continued support of the same paupers. *Newton* v. *Randolph*, 16 Mass. R. 426.

Vose and *Lancaster*, for the plaintiffs, contended, that the presumption of law is, that all public officers whatever do their duty. 3 Stark. Ev. 1250; 3 East, 192. If the postmasters did their duty, the letter must have reached the postoffice in Vienna before the first of October. The law only requires, that the letter should arrive at the postoffice, and if the overseers do not immediately take it out, they should inquire when it arrived, and take care and send their answer in season, if the pauper does not belong to them.

The testimony was rightly rejected, because the original should have been produced, and not its contents proved; and because it was wholly irrelevant. The most that could have been made out of it was, that the town officers at that time did not think that they had a good cause of action, or they would have brought their suit. But any admissions of the officers of a town cannot change the settlement of a pauper. *Peru* v. *Turner*, 1 Fairf. 185.

The case does not show that the postage of the letter was not paid. But the plaintiffs were not obliged to pay it. The statute only requires, that the letter should reach the town to be charged by due course of mail, not that the postage should be paid, when put in.

The opinion of the Court was drawn up by

Shepley J. — It is enacted by the seventeenth section of the act of 1821, c. 122, providing for the settlement and re-

lief of the poor, that on the required notice being given, if the pauper is not removed, and the notice is not objected to in writing within two months after such notice given, that the town, whose overseers are thus notified, shall be liable for the expenses of his support and removal, "and shall be barred from contesting the question of settlement with the plaintiffs in such action." The act of 1835, c. 149, provides, that if the written notice and answer thereto "shall be sent by mail, and shall arrive at the postoffice in the town where the overseers of the poor of the town to whom such notice or answer may be directed shall reside, it shall be taken and deemed equivalent to an actual delivery of such notice or answer to such overseers."

The first exception taken is, that "the Court ruled, as the notification appeared to have been received, and as in due course of mail it should have arrived on the 28th of September, it might be considered, that there was *prima facie* evidence that it did so arrive." It is said, that this is not a case for presumption; and that it cannot have been the intention of the legislature, that an estoppel should be created by a mere presumption of law. It is true, that the statute requires notice; and the case finds, that notice was actually received. The true question then is, on whom was the burthen of proof of the time when it was received. And there is no injustice in applying a presumption of law to the decision of that question. The overseers of the poor of the town receiving the notice, were legal witnesses, and could be called to testify to the fact by either party. If they had no memorandum or recollection of the date, there might be no positive proof; and the law must supply a rule of its own, to decide from whom the proof ought to have come, and upon the effect of the omission to produce it. And it does, by one of its maxims, furnish such a rule. It is, that all acts are presumed to be legally and properly done, until the contrary is proved. Every person holding an office or trust, is presumed to perform his duties without violating the laws. The case finds, that the letter containing the notice "was despatched by mail on the

28th of September, 1839, and that if it arrived in due course of mail, it must have reached the postoffice in that town on the same day." And it must have arrived in due course of mail, unless some postmaster or mail carrier violated the law, and neglected his duty; and the presumption of law is, that he did not. The arrival at the postoffice is made by the statute equivalent to a delivery to the overseers, and the two months would commence from such arrival or delivery. It is also objected, that the notice was not legal and effectual, because the postage of the letter enclosing it was not paid. The statute having provided, that if the notice shall be sent by mail, and shall arrive, it shall be deemed equivalent to actual delivery, it is not for the Court, by construction, to annex another duty to be performed by the plaintiffs to those prescribed by the statute, to make such notice equivalent. The legislature might have considered, that the burthens would be as fairly equalized by requiring each town to pay the postage on its letters received, as on its letters sent. And that by requiring the payment to be made on those received, the law would be more analogous to that respecting notices on bills of exchange, than it would by requiring payment of the postage on those sent.

It is contended, that the testimony offered was improperly excluded, and that the rights of the parties might have been affected by it. And the counsel relies upon the decision in the case of *Newton* v. *Randolph*, 16 Mass. R. 426. In that case it was decided, that a new notice, while an action was pending to decide the settlement, or after the settlement had been judicially determined, would not operate as an estoppel. When the notice was given in this case, there had been no judicial decision respecting the settlement, and there was no action pending between the parties relating to it. The notice given in the year 1825, became inoperative by the provisions of the eleventh section of the statute, after two years. The subsequent proceedings could not have varied the rights of the parties, and the testimony was properly excluded as immaterial. It is not therefore necessary to decide whether the written notice ought to have been produced.

The remarks of the presiding Judge upon the testimony did not withdraw it from the consideration of the jury, or deprive them of the right to decide according to their own sense of duty. And they are not therefore liable to exception, as an expression of a legal opinion. It may be proper to observe however, that the postmaster must have received a way bill, and must have forwarded it, according to his own testimony, on the first day of October, or it might have been found, unless some person officially intrusted with the performance of a duty, had, contrary to law, refused or neglected to perform it; and the presumption of law is, that he did not.

Exceptions overruled.

THE INHABITANTS OF FREEPORT *versus* THE INHABITANTS OF SIDNEY.

The occupant of an estate of which he has a freehold, for the term of three years successively, of the clear yearly income of ten dollars, does not thereby acquire a settlement under the Massachusetts settlement act, St. 1793, c. 34, if, during the time, he has received relief from the town as a pauper.

The yearly income, under that statute, is to be ascertained by deducting all expenses to which it might necessarily and legally be subjected; and must be valued as if the property had been subjected to taxation, when the forbearance to tax it had been on account of the poverty of the occupant.

THIS was a suit instituted to recover for supplies furnished to Lydia Day and her son, James Day. It appeared that Lydia Day was a daughter of Benjamin Day, and the only settlement attempted to be proved was derived from her father. Notice, and a denial of settlement, were admitted.

The plaintiffs, at the trial before SHEPLEY J., alleged that Benjamin Day acquired a settlement in Sidney by the fourth mode provided by the act of Massachusetts, passed February 11, 1794, by having an estate of inheritance or freehold in that town, and dwelling and having his home there, of the clear yearly income of three pounds, and taking the rents and profits thereof three years successively. There was testimony intro-

duced by the defendants tending to prove that during some of the years while he held the estate, he had received small supplies as a pauper, and the jury were instructed that after the time when he first so received supplies, if he received them afterward, yearly, he could not be regarded as having an estate, and as taking the rents and profits of it, in the manner required by the statute.

There was testimony proving that during other and more than three successive years, he resided and took the profits of an estate; and that the same was not taxed in the town of Sidney during those years. And the plaintiffs contended that the yearly net income should be ascertained upon the basis that it was not subjected to taxation, and requested the Judge so to instruct the jury, but he declined, and instructed them that it was to be ascertained by deducting all expenses to which it might necessarily and legally be subjected. The jury found a verdict for the *defendants*, which was to be set aside, and a new trial granted, if these instructions or refusal to instruct were erroneous.

Boutelle and *Emmons* argued for the plaintiffs; and cited on the first point, *Andover* v. *Salem*, 3 Mass. R. 436; *Granby* v. *Amherst*, 7 Mass. R. 1; *Somerset* v. *Dighton*, 12 Mass R. 383. And on the second point, *Western* v. *Leicester*, 3 Pick. 198; *Groton* v. *Boxborough*, 6 Mass. R. 50.

Vose, argued for the defendants, and cited on the first point, *Brewster* v. *Dennis*, 21 Pick. 233; *East Sudbury* v. *Waltham*, 13 Mass. R. 460; *East Sudbury* v. *Sudbury*, 12 Pick. 1; *Beetham* v. *Lincoln*, 4 Shepl. 137. And on the second point, *Groton* v. *Boxborough*, 6 Mass. R. 50; *Western* v. *Leicester*, 3 Pick. 198; *Granby* v. *Amherst*, 7 Mass. R. 1; *Reading* v. *Tewksbury*, 2 Pick. 535.

The opinion of the Court was by

WHITMAN C. J. — The verdict taken in this case for the defendants is to be set aside, and a new trial granted, if the rulings of the Judge, at the trial, should be deemed incorrect. The first was, that a settlement under the statute of Massachu-

setts, passed on the eleventh of February, 1794, determining what should constitute a legal settlement, did not embrace the case of an occupant of an estate of freehold, for the term of three years, of the clear yearly income of ten dollars per annum, if, in the mean time, the occupant received support from the town as a pauper; and in this he is clearly supported by the opinion of the Court in the case of *Brewster* v. *Dennis*, 21 Pick. 233; and the case of *East Sudbury* v. *Sudbury*, 12 Pick. 1, is to the same effect, in a case quite analogous in principle.

The other point, supposed to be incorrectly ruled, was, that the estate of the clear yearly income of ten dollars per annum, must be valued as if it had been subjected to taxation, when the forbearance to tax it would seem to have been on account of the poverty of the occupant. And in this we think also, that the opinion of the Judge was unexceptionable. The legislature found it necessary to establish some uniform rule, as to what should, in this particular, be sufficient to gain a settlement. Any rule established in such case must, necessarily, be an arbitrary one. The design was to fix upon the the least quantum of estate a man should possess to entitle him to gain a settlement. To arrive at this result, and establish a sure guide, it was then deemed expedient to prescribe, that the estate should be of the clear annual income of ten dollars per annum. This mode of ascertaining the value of the estate was supposed to be the best that it was practicable to devise. It must have been predicated upon the supposition, that it would be subjected to the ordinary deductions from its productiveness, such as labor bestowed, dressing supplied, and taxes imposed upon it. In order that the test of value should be truly applied, these deductions would be indispensable. It would not be a fair criterion, if it might be affected by the forbearance, on account of the poverty of the occupant, to levy taxes upon it. The estate to the owner might be rendered productive, when otherwise it would not be so, if it were situated in a place, where his neighbors, relatives or friends, from motives of humanity or charity, were disposed to perform the labor upon

it, or furnish it with dressing gratuitously; and the forbearance to tax it, from the same consideration, would be similar in effect. The net income therefore must be taken after all such deductions are made. It is admitted, if the estate in question had been subjected to taxation, its net income would have been less than ten dollars per annum. We think, therefore, that judgment must be entered on the verdict.

SAMUEL HOMANS *versus* ALLEN LAMBARD.

Where the question on trial between the parties is, whether a promise by the defendant was an original or a collateral one, the jury may rightfully be instructed, that if the goods were furnished on the credit of the defendant, and not on the credit of the third person, the promise was original, and not collateral; and that a presentment of the bill of the goods to such third person for payment, did not impair the plaintiff's right against the defendant, who would thereby have been relieved, if the application had been successful.

Although it is the duty of the Court to put a construction on the language of a contract, when it has already been ascertained what the terms of it are; yet when many facts and several conversations at different times, testified to by several witnesses, are in evidence to prove the contract, and it is matter of controversy what the terms of it are, the question should be put to the jury as matter for their determination, with appropriate instructions as to the law.

ASSUMPSIT for two parcels of hemlock timber, delivered in July, 1838. It appeared that the timber in question, went to the use of the Kennebec Dam Company, Daniel Williams being at that time their treasurer, Amasa Hewins their agent for the purchase of timber, and the defendant their agent for hiring, directing and paying laborers. It appeared, that what was called *dam paper*, was written evidence of debt against the company, signed by their treasurer. For the plaintiff, Amasa Hewins testified, that being at the time agent of the company for the purchase of timber, early in July, 1838, he applied to the plaintiff, to purchase from him the first parcel of timber; that the plaintiff said, that he would not know the

dam company in the business, or sell to them, but that if Daniel Williams would pass his word, as an individual, that he should have the money at the time it was due from the plaintiff to Mr Southwick, of whom he bought the first parcel, and a part of the second, which would be in ninety days, Hewins might have the timber. The witness further testified, that upon communicating these terms to Mr. Williams, he agreed to do as the plaintiff required. That not far from a month after, he had occasion to apply to the plaintiff for the second parcel, and he consented to sell it upon the same terms as he had before prescribed. That subsequently the witness stated to Williams, in the presence of the defendant, that the plaintiff would sell upon the same terms as before, but he had no recollection of then stating, that the plaintiff would have nothing to do with the dam company, and thought he did not. That Williams thereupon stated, that there was the agent, Lambard, and he must see to it. He then turned to the defendant, and repeated to him what the former bargain was. That the defendant then inquired, what security does the plaintiff want? The witness replied, that which will produce the money in ninety days. That the defendant then said, he had the plaintiff's note, does he want any better security than his own paper? The witness said, that probably would be satisfactory. Thereupon the defendant said, I will exchange the plaintiff's paper for dam paper, and should be glad to do so. The witness communicated this conversation to the plaintiff, who said that he wanted no better security than his own paper, and that the surveyor agreed on might survey the timber, which was accordingly done in the presence of Hewins, but not of the plaintiff; and the surveyor made out the survey bill, as he did of the former parcel, as from the plaintiff to the dam company, and on the presentment of these bills to the treasurer, by the surveyor, he paid him for surveying. These bills were produced by the treasurer at the trial.

Upon this evidence the plaintiff claimed to charge the defendant for the second parcel, conceding that he was not liable for the first. It was admitted that the plaintiff, in the fall of

1839, by his agent, called upon the defendant and requested him to indorse the amount due for the timber on plaintiff's notes, but the defendant refused to do it.

It was proved by the defendant that he held, at the time, paper against the plaintiff, in which others were also interested, but upon which his claim against the plaintiff exceeded the value of the timber, and that the same paper had been put in suit, and the amount due thereon collected and paid to the defendant, and that each of the notes much exceeded the value of the timber. The survey bill was from the plaintiff to the Kennebec Dam Company.

And Daniel Williams testified that he had no doubt the survey bill was brought to him by the plaintiff, although he did not recollect the fact. That he should have given him dam paper therefor, if he had desired it. He further said the plaintiff had said to him, he indorsed for him, a note which the plaintiff said he procured to be discounted at the Augusta Bank, but for what amount, whether for the first parcel or more the plaintiff did not state. It appeared that during that season, from time to time, the defendant received from the treasurer large sums of money designed and used for the payment of the laborers. It appeared the dam company did not at that time pay their paper promptly, that their credit had become doubtful, and they had previously mortgaged a considerable part of their personal property. The following year, 1839, the dam was so seriously injured, that the company became deeply insolvent.

Daniel Williams further testified that they were not sued in the season of 1838, and that if the plaintiff had that year furnished the defendant with dam paper for the timber, he thought the defendant might have protected himself. But in fact he had not collected or secured the amount of a prior debt due himself.

The counsel for the defendant contended that the promise proved was collateral, and, there being no memorandum in writing, void by the statute of frauds. As evidence of this they relied upon the form of the general bill and the demand

made by the plaintiff upon the treasurer for payment, but principally upon the terms of the proposition, proved, as he contended, to have been made by the defendant, which his counsel insisted necessarily implied, that the sale was made to the company, and that the plaintiff was first to receive of them the usual evidence of debt. Upon this ground of defence, WHITMAN C. J. then presiding, instructed the jury, that if they were satisfied the timber was furnished on the credit of the defendant, and not on the credit of the dam company, the promise was original and not collateral; and that the presentment of the bill to the treasurer, and the demand on him for payment, did not impair the plaintiff's rights against the defendant, who would have been thereby relieved, if the application had been successful.

There being no proof that the plaintiff had procured dam paper for the timber, or had offered such paper to the defendant to be exchanged for or indorsed on the plaintiff's own paper, the counsel for the defendant requested the presiding Judge to instruct the jury, that the action was not maintained. Upon this point, the Judge instructed the jury, that if they believed the understanding of the parties to have been, that the plaintiff should procure what was called dam paper, and present it to the defendant, to be exchanged for his (the plaintiff's) notes, the action was not sustained. But that they would consider whether it was reasonable for them to believe such to have been, in effect, the agreement between the parties. The contracts were to be interpreted according to the understanding of the parties thereto; and that if the plaintiff did not understand, at the time, that he was first to procure dam paper and present it to be exchanged, and the defendant was aware of this, it could not be considered to be the agreement that he should do so; that they would take into view all the circumstances in evidence in the case, and draw their own conclusions from them; that the defendant, if he had paid the plaintiff's bill for the second parcel of timber for the use of the dam company, would have equally as good ground of claim against the company, as if he had obtained dam paper; and

that the procuring of such paper might have been but a useless ceremony. And if they were satisfied that the original credit was given to the defendant, and that it was not agreed between the parties that the plaintiff should first procure what was called dam paper, and present it to the defendant, to be exchanged as aforesaid, the plaintiff might be considered as having made out his case.

The jury thereupon returned their verdict for the plaintiff, and the defendant excepted to the foregoing rulings and instructions.

N. Weston, for the defendant, argued in support of the grounds of defence taken by him at the trial; and contended, that the rulings and instructions were erroneous. On the point, that the promise was collateral, he cited 2 Stark. Ev. 595, and cases there cited; *Matson* v. *Wharam*, 2 T. R. 80.

Bradbury, for the plaintiff, said that the question, whether the promise was original, or collateral, was one of fact, and not of law. The true question is, to whom was the credit given? 1 Stark. Ev. 407. It was not a mere interpretation of language, but an inference to be drawn from proof of many facts, and credit to be given to several witnesses. This is the exclusive province of the jury.

The contract no more required, that the plaintiff should procure *dam paper*, and present it to the defendant, than that the defendant should procure it, and present it to the plaintiff. Besides, the request of the counsel for the defendant was substantially complied with.

The opinion of the Court was afterwards prepared by

Tenney J. — The timber, the value of which is claimed in this action, unquestionably went to the use of the Kennebec Dam Company, but the promise attempted to be enforced, is alleged to have been original and not collateral; and such the jury have found it to be. The verdict is attempted to be set aside on the ground of misdirection of the Judge in matter of law. He instructed the jury, "that if they were satisfied the timber was furnished on the credit of the defendant, and

not on the credit of the dam company, the promise was original and not collateral; and that the presentment of the bill to the treasurer, and the demand on him for payment, did not impair the plaintiff's rights against the defendant, who would have been relieved, if the application had been successful." We do not perceive how this instruction can be regarded as incorrect, standing unconnected with the facts. But in the argument it is insisted, that the defendant's liability depends upon a construction, which the Court was bound to put upon certain language, which it is testified he used at the time of negotiation, viz. "I will exchange the plaintiff's paper for dam paper and will be glad to do it;" and that therefore the matter was improperly left to the jury.

If the liability of the defendant depended entirely upon a written promise, expressed in these words, it would have been the duty of the Court to have put upon it a construction, and that construction would have been conclusive, if correct. But there was other conversation between the parties; also between the plaintiff and other persons in the presence of the defendant, which had a tendency to manifest to the defendant, the views entertained by the plaintiff on the subject of the sale of the timber. Other facts touching the matter were in evidence, all of which might have had an important influence in satisfying the jury of the true character of the transaction. It was for them alone to judge from the evidence, what was said and done, and then to determine therefrom the intention of the parties. It would have been a manifest invasion of their rights, for the Court to select a particular portion of the evidence, which the jury might, or might not believe, and, as matter of law, inform them, that their verdict must depend upon the construction, which the Judge should give to that, independent of other facts in the case. The meaning of the parties was to be gathered from all the evidence before them, and this matter of fact was submitted to them on testimony, to which no objection was made.

The presentation of the bill by the plaintiff to the treasurer of the company, if it were made, was by no means conclusive

evidence, that the promise was collateral, but was for the jury to consider; it was a material fact for them, but not one from which any legal inference was to be drawn.

The defendant's counsel requested, that the Judge would instruct the jury, as matter of law, that as the plaintiff had not obtained dam paper and presented it to the defendant to be exchanged or indorsed, the action was not maintained. We think he was correct in submitting the question of the intention of the parties, on this branch of the case, to the jury. The request for this instruction must have been upon the hypothesis, that it was proved, that the payment was to have been made by the defendant in the exchange of dam paper for that of the plaintiff. That very fact was in issue, and how the jury would settle it, could not be foreseen. The jury were properly left to settle the question of intention; and if the defendant had performed all that he was bound to do, he would be discharged; but if otherwise, the plaintiff was entitled to recover.

Judgment on the verdict.

DAVID BETTS *versus* FRANCIS NORRIS.

In an action against an officer for neglect of duty in not attaching real estate upon a writ, as he was directed to do, and might have done, sufficient to fully satisfy the judgment afterwards rendered, whereby the creditor lost a part of his debt, *it was held*, that the statute of limitations commenced running from the time of the return of the officer upon the writ, or of its return into Court, and not from the time when it was ascertained by the judgment and levy upon the property attached, that it was not sufficient to satisfy the judgment.

CASE against Norris, as a deputy sheriff, for an alleged neglect of duty. The writ in this suit was dated June 1, 1840.

The general issue was pleaded, and a brief statement filed, setting up the statute of limitations in defence.

The plaintiff, to support the issue on his part, produced and

read a copy of a writ, in which the plaintiff alleged his damage at two thousand dollars, and which had been sued out by the plaintiff against John Lane and Jabez Leadbetter in due form, returnable to the Court of Common Pleas, August Term, 1829, in this county, with an indorsement thereon of an order by the plaintiff to the defendant to attach sufficient property; and having a return thereon by the defendant, that he had made service thereof, by attaching sundry items of real and personal estate, and summoning the said Lane and Leadbetter, &c. The plaintiff then produced and read a copy of a judgment, duly rendered in his favor in the same case, at the June Term of this Court, in this county, holden in 1834, for $1558, debt, and $317,67, costs, and an execution thereon, duly sued out, and seasonably levied on the property attached on said original writ, but without satisfying the same in full, but leaving a balance unpaid of $332,69. And then offered to prove that the defendant might, on said writ so served and returned by him, have attached other property of the debtors therein named sufficient to have fully satisfied said execution.

Whereupon WHITMAN C. J. presiding at the trial, ruled, as the statute of limitations had been interposed, and the nonfeasance in such case would appear to have taken place more than six years before the institution of this suit, that such proof would not support the plaintiff's claim. And thereupon he consented to become nonsuit, reserving leave to move to take it off, and have the action stand for trial, if the whole Court should be of opinion that the action could be maintained upon the proof so offered.

May, for the plaintiff, contended, that the action was not barred by the statute of limitations. It could not be ascertained in any possible manner whether there was, or was not sufficient property attached to respond the debt and costs, until it was sold or appraised off on execution. The creditor could maintain no action until the contingency happened, when the amount of the debt, and the value of the property had both been ascertained. The cause of action did not accrue until that time, which was within six years of the time of

the commencement of the action. *Hinsdale* v. *Larned*, 16 Mass. R. 65; *Bailey* v. *Hall*, 4 Shepl. 408; *Walker* v. *Bradley*, 3 Pick. 261; *Cæsar* v. *Bradford*, 13 Mass. R. 169; *Rice* v. *Hosmer*, 12 Mass. R. 127; *Mather* v. *Greene*, 17 Mass. R. 60. And a case in Penobscot, not yet reported, (*Harriman* v. *Wilkins*, 2 Appl. 93,) wherein it was decided, that the statute of limitations began to run from the time of the return of *non est inventus* on the execution, and not from the time of service of the writ, in action against an officer for taking insufficient sureties in a replevin bond.

Wells, for the defendant, contended, that the cause of action accrued to the plaintiff on the return of the writ into the clerk's office, with the insufficient return upon it. The plaintiff then knew what the officer had done. He knew also how much was due to him, and the value of the property. It was real estate, and could be seen and valued by the plaintiff as well as by the officer. The action is founded on the alleged neglect of the defendant in not attaching sufficient property on the writ. That was the only omission of duty by him of which complaint is made. There should be some limitation of the liability of officers, and the law contemplates that there should be. The time is to be ascertained by looking at the acts of the defendant, and not by the length of time the parties may keep an action in Court. Angell on Lim. 294; 4 T. R. 610; *Rice* v. *Hosmer*, 12 Mass. R. 127; *Greene* v. *Lowell*, 3 Greenl. 373; *Miller* v. *Adams*, 16 Mass. R. 456; *Bishop* v. *Little*, 3 Greenl. 405; *Williams College* v. *Balch*, 9 Greenl. 74; *Wilcox* v. *Plummer*, 4 Peters, 172.

The bail have a right to surrender their principal after judgment, and therefore no action brought before that time had elapsed, could have been sustained. In a replevin suit, the law requires the bond to be returned into Court, and its very condition is such, that there can be a breach of it only after judgment for a return, and the return of an officer, that no return had been made. In both cases, the cause of action did not accrue, and of course the statute of limitations did not commence running until after judgment.

The opinion of a majority of the Court, SHEPLEY J. dissenting, was delivered June 3, 1843, by

WHITMAN C. J. — This action against the defendant is for a nonfeasance as a deputy sheriff, in not attaching sufficient property as ordered on mesne process in favor of the plaintiff, and against John Lane and Jabez Leadbetter, to satisfy the judgment afterwards recovered thereon. The writ was served in 1829. This action was commenced in June, 1840; and within six years of the rendition of the judgment in that case. The statute of limitations is relied upon in defence. The plaintiff insists, that his right of action against the defendant did not accrue till after the rendition of judgment against Lane and Leadbetter. The defendant contends that it accrued, if ever, at the time of the attachment returned on the writ against them. At the trial, the plaintiff consented to become nonsuit, reserving leave to move to have it taken off, and the action reinstated for trial, in case the Court should be of opinion, that the defence, under the statute of limitations, could not be sustained.

To determine when the right of action accrued, is not without its difficulties. It is very clear that the particular act of nonfeasance occurred when the writ was returned by the defendant, without having complied with the order of the plaintiff; and the plaintiff's writ must necessarily so allege it. But it is insisted, though the act of nonfeasance did then take place, that the injury did not arise till after the rendition of judgment; nor until it was ascertained, by a levy, that the property attached was insufficient to satisfy the execution thereon issued. The question would seem to be, was the omission a wrong done to the plaintiff, from which the supposed injury accrued? or was it an innocent act of the defendant, from which consequential injury alone arose to the plaintiff? If the former, then the act complained of was the subject matter of the grievance; and the statute should begin to run from the time it took place. If the latter, then it should begin to run only from the time of the happening of the injury. If a man erects a dam on his own land, causing a reflux of a

stream, which would overflow his neighbor's land only in case of a high freshet, the erection of the dam would be an innocent act; and the injury to be complained of would be consequential merely. But if the law gave a right to erect such a dam, and provided no other remedy for a person liable to be injured by it, than, that the builder of it should, in the case of a rise of water, hoist a gate sufficiently high to prevent the reflux of the water, to the injury of his neighbor, then the not hoisting of the gate would be the grievance to be complained of.

The case at bar has been supposed to bear a similitude to the case of *Roberts* v. *Read*, 16 East, 215, in which it appeared that the defendant, a surveyor of highways, had so excavated adjoining the plaintiff's wall, that some months afterwards it fell. The cause of action was considered as accruing when the wall fell. It was a special action on the case for consequential damage. Till the wall fell, there was no trespass upon the plaintiff's rights. It did not appear but that the surveyor had done what he innocently might do. The case was decided upon the same principle, as in any other case of an injury merely consequential. Lord Ellenborough remarked, "it is sufficient that the action was brought within three months after the wall fell, for that is the gravamen; the consequential damage is the cause of action in this case." And that, "being an action on the case for consequential damage, it could not have been brought till the specific wrong had been suffered."

The same was the case in *Gillon* v. *Boddington*, 1 C. & P. 541, which has been supposed also to bear a similitude to the case at bar. But in that case, the reporter, in his marginal abstract, notices, that "the act itself was not tortious or injurious, except from those consequences, which occurred sometime after." In the case at bar, the act of returning the writ without attaching sufficient property, was the actual wrong done, which occasioned the injury, and is the substantive cause of action. It was a wrong for which an action might instantly have been brought. Whether it could have been sustained or not, might still have depended on whether the plaintiff's

action, against Lane & Leadbetter, could have been sustained. If not, the neglect to attach property was no wrong or injury to him. And it might have been found convenient to continue the action against the defendant till it was ascertained, whether the plaintiff's action against Lane & Leadbetter proved successful; and also to ascertain the amount of damage, which the nonfeasance complained of would ultimately occasion. Because, until this had been done, it might have been inconvenient to establish those facts, could form no ground to question the original cause of action against the defendant.

It is undoubtedly very true, that no man has a right of action against a wrongdoer, unless he is personally injured. But, in the case of every violation of the rights of a particular individual, the law implies damage. It may be but nominal. But still a right of action accrues for it. A sheriff might neglect to arrest and commit a worthless debtor to jail; and it might even happen that it would be productive of a pecuniary loss to the creditor, that he should do so; still, if the creditor had a right to have him committed, a right of action would exist in his behalf, for the nonfeasance, and nominal damages would be recoverable. In the case at bar, whether the defendant, by not attaching more property, did the plaintiff a wrong, depended on the amount of his debt. That amount did not depend on any subsequent proceeding. It was the same, at the time he commenced his suit for it, that it was at the rendition of judgment; with the exception of the damage for the detention of the debt. The wrong done to the plaintiff, therefore, occurred when the nonfeasance took place, and not when it came to be ascertained, by subsequent events, what the precise amount of the injury turned out to be.

It is believed, that there is no substantial distinction between actions for torts, where assumpsit might also have been sustained, and official acts of misfeasance or nonfeasance, if there be any such, in which assumpsit could not have been sustained. If a tort be relied upon, it is not perceived how there can be any such distinction. There is certainly no direct authority in

support of it. But if there were any ground for such a distinction, is it not clear that assumpsit might have been instituted, instead of case, for the injury here complained of? Wherever the law requires one man to perform an official duty for another, for a reward, and at his request, does not the law imply a promise? If so, an action would well lie upon such promise. Mr. Justice Bailey, in *Howell* v. *Young*, 5 B. & C. 259, seems so to have understood the law, when he says, "It appears to me, that there is not any substantial distinction between an action of assumpsit, founded upon a promise, which the law implies, that a party will do that which he is legally liable to perform, and an action on the case, which is founded expressly upon a breach of duty."

This authority is, furthermore, directly in point, to show that the injury arising from a wrong done, takes its date from the time of doing the act occasioning the injury. An attorney, in that case, was guilty of a misfeasance, or nonfeasance, attended with a consequent injury to the plaintiff. It was held, that the damage, subsequently arising, did not constitute a substantive cause of action, of itself; and that the statute of limitations began to run from the time that the cause producing the injury took place.

In *Godin* v. *Ferris*, 2 H. Bl. 14, it was holden, that the misfeasance of a custom-house officer, in wrongfully seizing goods, not liable by law to be seized, took place at the time of the seizure; and that the statute of limitations began to run from that time, and was not dependent upon the event of proceedings at law against the goods. Similar cases have repeatedly arisen since, and have been similarly decided in the English courts. The case of *Fetter* v. *Beale*, 1 Salk. 11, is to the same effect in principle. The Court held, that an action depending upon consequential injury to a person, arising from an assault and battery, committed so long anterior as to be barred by the statute of limitations, was also barred, though occurring afterwards.

In *Miller* v. *Adams*, 16 Mass. R, 456, in the case of the misfeasance of an officer, in not duly serving a writ, whereby

the judgment rendered in the case became liable to be reversed, it was holden, that he was protected by the running of the statute of limitations, from the time of the act of misfeasance, and not from the time of the reversal. In *Cæsar* v. *Bradford*, 13 Mass. R. 169, it appeared that the officer, serving the original writ, falsely returned that he had taken bail, when in fact he had not; the Court decided, that the right of action accrued against him at the time of his making the false return. In *Rice* v. *Hosmer*, however, 12 Mass. R. 127, the same Court, in an action against the sheriff, for the default of his deputy, for not taking *sufficient* bail, ruled that the right of action did not arise till after *non est inventus* returned upon the execution. Wherein the distinction lies, in point of principle, between this, and the case of *Cæsar* v. *Bradford*, is not obvious to my mind. In both, the officer must have returned, that he had taken bail in the usual form. In the one it appeared, that he had taken no bail, and in the other, that insufficient bail had been taken. The reason given by Mr. Justice Dewey, who delivered the opinion of the Court, for the decision in the latter case, is, that "it is usual for the officer, who serves the writ, to retain the bail bond until it is called for by the plaintiff in the action; and he has no occasion to call for it, until his execution against the principal is returned unsatisfied. The creditor, therefore, cannot be presumed to know any thing of the sufficiency of the bail, until that time." And it would seem, that he might have added, "or whether any bail had been taken." Upon this ground, it was held, that the statute of limitations did not begin to run, in such case, till after the return of *non est inventus*. And upon the authority of this case, it was so ruled again in *Mather* v. *Green*, 17 Mass. R. 60. Mr. Justice Dewey, however, in the above opinion, instanced the cases of an escape, non-arrest of the body, and not *attaching goods*, &c. as being those in which an action would lie immediately, or before judgment recovered in the action.

If not attaching goods, when ordered to do so, give an instant right of action, and it would seem that the whole court

must have concurred with him in this *dictum*, the statute would begin to run from the time of such neglect; and it would seem to be an expression of an opinion, if not an authority, directly in point. Is there any distinction, in principle, between not attaching goods when ordered, and not attaching sufficient, as it respects the time when a right of action would accrue for the nonfeasance? It could no more be told, how much the plaintiff would recover, or whether he would recover any thing, in the one case than in the other. Suppose the amount of goods attached to be trifling, and the demand of the plaintiff large, when there were goods in abundance, that might have been attached, must the creditor wait till judgment and execution, before he would have a right of action against the officer for his neglect? If not, how much must the officer attach, short of a sufficiency, to prevent the right of action from accruing till after judgment? Really, it does seem, that it can make no possible difference in principle, as to the time when the right of action should accrue, whether the officer returns a writ with but a nominal attachment, and a return of an attachment short of the amount, which he may be ordered to attach, and which he might have attached.

As to the argument arising from any inability to prove the amount of the actual damage till after judgment and execution, it is difficult to perceive how that should have any legitimate bearing upon the question. If a man be sued for the breach of his covenant of warranty, in his deed of real estate, he cannot tell what the amount of the damages to be recovered against him may be, till judgment recovered; still it will not affect the time of the accruing of his right of action against his warrantor. In the case at bar, if the nonfeasance had been the non-arrest of the debtors, whereby they had been enabled to flee the country, with property enough to pay the debt, the amount of damage would have been uncertain till judgment against them. The same difficulty would have existed, if the attachment had been merely nominal. It must be that the right of action exists, whenever the officer fails to do his duty; and that the ascertainment of the actual damage

is but an incident thereto; the ascertainment of which may depend upon subsequent contingencies; as in the case of a permanent or durable injury arising from an assault and battery, and numerous other tortious acts.

In *Wilcox & al.* v. *the Executors of Plummer*, 4 Peters, 172, this whole subject seems elaborately to have been considered; and the learning, in reference to it, to have been exhausted. The arguments of counsel were by Mr. Wirt, then Attorney General of the United States, for the plaintiff, and Mr. Webster, for the defendant. The defendant's intestate, an attorney, had received an indorsed note for collection. He first sued the maker, and obtained judgment against him; which proved fruitless, by reason of his insolvency. The indorser was not sued till long after a reasonable time had elapsed, after judgment against the principal; and, when sued, the action was framed in such an unskilful manner that it abated; before which the statute of limitations had intervened, and barred the plaintiff's right to recover. This action for the default of the intestate, came into the Supreme Court upon a disagreement of opinion, certified from the Circuit Court. The Supreme Court certified their opinion to the Circuit Court, on the first count, which was for negligently omitting to sue the indorser in a reasonable time, to be, "that the cause of action arose at the time, when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection; or, at all events, after the failure to collect the money of the maker." Mr. Justice Johnson, in delivering the opinion of the Court, remarked, that, in such case, no more than nominal damages might have been proved or recovered; but that proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict." The other count in the writ, was grounded upon the negligence in framing an insufficient writ against the indorser; and suffering the statute of limitations to become a bar; in reference to which the Court held, that the injury complained of in that count must take its date from the time of making the insufficient writ; and not from the time when

the claim became barred by the statute of limitations. From a careful examination of that case, it will seem to be difficult to infer, that the statute of limitations, in any case of nonfeasance or misfeasance, unaccompanied by fraudulent concealment, should be considered as beginning to run from any time, other than that at which the act of nonfeasance or malfeasance actually took place. The substantive cause of action then takes place; and whatever may follow, or flow from it, is but incident thereto, and must follow the fate of the primary cause.

In the case at bar, it seems to a majority of the Court, that it results from principle, and from the authorities cited, that an action had accrued to the plaintiff, if at all, on the return of the writ; and that no substantive cause of action can be considered as having arisen afterwards. The plaintiff had, for years after all the damage complained of had been fully ascertained, ample opportunity to have instituted his suit. Not having done so till after six years had elapsed from the time when his cause of action arose, he is barred; and judgment must be entered on the nonsuit.

The following reasons for his dissent were given by

Shepley J. — It will be admitted, that the statute of limitations commences to run from the time, when the right of action accrues. The only difficulty consists in determining that question. The general rule is believed to be, that in actions founded on contract, express or implied, the right of action accrues upon the breach of it; and in actions founded on tort, it accrues when the party is injured. A mere violation or neglect of duty enjoined by law, or otherwise imposed without contract, unless accompanied or followed by an injury to some person, cannot be the foundation of an action at common law. The law does not allow an individual to maintain a suit to redress moral wrongs, from which he has suffered no injury. The state or sovereign power only can interpose in such cases. And to decide whether the omission to comply with an order to attach property was a wrong or an innocent act, can afford little aid in forming a conclusion, *when the right of action*

first accrues. That right does not arise out of any such moral attribute of the act. Nor does it first accrue when a wrongful act is done, unless the party suffers from it at that time, which is the case in trespasses; and may, or may not, be the case in those instances, in which an action on the case would be the proper remedy. There is therefore a fundamental distinction in this matter between actions founded on contract, and those founded on tort. And a solution of the remarks made in some of the decided cases may be found in an exception, to which most if not all general rules are liable. To the rule, that in actions founded on tort the right of action first accrues upon the injury suffered, an exception may be found in cases where the form of the action may be tort or assumpsit, at the election of the party. In such cases, if the party elects to bring an action of tort, the mere form of action will not assist one to determine when the right of action accrues. There is a class of cases falling within this exception; and among them is the case of *Howell* v. *Young*, 5 B. & C. 259. And this fully explains the remarks of Justices Bayley and Holroyd in that case. Mr. Justice Bayley says, "it appears to me, that there is not any substantial distinction between an action of assumpsit founded upon a promise, which the law implies, that a party will do that, which he is legally liable to perform, and an action on the case, which is founded expressly upon a breach of duty. Whatever may be the form of action, the breach of duty is substantially the cause of action." The language of every judicial opinion is explained by the subject matter under consideration; and the breach of duty then considered, was that arising out of the relation of attorney and client, for which assumpsit might as well have been maintained as a special action on the case, and not such a breach of official duty as can never be the foundation of an action of assumpsit. When the action is founded upon a neglect of official duty, the gist of the action is the injury suffered; and no action can be maintained but one in form, as well as substance, founded on that injury; unless it be otherwise provided by statute. The relation between an officer and the person for whom he per-

forms an official act, is not that arising out of a contract, express or implied. The law requires the performance of the act; and requires it in many cases, when the officer would refuse to perform it, if he were at liberty to do so. The compensation does not arise out of any such implied or express contract; but it is the reward of the law. And in many cases it is more, and in others less, than would be awarded, if the services were performed by virtue of a contract. No case has been produced from the books, shewing that assumpsit could be maintained for the omission to perform such an official act. And Mr. Justice Bayley's remark, in *Howell* v. *Young*, does not apply to a case of official neglect of duty, but to a case of professional neglect. And in such cases, while the relation between the parties arises out of a contract, express or implied, the action may be in form of assumpsit on a breach of the contract, or in form of tort arising from a neglect of duty. The distinction, as to the time when the right of action accrues, between actions of tort founded on the neglect of official duty, and on the neglect of professional duty, is this: for the neglect of a professional duty, a right of action accrues as soon as there is a breach of the contract, irrespective of the form of action. And if an action of tort be brought for the injury, which may subsequently happen from such breach, that cannot change the fact, that a right of action existed as soon as the contract was broken. While in actions founded on an official neglect of duty, it does not necessarily follow, that an injury has happened from that neglect, and there is no earlier right of action in any other form. In this class of cases, therefore, the right of action accrues, when an injury happens, whether that be at the time of the neglect of duty, or at a subsequent period.

With these principles there will be little difficulty in this case in arriving at a satisfactory conclusion.

The plaintiff sued out a writ against John Lane and Jabez Leadbetter. The *ad damnum* was two thousand dollars. The defendant, being a deputy of the sheriff, received the writ with written instructions to attach all their real estate. On the 12th

of June, 1829, he returned on it an attachment of certain real estate described, not including all the real estate of Leadbetter which he might have attached; judgment was recovered June Term, 1834, for $1558, debt, and $317,67, costs; and the execution issued thereon was levied within thirty days after judgment on all the real estate attached, leaving a balance unsatisfied of $332,69. Upon these facts, when could the plaintiff have first maintained an action against the defendant for neglect of official duty? Not until he had suffered an injury. Being enabled to exhibit all the facts, could he have proved an injury between the date of the attachment and the rendition of judgment? During that time, the amount due from Lane and Leadbetter was undetermined and uncertain. Whether the real estate attached would satisfy the whole judgment, was uncertain. This could be ascertained only by the appraisement. It might increase or decrease in value during the time that the suit was pending. There might be an increase, from a rise of prices, and from repairs, and from improvements; or a decrease from a fall in prices, and from dilapidation, and from destruction by fire or otherwise. He could not have recovered nominal damages, for the reasons before stated, without proof of some actual injury at the time of the commencement of the suit. Damages may in such cases be recovered for injuries suffered to the time of the trial, but this is true only, when there was an existing cause of action, and some damage at the time of the commencement of the suit. An action of tort cannot be maintained, if no injury had been suffered at the time of its commencement, by proving that an injury has since happened from the cause alleged. There may be, and often is, an immediate injury arising out of a neglect of official duty; and in such cases the right of action accrues instantly. And in certain cases the law implies an injury as arising necessarily from the wrong done, as in slander. In the present case the burthen of proof would be on the plaintiff, and he must make it certain that he had been injured, before he could maintain an action. And it is not perceived how this could possibly be done, until after the plaintiff had recovered

his judgment, if it could be, before the insufficiency of the property attached to satisfy it was legally ascertained.

There does not appear to be any case brought to the consideration of the Court, opposed to these positions. The case of *Fetter* v. *Beale*, 1 Salk. 11, was an action for assault, battery, and maim. It appeared, that the plaintiff in a former action of assault and battery had recovered damages for the injury, and that since that time a piece of his skull had come out, for which this action was brought. The decision was, that the former recovery was a bar, because the whole injury, as well that, which was prospective and contingent, as that, which was existing and apparent, could have been proved and recovered for in the first action. The case of *Goden* v. *Terris*, 2 H. Bl. 14, was an action against an officer of the customs, for illegally seizing goods as forfeited. It was objected, that the action was not commenced within three months next after the matter or thing done, as the statute required. The decision was, that the statute commenced to run from the seizure. The action was trespass, which implies damage from the illegal act, and there was a present damage also by removing the goods, and the whole proceedings were at that time, either lawful or unlawful.

The case of *Howell* v. *Young*, was a special action on the case, founded, as before stated, on a breach of an implied contract, for which assumpsit might have been brought. And there was also a present defect of title, capable of being clearly and certainly established by proof, as soon as the neglect of duty occurred. And this present defect of title is the foundation of the remark of Mr. Justice Bayley, where he says, "if the allegation of special damage had been wholly omitted, the plaintiff would have been entitled to a verdict of nominal damages." The ground, upon which he would have been entitled immediately to that or a greater measure of damages, is also explained by Mr. Justice Holroyd, where he says, "so here, if the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss, which the plaintiff was

likely to sustain from the invalidity of the security." The case of *Short* v. *McCarthy*, 3 B. & A. 626, was assumpsit against an attorney for neglect of duty in not making a diligent search of the books of the Bank of England respecting the title to certain bank annuities; and the decision was, that the statute commenced to run from the neglect of the duty, which was a breach of the contract, although the plaintiff did not discover, that the title was bad until sometime afterward. The case of *Brown* v. *Howard*, 2 B. & B. 73, was also assumpsit against an attorney for neglect of duty in not laying out money on good security; and the defect of title did not become known to the plaintiff until sometime afterward. The decision was, that the cause of action accrued from the neglect of duty, that being a breach of the contract. The case of *Battley* v. *Faulkner*, 3 B. & A. 288, was assumpsit on a contract to deliver spring wheat, and the defendant delivered winter wheat, which being sown as spring wheat, did not produce a crop. And it was decided that the cause of action was the breach of the contract, although the special damage became first known to the plaintiff, when he expected his crop. The case of *Granger* v. *George*, 5 B. & C. 149, was trover for boxes containing books and papers. And it was decided, that the gist of the action was the conversion, and that the statute commenced to run from that time, although the plaintiff did not come to the knowledge of the conversion until sometime afterward. In these cases, where the party would seem to have suffered in consequence of his ignorance, it is apparent, that he might, by a careful attention to his business, have obtained an earlier knowledge of the facts, and might have been enabled to prove his loss, and to obtain redress. The case of *Wilcox* v. *the Executors of Plummer*, 4 Pet. 172, was assumpsit on the implied contract of an attorney to conduct the business of his clients with diligence and skill. And the decision was, that the right of action accrued upon the breach of that promise. Mr. Justice Johnson, in delivering the opinion of the Court, says, "the ground of action here is a contract

to act diligently and skilfully; and both the contract and the breach of it admit of a definite assignment of date."

The following cases tend to establish, confirm, or elucidate, the positions before stated. The case of *Roberts* v. *Read*, 16 East, 215, was a special action on the case against surveyors of highways for digging so near the plaintiff's wall as to undermine it, and cause it to fall. The act was done in May, 1810. The wall fell the following January. Lord Ellenborough says, "it is sufficient, that the action was brought within three months after the wall fell, for that is the gravamen; the consequential damage is the cause of action in this case;" "it could not have been brought till the specific wrong had been suffered." And Mr. Justice Bayley significantly asked, "how was the damage to be estimated, before it actually happened." The case of *Gillon* v. *Boddington*, 1 C. & P. 541, was an action on the case for an injury occasioned to the wall of a wharf, by making excavations to prepare a dock. These were made in the year 1822, and the wall fell in 1824. The decision was, that the statute did not commence to run until after the wall had fallen. *Rice* v. *Hosmer*, 12 Mass. R. 127, was an action on the case for official neglect of duty in omitting to take sufficient bail. And in the opinion of the Court it is said, "had the plaintiffs brought their action at any time, before they obtained judgment in the suit against Carlton, they could have shewn no actual damage. It was then uncertain, whether they would prevail in their suit; and if they did, the principal might satisfy the judgment, or be surrendered by the bail." There do not appear to have been greater difficulties in that case, than in the present, in maintaining an action before judgment. In that case it is also said, that "there is no doubt, that an action upon the case for the neglect or misconduct of an officer, may lie in some cases immediately or before judgment in the suit; as for suffering an escape, neglecting to arrest a debtor, or to attach his goods, or to return the writ." And Mr. Justice Dewey very correctly says, "but those cases are different from the present, and depend on different principles." The reason of the difference in principle is

this, that in those cases named by him as examples, there would be a present injury arising, and capable of being proved, as soon as the neglect or act had occurred. The case of the sheriffs of *Norwich* v. *Bradshaw*, Cro. El. 53, was an action on the case for an escape against the party committing it. And the decision was, that the sheriffs were thereby damnified, although they had neither been sued for, nor paid the debt. The reason is obvious; they were by the escape made presently liable for it.

The case of *Ravenscroft* v. *Egles*, 2 Wilson, 294, was an action on the case against the warden of the Fleet prison for a voluntary escape. The prisoner returned to prison on the day of the escape, and the plaintiff proceeded to judgment against him. The decision was, that the action could be maintained. In the opinion it is said, "though the plaintiff might lawfully proceed to judgment against him, yet he could not charge him in execution." And if an escape be voluntary in the jailer, "nothing afterwards will purge it." Here therefore was a present injury, which could be proved. The case of *Alexander* v. *Macauley*, 4 T. R. 611, was an action on the case against the sheriffs for an escape. The plaintiff could not prove any debt against the person who escaped; and the question was raised, whether he could recover nominal damages, and it was decided, that he could not. The case put by Mr. Justice Dewey, of neglecting "to attach his goods," is that of a neglect to make any attachment, when directed to do so; and between such a case, and that of neglecting to attach sufficient, there is this important distinction: in the former case, the plaintiff is deprived of the security, to which he is entitled by law; and that is a present injury capable of present proof; and it lays the foundation of an action upon the case on the principle before stated, that the right of action accrues, when the injury is suffered. In the latter case, there is no violation of the right to have security. And when there is a substantial, and not a nominal and deceptive compliance with the order to attach, it must remain uncertain, whether any loss will arise from the neglect, until after judgment, if not until after an ap-

propriation of the property, which has been attached. Take the case of an attachment of a large stock of goods as an example. The neglect to make an attachment destroys the right of security, and the immediate damage would be apparent and of easy proof. If two thirds of the stock were attached, when the order was to attach the whole, the officer might be able to prove by the wholesale prices and by the present cash value, that he had in custody sufficient to cover the *ad damnum* and all costs, and if the plaintiff immediately commenced a suit he must fail. And yet these same goods on a sale according to law might not pay two thirds of the debt. The right of action here in fact would first arise, when the plaintiff was injured. The case of *Miller* v. *Adams*, 16 Mass. R. 456, illustrates this distinction. That was an action upon the case against a deputy of the sheriff for neglecting to serve a writ. He had attached property and summoned a trustee, but had not made service on the principal defendant. The decision was, that the right of action accrued on the return of the writ, although the omission to serve on the defendant did not become known to the plaintiff until a long time afterward. Here there was a present injury at the time of the return, and capable of proof; and the cause of action therefore then accrued; and it was through the inattention of the plaintiff or his attorney, that it was not immediately known. Where the remedy is perfect, although the party may not know it to be so, the statute will commence to run against him. But when he has come to the knowledge of a wrongful act and fears an injury from it, it will not begin to run, until he is actually damnified. *Cæsar* v. *Bradford*, 13 Mass. R. 169, was an action on the case against the sheriff. The first count was for a false return by his deputy in stating, that he had taken a bail bond, when he had not. The bail bond was not demanded for more than a year after judgment, when there was no remedy upon it against the bail. The decision was, that the limitation of one year was for the benefit of the bail only, and not for the sheriff. The action was not commenced until after *non est inventus* had been returned on the execution. And at

that time the plaintiff had suffered an injury in being deprived of his security arising from the custody of his debtor, or its equivalent a bail bond.

Mather v. *Green*, 17 Mass. R. 60, was an action on the case against a deputy of the sheriff for taking insufficient bail. One person only was taken as bail. A judgment on *scire facias* had been obtained against him, and the execution issued thereon had been returned with an indorsement, that neither body nor property could be found. For the plaintiff it was contended, that the right of action did not accrue until after this return. The decision was, that it accrued on the return of *non est inventus* on the execution against the principal, as the plaintiff then might have inquired, and "would have ascertained the fault of the defendant in that he had taken but one surety." At that time he had suffered an injury, and could have proved, that he had been deprived of the security, to which he was by law entitled, and that such security had become highly important. *Bailey* v. *Hall*, 4 Shepl. 408, was an action on the case against the sheriff with a count in trover. The plaintiff alleged, that a deputy of the defendant had attached his goods on a writ in favor of Howard, and had wasted them before the judgment. The goods were not applied to satisfy the execution issued on the judgment recovered by Howard against the plaintiff. The decision was, that the right of action did not accrue until the attachment was dissolved. The case of *Harriman* v. *Wilkins*, 2 App. 93, was an action on the case against the sheriff for the neglect of a deputy in taking a replevin bond with insufficient sureties. The decision was, that the right of action did not accrue until after judgment for a return and a failure to procure the property. It will be perceived, that the cases are all reconcilable and consistent with the principles before stated; and this would seem to be sufficient to test their accuracy.

The Inhabitants of Belgrade *versus* The Inhabitants of Dearborn.

By the statute of 1839, annexing a part of the town of Dearborn, with the inhabitants "having a legal settlement" on the territory set off, to the town of Belgrade, such were intended, as were entitled to support and relief from Dearborn, in case of their falling into distress, whether residing on the territory at the time of the annexation, or removed therefrom without having acquired a settlement in any other town.

And by the settlement act of 1821, c. 122, upon the division of towns, those having a legal settlement therein, and who were absent therefrom at the time of such division, have their settlement in such town as the part they dwelt upon shall have fallen into.

Where a person had originally acquired a settlement by living within the part of Dearborn which was not annexed to Belgrade, but had removed into the part which was annexed thereto, and lived several years, and there died, and his family continued to reside there until the annexation took place, being supported as paupers; *it was held*, that the family had their settlement in Belgrade.

This was an action, commenced Jan. 11, 1841, brought to recover the amount expended for supplies furnished to several paupers, alleged to have had their legal settlements in Dearborn.

Dearborn had once been an incorporated town. On March 22, 1839, a large portion of the town was annexed to Belgrade; on Feb. 29, 1840, a large part of the residue, with other land, was incorporated into a new town by the name of Smithfield; and on April 20, 1841, the act incorporating the *town* of Dearborn was repealed, and the corporation, as a town, dissolved; the remaining territory was made a plantation, and made liable for the *debts of the town.*

The overseers of the poor of the town of Belgrade, and the assessors of the plantation of Dearborn, once the town of Dearborn, agreed to submit the questions of settlement, as to the paupers named in the suit, to the decision of the Court upon the following statement of facts.

William Rowe had lived and had his home for more than five years on that part of the town of Dearborn, which was annexed to the town of Belgrade by the act of 22d of March, 1839, but had removed from said town of Dearborn into the

original town of Belgrade, prior to said annexation, and was living there at the time, but had not lived there for five years.

Valentine Cook and family, including Eleazer Bickford, lived and had their home on that part of Dearborn, which was incorporated into the town of Smithfield by the act of 29th February, 1840, for more than five years prior to the fall or winter of 1832, and then moved into that part of the town of Dearborn which was annexed to the town of Belgrade by the act of the 22d of March, 1839, and remained there until May, 1837, supporting themselves. They then received some supplies from the town of Dearborn, for which the town retained out of his *surplus revenue* the same amount the next April. Valentine Cook died in Nov. 1837, leaving his family still living on that part since annexed to Belgrade. At the time of the annexation they were supported by the contractor for the support of the poor for the town of Dearborn, he and they residing upon the territory annexed to Belgrade.

John Brooks was an inhabitant of the town of Dearborn, and of that part which was, in the spring of 1839, annexed to Belgrade, and sometime in the month of November or December, 1838, went by virtue of a bargain, made in his behalf by the keeper of the poor in Dearborn, to live in Rome. The bargain made, was, that he might go and live there during the coming winter and until the first of May, provided he should be obliged to do nothing except to cut firewood at the door in pleasant weather, and take care of the few creatures at the barn. When the proposition was made to Brooks, he would not agree to go unless he might return, if he should not like to live there as well as he should where he then was. Sometime in the month of April, 1839, Brooks came back to the same house, and brought all his wearing apparel, which was all the property he owned. Brooks would not go to Rome without the consent of the keeper of the poor, at whose house he then was, that he might come back, if dissatisfied. Such permission was given to him, and that was the principle he went there upon, and accordingly in April, he returned to the same

house from which he went, stating that the farm had been sold, and that he was not wanted any longer.

Eleazer Bickford, a minor, had a legal settlement derived from his parents in that part of Dearborn now Smithfield, but had removed from the town of Dearborn, a number of years prior to the incorporation of Smithfield, but had gained no settlement elsewhere. The parties made a statement of the amount expended by the plaintiffs for the support of each of the paupers.

It was further agreed, that Belgrade should recover full costs in said action up to the time of the offer, which Dearborn made to be defaulted for a certain sum, likewise for all other costs, if Belgrade shall be entitled to all or any part of said sums claimed for the support of said paupers; but if it be the opinion of the Court, that Belgrade is not entitled to any part of the sum claimed, then Dearborn shall be entitled to full costs from the time of said offer to be defaulted.

Emmons argued for the plaintiffs, and cited *New Portland* v. *Rumford*, 13 Maine R. 299; and *Smithfield* v. *Belgrade*, not yet reported. (1 Appleton, 387.)

Bradbury argued for the defendants, and cited as to the settlement of Rowe, *Hallowell* v. *Bowdoinham*, 1 Greenl. 199. As to that of Cook, *Fitchburg* v. *Westminster*, 1 Pick. 144; *New Portland* v. *Rumford*, 1 Shepl. 299. And as to that of Brooks, *St. George v. Deer Isle*, 3 Greenl. 390.

He also contended, that by the repeal of the charter and dissolution of the corporation, as a town, the inhabitants of the *plantation* of Dearborn were absolved from all liability to support paupers belonging to the *former town* of Dearborn.

The opinion of the Court was afterwards drawn up by

Whitman C. J. — The plaintiffs have instituted their suit to recover of the defendants the amount of the expenses incurred in the maintenance of a number of paupers alleged to have their settlement, in the defendants' plantation. The defendants are comprised of that part of the former inhabitants of the former town of Dearborn, remaining after the annexation of

different portions of its territory and inhabitants to other towns, of which the plaintiffs received a large share. The inhabitants, so set off, were those "having a legal settlement" on the territory set off. This phraseology could not have been used with an intention of constituting any persons, not actually resident upon the territory set off, citizens of the towns to which the annexations were made. The words "legal settlement," however, as here used, have a sort of technical meaning; and had reference to the statute providing for the support and maintenance of the poor, which provides, in effect, that all settlements, gained by any of the modes prescribed therein, shall remain until lost by gaining a new settlement elsewhere. A settlement so gained is what is intended by a legal settlement, viz. a settlement, which gives a right to a support from the town in case of falling into distress and becoming necessitous. The meaning of the words might, perhaps, be satisfied by restricting them to such persons as had a legal settlement in Dearborn, and were, at the time of the annexation, actually resident on the parts annexed. But it must be regarded as more consonant to the intention of the legislature, indicated by former enactments, *in pari materia*, to suppose they intended to include here, by the words used, all who had acquired their settlements on the territory annexed to the other towns, although removed therefrom at the time of the annexation. And, moreover, it is provided in the act concerning paupers, that, upon the division of towns, those having a legal settlement therein, and who were absent therefrom at the time of such division, shall have their settlements in such town as the part they dwelt upon shall have fallen into. Keeping this exposition of the statutes in view, we will proceed to consider the several questions arising in this case in reference to the paupers named.

The first, William Rowe, appears to have gained his settlement on that part of Dearborn annexed to Belgrade, but, at the time of the annexation, was living within the prior limits of Belgrade, in which however he had not then resided long enough to acquire a settlement. He therefore, according

to the principles before stated, falls within a class of paupers, which upon the annexation, the inhabitants of Belgrade became liable to support. His having moved into that town, instead of some other, can make no difference.

The second pauper, Valentine Cook, up to the time of the annexation, had his legal settlement in Dearborn; and from 1832 to 1837, when he died, he resided with his family on the part annexed to Belgrade; and his family continued so to reside till after the time of the annexation. Shortly before he died he had received some supplies as a pauper, which had been reimbursed by his *surplus money*; and his family afterwards had been relieved till the time of the annexation. Under these circumstances we entertain no doubt, but they must be considered as having passed to Belgrade, and thereby had gained a legal settlement therein.

The third pauper, John Brooks, appears to have gained his settlement upon the territory annexed to Belgrade; and although he had left there to work for his board during the winter of 1838—9, and under an expectation of staying away until the first of May then next, yet it was manifestly with an *animo revertendi*, and he did in fact return in April, before the act of annexation went into operation. We think, therefore, that thereafter his legal settlement was changed from Dearborn to Belgrade.

The fourth pauper, Eleazer Bickford, it is admitted, had his legal settlement, derivatively, in Dearborn; and that it was acquired on that part of the town annexed to Smithfield; and it is manifest that he, upon the incorporation of that town, in February, 1840, acquired a settlement there; and, any expense incurred for his relief thereafter, was chargeable to the inhabitants of that town, and not to the defendants. It does not appear that any part of the amount charged on his account, was incurred before that act went into operation, which was on the day of its passage. We cannot, therefore, consider the defendants as liable to pay any part thereof.

Judgment must, according to the agreement of the parties, be entered for the plaintiffs, for the amount for which the de-

fendants offered to be defaulted, with full costs up to the time of such offer; and for costs for the defendants thereafter.

EZRA JOSSELYN *& al. versus* JOSEPH HUTCHINSON.

By a devise to L. J. of "the whole of my estate of every name and nature, both real and personal, of which I may die possessed, after paying my just debts," the devisee takes an estate in fee in the lands of the testator.

WRIT OF ENTRY, demanding a tract of land in Fayette. A statement was made by the parties from which it appeared, that the land was the property of Isaac Josselyn, deceased. The demandants are his heirs at law, and the tenant has the title of Lois Josselyn, the widow, derived under the will. The will was dated December 2, 1814, and was duly proved and allowed. Excepting the formal parts, the whole will was in these words:—

"I give and bequeath unto my beloved wife, Mrs. Lois Josselyn, the whole of my estate of every name and nature, both real and personal, of which I may die possessed, after paying my just debts. And I hereby appoint Ezra Josselyn sole executor of this my last will and testament, hereby revoking all former wills by me made. Let it be remembered, in this last will and testament of mine, I did not forget my children nor grandchildren."

The only question presented, was, whether Lois Josselyn took by the will an estate in fee simple, or only for life. A nonsuit was ordered, which was to be set aside, if the widow took but a life estate.

Morrill argued for the demandants, and cited, 13 Wend. 578; 18 Johns. R. 31; 8 Mass. R. 3; 12 Johns. R. 389; 4 Kent, 536; 6 Har. & Johns. 205; 11 East, 220; 10 Wheat. 204; Bac. Abr. Title, Wills; 4 Kent, 538.

Howe argued for the tenant, and cited, 12 Johns. R. 389; 18 Pick. 537; 6 Johns. R. 185; 11 Johns. R. 365; 17 Johns. R. 281; 12 Wend. 602; Cowper, 299.

The opinion of the Court was drawn up by

TENNEY J. — The demandants claim the land described in their writ, as the heirs at law of Isaac Josselyn, deceased. The defendant resists that claim, and asserts a title in himself under a deed to him from Lois Josselyn, deceased, the widow and devisee of the said Isaac. The will of Isaac was duly proved and approved. The only question is, did the defendant's grantor take by the will an estate in fee or only for life?

The language of the will is, "First, I give and bequeath to my beloved wife, Lois Josselyn, the whole of my estate of every name and nature, both real and personal, of which I may die possessed, after paying my just debts."

Though it may be necessary, in order to pass a fee simple estate by deed, that the word "heirs" should be inserted, it has long been settled, that it is not required in a will, provided it appear by some terms of limitation therein, either express or implied, that it was the intention of the testator to devise an estate of inheritance. If such be wanting, an estate for life only passes by the will. The words "all the estate" of the testator passes a fee simple. The language used in the will before us, "the whole of my estate, of every name and nature, both real and personal," may be regarded, if possible, still stronger. Within the term "estate of every name and nature" must be included a reversionary interest, as well as an estate for life, and is repugnant to the idea, that only the latter was intended. 6 Cruise's Digest, 244. The cases cited by the defendant's counsel are numerous and conclusive; and by the agreement of the parties, the nonsuit must stand.

The State *versus* True Whittier.

In an indictment under St. 1825, c. 312, for maliciously injuring a dwellinghouse, not having the consent of the owner thereof, where at the time of the commission of the offence, the house injured was not in the possession of the owner, but of a tenant at will under him, it may well be described as the house of the tenant.

On the trial of an indictment, after the jurors have given in their verdict and have separated, and there has been an opportunity for others to converse with them, to operate upon their judgments, prejudices, or fears, to induce them, or some of them, to give a different account or explanation of it, it is not considered as regular, or authorized by our practice, to permit new inquiries to be made and explanations to be given; but if it be done, and the accused could not be injured thereby, the verdict will not be set aside.

Thus, where there were two counts in the indictment, properly joined, and there was no evidence to support the second, and the jurors returned a general verdict of guilty, and separated, and afterwards, on inquiry by the Judge, replied that they found the accused guilty on the first count, and not guilty on the second; the Court declined to set aside the verdict.

And if the finding had not been limited to the first count by the jury, the attorney for the State might have cured the difficulty by entering a *nolle prosequi* of the second count.

On the trial of a person indicted for a criminal offence, the presiding Judge is not obliged to permit the introduction, even on cross-examination, of a collateral fact which may occasion a new and distinct issue.

A child of any age, capable of distinguishing between good and evil, may be examined on oath; and the credit due to his statements, is to be submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion.

A preliminary examination of a child under fourteen years of age, prior to his testifying to the jury, is only necessary to satisfy the presiding Judge, that he may testify; and if the Judge is satisfied of the propriety of admitting the witness, it is sufficient for that purpose.

Where the indictment alleges, that the accused, "beat in the windows and broke the glass of a dwellinghouse, not having the consent of the owner thereof," it is not incumbent on the government, after proving the injury to the building, to introduce any direct evidence that there was no consent of the owner; but being a matter peculiarly within the knowledge of the accused, the burthen of proof is upon him to show that he had such consent.

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

This was an indictment against the defendant, containing two counts. The first count alleged that the defendant on the 20th of April, 1841, beat in the windows and broke the glass of a building, being a dwellinghouse, the property of one David W. Jackman, and that said Whittier had not the consent of the owner of said house for the doing said injuries. The second count was like the first, except it was alleged that the said house was the property of Jacob Butterfield. The county attorney admitted, that both counts were for the same offence. The only evidence adduced in relation to the ownership of the said house was that of said Jackman, who was a witness for the State, and who testified that he hired said house by parol of said Butterfield for one year, not then expired, and was occupying the same under that letting, when it was injured as aforesaid. The defendant requested the Judge to instruct the jury, that it was not proved, that said house was the property of said Jackman; but the Judge did instruct the jury, that if said Jackman's testimony was believed, he was the owner of said house, and that the proof aforesaid was sufficient to show that fact for the purposes of this indictment. The Judge also instructed the jury, that it was incumbent on the defendant to prove that he had the consent of the owner to do the injury aforesaid, and that it was not incumbent on the government to prove that there was no consent of the owner. The Judge further instructed the jury that there was no sufficient proof that said Butterfield owned the said house, and that the defendant could not be convicted on both of said counts. The jury found a general verdict of guilty. After they had so found, the jury separated and went away from the court house to dine. After they returned, having dined, the Court inquired of the foreman, whether they found the defendant guilty on both counts, and the foreman replied that they found him guilty on the first count, and not guilty on the second count, to which the jury assented; the defendant objecting to the putting said inquiry by the Court and the answer aforesaid. It appeared by the testimony of said Jackman, that there had been a difficulty between him and the defend-

ant, growing out of a prosecution for a criminal offence against said Jackman's wife's mother, and the defendant asked said Jackman whether said Whittier was the complainant against the mother of his wife in said criminal prosecution, to which question the attorney for the State objected, and the Judge sustained the objection, and the question was not answered.

Hiram Irvine was called by the State as a witness. He stated that he was thirteen years old. The defendant claimed the right to have the boy interrogated by the Court, for the purpose of ascertaining whether he understood the nature of an oath, but the Judge declined to make the examination, or to put interrogatories for that purpose. The defendant claimed the right to examine the witness for that purpose, but the Judge ruled that the defendant had not the right claimed, and the witness was examined by the attorney for the government in the first place in chief. Upon cross-examination, the defendant's attorney inquired of the witness, if he knew the nature of an oath, to which he replied, that "he thought he knew something about it." The defendant's attorney then asked him what it was, and what would be the consequences of stating falsely as witness, to which he replied, that "his oath would be good for nothing," and this was the only account of the matter he gave to the defendant's attorney. He was thereupon asked by the county attorney, "if God would approve his telling what was untrue;" to which he replied "that he did not know." He was then asked by same attorney, "if his Maker would punish him, if he should swear falsely;" to which he answered, that "he supposed he would." In the charge to the jury, their attention was particularly called to the credibility of this witness. Said Hiram on his examination in chief, testified to facts strongly tending to show, that the defendant was guilty.

To which rulings, inquiries and instuctions the defendant excepted.

The District Judge, before affixing his signature to the exceptions, made this statement in writing: — I deem it proper to add, that though the witness, Hiram Irvine, evidently mis-

apprehended one of the questions proposed to him, his whole testimony was of such a character, as to repel all pretence of incompetency by reason of any want of general intelligence.

Wells, for Whittier, contended that the mere possession of a house, as tenant at will, did not support the allegation in the indictment, that the house was the property of such occupant. It has been decided, that in indictments for larceny from a house, such proof was insufficient. There is less reason for admitting it in this case. 1 Chitty's Cr. Law, 176; *Rex* v. *Wilson*, 8 T. R. 358.

It was incumbent on the government to prove affirmatively, that the accused had not the consent of the owner. The want of the consent of the owner is a constituent part of the offence, and should be both alleged and proved, to support the indictment. 1 Chitty's Cr. Law, 234; *Little* v. *Thompson*, 2 Greenl. 228; Hall's case, 5 Greenl. 409; *Smith* v. *Moore*, 6 Greenl. 274; *Comm.* v. *Maxwell*, 2 Pick. 139; *Comm.* v. *Tuck*, 20 Pick. 363; 1 Stark. on Ev. 378.

The calling of the jury to answer interrogatories with respect to their verdict, after they had separated and mixed with others was erroneous. *Little* v. *Larrabee*, 2 Greenl. 37.

The question to Jackman was a proper one, and should have been answered. It had a tendency to draw from the witness information affecting his credibility.

The Judge should have examined the boy, or suffered the counsel to have done so, before he was permitted to testify. When the proposed witness is under fourteen years of age, he should be examined as to his capacity, and this is to be settled before he is admitted to testify. *Comm.* v. *Hutchinson*, 10 Mass. R. 225; *Jackson* v. *Gridley*, 18 Johns. R. 98; 2 Overton, 80; Greenl. on Ev. 410.

Bridges, Attorney General, for the State, said that the indictment should allege the property of the building to be in the occupant, and not in the owner. Rosc. Cr. Ev. 583, 585, and cases there cited; *The people* v. *Gates*, 15 Wend. 159.

The counsel for the State would appear sufficiently ridicu-

lous in introducing testimony to prove, that a man did not consent, that another should dash in his windows in the night. In such case the want of consent would be presumed by the jury. The rule of law is, that if facts are proved from which the jury may presume another fact, it is sufficient. 1 Stark. Ev. 324, 364. Where a fact is peculiarly within the knowledge of the accused, the government need not prove it. If he had the consent of the owner, the burthen of proof was on him to show it. *U. S.* v. *Hayward*, 2 Gall. 484; 1 McCord, 573; Rosc. Cr. Ev. 72.

The defendant cannot object to an inquiry of the jury which is solely for his benefit. The effect was merely to exempt him from punishment for a conviction on both counts. The prosecuting officer has a right to enter a *noll. pros.* to the whole of any count in an indictment, at any time. *Comm.* v. *Tuck*, 20 Pick. 356. And it is now proposed to enter it.

The question to Jackman was entirely irrelevant, and ought not to have been put. But if the inquiry was to be made, the proper proof was by the record.

Where a proposed witness is under fourteen years of age, it is for the presiding Judge to be satisfied, that the witness ought to testify, and his credit is left to the jury. It is a mere exercise of discretion in the Judge, to determine when the minor may testify, and is not the subject of revision by exceptions. There is no particular mode of doing this, and the Judge has certified that he was satisfied.

The opinion of the Court was drawn up by

Shepley J. — The statute, 1825, c. 312, provided, "that if any persons shall wilfully and maliciously injure or destroy any building or other fixture, not having the consent of the owner thereof," he may on conviction be punished by fine or imprisonment. This indictment alleges in the first count, that the accused "beat in the windows and broke the glass of a building, being a dwellinghouse, the property of one Daniel W. Jackman," and that he had not the consent of the owner

therefor. In the second count, the house is alleged to be the property of Jacob Butterfield.

The testimony proved, that Jackman was in possession of the house under a parol agreement to occupy it for one year, when the same was injured. It is contended, that this was not sufficient proof of the allegation in the indictment, that Jackman was the owner. The rule of law appears to be, that possession is sufficient evidence for that purpose, unless it be that of a servant merely, who is occupying as such for another. Where one was indicted for burning the house of another, it was decided, that a tenant, who set fire to the house of his landlord before his term expired, was not guilty of burning the house of another. *Brieme's* case, Leach, 195. In the case of the *People* v. *Van Blarcum*, 2 Johns. R. 105, who was indicted for burning the county court house and jail, alleged to be the dwellinghouse of the jailer, who by permission of the sheriff, lived with his family in a part of the building, and under the same roof covering the court house and jail, the Court said, it was sufficient proof of the allegation, that it was the jailer's dwellinghouse, that it was his actual dwelling at the time of the burning.

Another exception taken to these proceedings is, that the jury returned a general verdict of guilty after having been instructed, that there was no sufficient proof to sustain the second count; and after having separated and dined, they were asked, whether they found the accused guilty on both counts, and they answered, that they found him guilty on the first and not guilty on the second. After the jurors have separated and there has been an opportunity for others to converse with them after verdict, to operate upon their judgments, prejudices, or fears, to induce them, or some of them, to give a different account or explanation of it, there would be great danger in permitting new inquiries to be made and explanations to be given; and such a course is not considered as regular, or authorized by our practice. It was decided in *Little* v. *Larrabee*, 2 Greenl. 37, where the error in the verdict was not formal, but material, that it should be corrected by granting a new trial, or

in some other mode than by the explanatory affidavits of the jurors. And there is little difference in the danger attending it, whether the explanation be made in open Court, or by the affidavits of the jurors. But it is not necessary in this case to set aside the verdict for the purpose of correcting any error in finding or in receiving it. The accused has not been injured by limiting the finding to the count, on which he might have been properly found guilty. And if it had not been so limited, the attorney for the State might have cured the difficulty by entering a *nolle prosequi* of the second count. *Comm.* v. *Tuck*, 20 Pick. 356.

The question proposed to be put to Jackman has reference to a matter quite foreign to the issue; and a Court is not obliged to permit the introduction even on a cross-examination of a collateral fact, which may occasion a new and distinct issue.

It was at one time considered, that an infant, under the age of nine years could not be permitted to testify. *Rex* v. *Travers*, Stra. 700; *Comm.* v. *Hutchinson*, 10 Mass. R. 225. And that between the ages of nine and fourteen years it was within the discretion of the Court to admit or not, as it should or should not be satisfied of the infant's understanding and moral sense. *Rex* v. *Dunnel*, East's P. C. 442. It was finally determined in *Brazier's* case, ib. 444, on consultation between all the Judges, that a child of any age, capable of distinguishing between good and evil, might be examined on oath. And Roscoe says, this has been the established rule in all civil and criminal cases since. Roscoe's Cr. Ev. 94. The credit due to the statements of such a witness is submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion. In this case the witness was thirteen years of age, and the counsel for the accused was permitted, on the cross-examination, to introduce for the consideration of the jury the necessary information on these points. And it could not be material to the accused, whether such information was elicited before the examination in chief or afterward. The examination before was only necessary for

the information of the Judge, who appears to have been fully satisfied of the propriety of admitting the witness.

The counsel relies with more confidence on the exception to that part of the charge, which states, "that it was not incumbent on the government to prove, that there was no consent of the owner," and that the burthen of proof was on the accused to show, that he had such consent. A number of cases are cited, which decide, that in a declaration, or an indictment, on a statute, there must be an averment, that the act was done without consent, when, as in this case, it is a substantial part of the offence. And it is thence inferred, that it is the duty of the prosecutor to introduce some direct testimony to prove it. This inference does not appear to be a legal one, or to be authorized by the decided cases. It is true, that the jury must be satisfied of the truth of all the material allegations, before they can be authorized to find a verdict of guilty. But the testimony introduced to prove one averment may be such as to raise a strong presumption, that another averment is also true. A person might be found cutting or tearing down a house, or breaking in the windows, under such circumstances, that every man of common experience would conclude, that he was not violating any law or duty. While under a different state of facts and circumstances, the conclusion would be equally satisfactory, that he must be acting in violation of both. And in the latter description of cases, there is nothing unreasonable or illegal in requiring, that one, who would avoid the effect of such a presumption, should introduce testimony to rebut it. In *Jelfs* v. *Ballard*, 1 B. & P. 468, Mr. Justice Buller says, "the plaintiff must state in his *scire facias* every thing, that entitles him to recover; but it is a very different question, what is to be proved by one party, and what by the other." And Heath J. says, "it is a common thing in actions on the game laws for the plaintiff in his declaration to negative all the qualifications, which would exempt the defendant from the penalties of those laws; but it lies on the defendant to prove, that he comes within any of them." All the Judges appear to have been of the same opinion, when such

a case was pending in their own Court, although two of them thought, that the opposite rule prevailed in convictions before a magistrate. *Rex* v. *Stone*, 1 East, 639. In the case of the *United States* v. *Hayward*, 2 Gall. 485, the information alleged an importation of goods from Nova Scotia, "in some vessel not being a neutral vessel;" and it was decided, that the burthen of proof was on the claimant to show, that the goods were imported in a neutral vessel, if he would avoid the effect of an importation from that place. And Mr. Justice Story in that case states the general rule to be, "where the negative does not admit of direct proof, or the facts be more immediately within the knowledge of the defendant, he is put to his proof of the affirmative." Starkie, in substance, states the rule to be, that a negative is not required to be proved by the plaintiff, except where the law presumes the affirmative. 1 Stark. Ev. Met. Ed. 362 to 365. And that presumption arises only where the charge involves a criminal neglect of duty. But in *Rex* v. *Rogers*, 2 Camp. 654, on an indictment founded on the 42 Geo. 3, c. 107, for coursing deer in enclosed grounds, without the consent of the owner, Lawrence J. held, that it was necessary on the part of the prosecution to prove, that the owner had not given his consent. In *Harrison's* case, reported in Roscoe's Cr. Ev. 56, on an information for selling ale without license, it was held, that the informer was not bound to produce evidence that the accused had no license. In *Gening* v. *the State*, 1 McCord, 573, on an indictment for selling spirituous liquors without license, it was decided, that the burthen of proof was on the defendant to show, that he had a license. In *Smith* v. *Moore*, 6 Greenl. 274, where the declaration was adjudged to be defective for the omission of the allegation, that the neglect was "without just excuse," the case of *Little* v. *Thompson*, 2 Greenl. 228, where there was an omission of the allegation, "without the consent of the owner," is referred to, and the Court say, "for though the omitted averments should have been in both cases inserted; yet in both also the burden of excusing proof would have been thereby thrown upon the defendants." In the case now un-

der consideration it was a matter peculiarly within the knowledge of the accused, whether he had obtained the consent of the owner; and in such case, the general rule, the weight of authority, and the declared law in this State, authorized the charge of the District Judge.

Exceptions overruled.

JOHN T. MOORE & *al. versus* HENRY MOORE.

Possession alone, although for a less term than twenty years, is sufficient to maintain an action of trespass *quare clausum*, excepting against one who can exhibit a legal title.

The disseisor, having been in by disseisin for less than twenty years, may put an end to his disseisin, or transfer it to another, without any conveyance in writing.

A contract by a disseisor to purchase the land of the owner, destroys all claim to hold it adversely, either by himself or by those in possession for less than twenty years anterior to him.

In an action of trespass *quare clausum*, where each party relies merely on possession without proof of title, a contract by one to purchase of the owner is admissible in evidence, for the purpose of showing the character of the possession.

TRESPASS *quare clausum.* The trespass was alleged to have been committed upon a five acre lot, No. 14, in Gardiner.

At the trial, before WHITMAN C. J. at the adjournment in March, 1842, the plaintiffs produced a deed to themselves, purporting to have been executed by John Jeffries and others, by their agent Charles Vaughan, dated April 1, 1841, and proved the execution by Vaughan, and attempted to prove the execution of the powers of attorney authorizing the conveyance. They proved the handwriting of a subscribing witness to one of them, and thereupon the deed and power of attorney were read to the jury; but as it afterwards appeared that the power was executed by a person as an executor, and there was not proof that he was such, the deed and power were ruled out of the case. The plaintiffs then attempted to prove that

they and their father John Moore, under whom they claimed, had been in the exclusive and uninterrupted possession of the lot for more than twenty years next before the bringing of the suit, and adversely to the defendant and those under whom he claims. For this purpose they introduced ten witnesses, whose testimony is given in the exceptions, and sufficiently stated in the opinion of the Court. The plaintiffs also introduced a written agreement, signed by John Moore, their father, dated Dec. 14, 1819, and proved its execution, and delivery to Charles Vaughan, agent of Jeffries and others, wherein he contracted to purchase lot No. 14 of them. The defendant objected to the reading of this paper to the jury, but it was admitted by the Judge. It was proved, that the land in controversy had been taxed to Else Moore, in 1814, 1815 and 1816, but that in 1817, and for several successive years, it was taxed to John Moore.

The defendant then proved and read to the jury a deed from Else Moore and others, bearing date Feb. 11, 1841, purporting to be a conveyance of lot 14 to him. He also introduced nine witnesses, whose testimony also appears in the exceptions, to disprove the title of the plaintiffs, and to set up one in himself. This is also sufficiently noticed in the opinion of the Court.

There was also a motion for a new trial because the verdict was against the evidence.

Thereupon the Court instructed the jury, that to constitute a right to maintain this action, the plaintiffs must make out some kind of a title. That possession alone would be sufficient to maintain it against a mere trespasser without any pretence of title. But that against those who exhibited evidence of title something more was necessary. That if the plaintiffs had shown to the satisfaction of the jury, an adverse, exclusive and notorious possession in themselves and the ancestor under whom they claim, of twenty years duration, next before the trespass complained of in this action, a sufficient title was made out on their part to entitle them to recover; provided the act complained of as a trespass were proved. To

constitute such adverse possession, that it was not necessary for the plaintiffs to show that they and their ancestor had kept the lot within fence all that time. That it was only necessary the possession should be notorious, so that those who had any claim to the land must have had knowledge of it. That if in the present case, the possession of the plaintiffs and of their ancestor was such that Else Moore and her other sons must have known it, and that it was intended to be adverse and exclusive, and did not for the term aforesaid, attempt to interrupt it; such possession would bar them from a right of entry thereafter. That the plaintiffs, as the case was presented to the jury in this trial, must rely upon such an adverse possession. If it was not made out to the satisfaction of the jury the plaintiffs could not recover. That the evidence to this point was conflicting. That it was their duty to reconcile if they could. If they could not they must consider of the weight of testimony on the one side and on the other, of the characters, standing and credibility of the witnesses. That if they found the testimony on one side of a negative character, and on the other of a positive character, the latter was rather to be allowed to be of weight than the former. But that there were degrees of weight to be attributed to negative testimony, depending upon circumstances. In some cases that it would be entitled to very little weight, while in others it might be nearly or quite equal to positive testimony. That it would depend very much on the opportunity which the witness had for knowing, and upon the attention which it might appear that he paid to the incident about which he might be called to testify.

The jury were further instructed upon a suggestion made by the counsel for the defendant, that if Else Moore gave up the lot in question, or abandoned it to her son John, upon his making claim to it, and he went into possession by her consent, and she suffered him to go into the exclusive possession of it, and to continue such possession for the term of twenty years, she could not, nor could any persons under her, enter upon the land without being liable as trespassers. But that if John merely went into possession under her, without any such sur-

render or abandonment on her part, it would be otherwise, however long his possession might continue.

The Court further instructed the jury, that if they were satisfied lot No. 14 had been taxed to said John Moore during his life, from 1817 or '18, they would judge whether it was reasonable for them to believe, that Else Moore and her other sons must have known it or not, and if they did it might furnish evidence tending to show an adverse possession in him.

The Court further instructed the jury, that the deed of Jeffries and others to the plaintiffs, was wholly out of the case, the execution thereof not having been proved; and if in the case, would avail the plaintiffs against Else Moore and those claiming under her.

And finally, if they were satisfied, that said John and his heirs, the plaintiffs, had for more than twenty years before the trespass complained of was committed, been in the uninterrupted and adverse possession of said lot No. 14 exclusively and notoriously, and if the commission of the trespass was fully proved, the verdict should be for the plaintiffs, otherwise it should be for the defendant.

The jury returned a verdict for the plaintiffs, and the defendant filed exceptions to the admissions of evidence, and instructions and opinions of the Court.

Wells argued for the defendants, contending: —

That the contract to purchase of Jeffries and others was improperly admitted. The plaintiffs claimed title by possession, and this paper had no tendency to prove the issue, but merely some claim under supposed owners. It was signed only by the father of the plaintiffs, and is no better than his declarations.

That the instruction, that fencing was not necessary in order to acquire a title by adverse possession of land on which were no buildings, was erroneous. *Blake* v. *Freeman*, 13 Maine R. 130; *Ken. Pur.* v. *Springer*, 4 Mass. R. 416.

That the definition of *disseisin* was erroneous. It allowed the statute of 1821, c. 62, § 6, to act retrospectively, when it

should have had but a prospective operation. *Ken. Pur.* v. *Laboree*, 2 Greenl. 275.

The instruction, that the jury should take into consideration the *character and standing* of the witnesses was erroneous. If the character for truth is unimpeachable, every witness stands alike.

That the possession of John Moore by the consent of his mother, could not disseise her.

Taxes may legally be put to the owner or the occupant of land, and the assessment to one or to the other could not affect the question of disseisin.

The heirs, and not the widow, succeed to the rights of an intestate in real estate. The possession of John Moore was that of all his brothers and sisters, and he could thereby acquire no title by disseisin against them. 15 Maine R. 455; 2 Fairf. 309; 5 Pick. 135; 12 Johns. R. 367.

F. Allen argued for the plaintiffs, and replied to the argument for the defendants. The remarks of the Judge in relation to the weight of evidence, were, as was said, but commentaries upon the testimony, and not subject to exceptions, as matter of law. On this point were cited *Ware* v. *Ware*, 8 Greenl. 42, and *Carver* v. *Astor*, 4 Peters, 1.

The opinion of the Court was drawn up by

Shepley J. — This is an action of trespass *quare clausum* to recover damages for removing, on the 13th of May, 1841, a fence from lot No. 14, in the town of Gardiner, containing about five acres. Possession is sufficient to enable the plaintiffs to maintain the action against one, who cannot show a better title. And they are under no necessity of proving, that they have been in possession claiming to own for more than twenty years except against one, who can exhibit a legal title. If the defendant therefore has not exhibited any legal title, and the plaintiffs and those, under whom they claim, have been in the exclusive and adverse possession for several years, it will not be necessary to determine, whether they fully proved such a possession for more than twenty years.

It appears from testimony introduced by the defendant, that Reuben Moore, the father of the defendant and grandfather of the plaintiffs, in 1798 owned lot No. 15, also containing about five acres, and that there was no fence between it and the adjoining lot No. 14; and that one third part of the ten acre lot, comprehending lots No. 14 and 15, was cleared, fenced, and occupied, by him; that he died in the year 1805, being at that time in the occupation of both lots; that he left a widow and several children; and that the widow continued to occupy till 1808, when for the first time a fence was extended round the whole of lot 14; and that it was cleared in 1810; that a suit was brought by the proprietor in 1812, to recover it, without success; and that the son John, the father of the plaintiffs, took care of it. Charles Moore testifies, that John told him in 1822, that Mr. Vaughan said he should bring a new action for the lot unless some one would buy it, and wished him to buy with him; that in 1826 John claimed the lot, and said he had made a bargain with Mr. Vaughan for it; and that his mother said to John, she should do nothing about the lot, and that she concluded to give it up to John, who occupied it that year. Until this time the testimony in defence would be sufficient, if uncontradicted, to prove that the widow continued to occupy and claim the lot; but it would not show, that any son had obtained by possession any claim even to improvements. And when the whole testimony is examined, there can be no reasonable doubt, that during the year 1826, and subsequently until his death, John occupied the lot and claimed to do so as his own under the contract, which in 1819 he had made with Mr. Vaughan to purchase it of Jeffries, the owner; and that the plaintiffs, as his heirs, continued that occupation until this action was brought.

Had Else, the mother, acquired a title before she undertook to surrender her claims to her son John? Although a witness makes a general statement, that her husband occupied both lots at the time of his decease, when it is taken in connexion with the other testimony of the defendant, it clearly appears, that there was no such occupation or act of ownership on more

than the small portion first enclosed either by him or his widow, as would give notice of any adverse claim, until the whole was fenced in the year 1808. Until that time the greater part was uncleared, unimproved and unfenced, and there is no proof of any act of ownership upon it. The earliest period, at which a possession open, notorious, exclusive, and adverse, could have commenced on the greater portion of the lot, was during the year 1808. The defence does not distinguish between different portions of lot 14, by attempting to show that the fence removed was from the part fenced and improved before 1808; and the widow could not therefore have acquired a title against the true owner before the year 1826. When she surrendered her claims to her son John, there is no indication of an intention either on her part or on his, that he should possess it for the benefit of all the heirs of the father. And this act of hers put an end to her disseisin, or transferred it to her son John; and this she might do without any conveyance in writing. The deed of the 11th of February, 1841, from Else Moore and others to the defendant, could convey no title or interest whatever, for the grantors had nothing to convey. And when John was in possession in 1826, under a contract to purchase of the owner, there was an end of all claims to hold it adversely either by him or those in possession anterior to him. They had abandoned or transferred their possession, and he had given a contract to purchase and was holding under it. *Small* v. *Proctor*, 15 Mass. R. 495. The possession of the plaintiffs, claiming under their father, was sufficient to enable them to maintain the action against the defendant, whether their father's exclusive possession commenced before 1826 or not.

It is not therefore necessary to examine or decide several points presented in the arguments.

The contract of the 14th December, 1819, made by John Moore with the agent of the owner, was legally admissible in evidence for the purpose of shewing the character of his possession. For this purpose his own acts and declarations, while in possession, may be given in evidence. *Shumway* v. *Hol-*

brook, 1 Pick. 116. And this was a subsisting and valid contract, while he was in possession.

Exceptions overruled.

INHABITANTS OF WAYNE *versus* INHABITANTS OF GREENE.

Domicil depends on residence and intention; both are necessary to constitute it; and where it is once fixed, it is to continue until a determination to reside elsewhere has been carried into effect.

And in determining the intention of an individual, when he may move from one place to another, the character of his home, his mode of life, his habits, and his disposition, may appropriately be taken into consideration.

To acquire a settlement by residence in a particular town, the person must actually have resided there continuously for the space of five years, intending to make that his home and place of residence. Occasional absences, however, from there, for short periods, during the time, without any intention of taking up his abode elsewhere, or of abandoning his residence there, would not interrupt the running of the five years necessary to gain a settlement. But if during any part of the five years, he had determined to abandon his residence, and had actually carried his determination into effect, for ever so short a period, it would prevent his gaining a settlement.

THIS was an action of assumpsit for supplies furnished the wife and children of John Butler, whose settlement was originally in Leeds, and who was born in Leeds, September 2, 1800. No question was made as to notice or reply, or the furnishing of the supplies as charged.

The plaintiffs introduced testimony tending to show that John Butler was residing and having his home in Greene on the 21st of March, 1821, and the defendants also introduced testimony tending to show that he did not so reside in Greene, but in Turner, at that time, and the plaintiffs also contended that said Butler was emancipated before said twenty-first day of March. But the jury did not agree in relation to said residence nor said emancipation, but found there was a continued residence of five years, commencing in February or March, 1830, and terminating in March, 1835. John Butler was married in February, 1837, in Wayne. Jonathan Moore, a

witness for the defendants, testified that said Butler worked for him in Turner in 1825, 1826, and about a fortnight in February, 1830, and made his home with him during those periods.

Benjamin P. Rackley, a witness for the defendants, testified that said Butler came to his father, Benjamin Rackley's house in Greene, to work the last of February or the first of March, 1830, that he remained there the larger part of 1830, going away frequently, and staying a week or fortnight at a time; that he remained in that manner till the last of May or first of June, 1831, when he became offended and went away and took a final leave of them, took all the clothes he had with him, say, a spare shirt and perhaps a spare pair of trowsers, and declared he should not work there any longer, and that he should commence a suit unless he was paid what he said was due to him that day. That he went to Jairus Phillips', Jr. in Turner, where he, Rackley, saw him, and where he had previously resided; that on the first of July afterwards said John returned to the witness' father's, and wanted to work, and remained there until December, 1831, when he went to William Mooers' in said Greene.

Benjamin Rackley, a witness for the defendants, testified, that said John left his house the last days of May, 1831, and went to Turner, and said when he went away he should not come back again.

Roderic Dillingham, a witness for the defendants, testified that the last of May or first of June, 1831, he saw said Butler in Turner driving a team belonging to Jarius Phillips, Jr. of said Turner; that said Butler went to Gilman's mills in said Turner, and got a load of boards, and he saw said Butler going back to said Phillips' with said boards; that he had known him since he grew up; that he was in the habit of going back and forth, and had no home except where he dropped in. There was evidence that said Butler resided in Greene, after he resided at said Rackley's, at said Mooer's and at John Quimbys, until December, 1835. That wherever he worked he was in the habit of becoming displeased and leaving his

work, sometimes for a week or more, and then of returning to it again.

The defendants offered to prove by said Dillingham, that when he saw said Butler in said Turner, in May or June, 1831, said Butler offered to hire with him, which was rejected by the Court.

The said Butler was a witness for the plaintiffs. He testified as to his residence in various years in Greene. Said he resided at said Rackley's two years, and at said Mooers' most four years, and also at said Quimby's, and without being absent from either place except for a few weeks at a time.

WHITMAN C. J. presiding at the trial, instructed the jury, that the five years residence necessary to gain a settlement, must be continued residence, and without any intention of making it temporary merely. That in determining whether Butler was a mere temporary resident or not they must look to all the circumstances proved, having reference thereto, and particularly to the evidence tending to show that he had from boyhood, lived in Greene the greater part of his time. That if from the evidence of his early associations and habits of resorting to Greene, whenever he had done working out elsewhere for short periods, they should become satisfied, that he had intended to make Greene his place of residence and with such intentions that he had actually resided there continuously for the space of five years, he might be considered as having acquired a settlement there. That in such cases casual and fitful absences from there, for short periods, in the course of the five years, without any intention of taking up his abode elsewhere, or of abandoning his residence there, would not interrupt the running of the five years necessary to gain a settlement. But if during any part of the five years, he had determined to abandon his residence, and had actually carried his determination into effect, for ever so short a period, it would prevent his gaining a settlement. If however they should be satisfied that he did quit Rackley's in the manner he, Rackley, has stated, they would consider his habits and disposition as proved, and judge whether he meant seriously to abandon his residence and take

up his abode elsewhere. If not, and his going to Turner, as stated by Dillingham and the Rackley's, was the effect of his habits and temperament, and merely casual and without any serious intention of abandoning his residence in Greene, it should not interrupt the running of said five years.

The jury returned their verdict for the plaintiffs.

To which rulings, instructions and refusal to receive evidence, the defendants excepted.

Wells, for the defendants, said it was important to take into consideration the fact, admitted by all the witnesses, that Butler, the pauper, had no particular place of abode, which he could call his own; that his home was, in the language of a witness, wherever "he happened to drop in." There was no place in Greene, which he could, with the least propriety, call his home. That town was no more his home, than any other town in the State, where he happened to be. It was wrong, therefore, to assume that to be his home, when he left there, without an intention of returning, as the instruction does. It should have been, that if he went from Greene, with the design of going to Turner, and without any intention of returning to Greene, that his home ceased to be in the latter town.

If Butler had no intention to return to Greene; when he left there, his home ceased to be in that town. The fact of his leaving the town was clearly proved. The only farther inquiry was, did he then intend to return there? To show his intention, his declarations on the subject were clearly admissible. It was competent, also, to prove that when he was in Turner, he wished to make that his place of abode, and all the home he had. It was proving an act accompanied with a declaration. But even without any act, such declarations of intention, or proof of facts showing an intention, are clearly admissible. Dillingham's testimony was improperly rejected. *Gorham* v. *Canton*, 5 Greenl. 266; *Baring* v. *Calais*, 2 Fairf. 463; *Thomaston* v. *St. George*, 17 Maine R. 117; *Cambridge* v. *Lexington*, 2 Pick. 536; 1 Stark. Ev. 47; 2 Stark. Ev. 146; *Haynes* v. *Rutter*, 24 Pick. 242; *Thorndike* v. *Boston*, 1 Metc. 242.

Emmons and *May*, for the plaintiffs, contended that the rejection of the testimony, and the instructions to the jury, were right.

Working at service in a particular town is no evidence, that he intended to make that his home. Dillingham's testimony was irrelevant and immaterial, and was therefore properly excluded. *Knox* v. *Waldoborough*, 3 Greenl. 455; *Parsonsfield* v. *Kennebunkport*, 4 Greenl. 47. The instructions were in accordance with former decisions of this Court. *Thomaston* v. *St. George*, 17 Maine R. 117; *Parsonsfield* v. *Perkins*, 2 Greenl. 411; *Boothbay* v. *Wiscassett*, 3 Greenl. 354.

The opinion of the Court was afterwards drawn up by

TENNEY J. — This action is brought to recover remuneration for expenses incurred in the support of the wife and children of one Butler, who is alleged to have his settlement in Greene.

The verdict was for the plaintiffs, on the ground, that Butler had acquired a settlement in Greene by a continued residence therein for five years, commencing in February or March, 1830, and ending March, 1835. Evidence was adduced by the defendants tending to show an interruption of this supposed continued residence from the last of May or first of June to the first of July, 1831, and evidence of a counter character, particularly from the pauper himself, was introduced by the plaintiffs. It was not in controversy, that the pauper was absent from Greene at the time referred to, but whether with an intention of abandoning that town as his home, was the point in issue.

Domicil depends on residence and intention. Both are necessary to constitute it; and when it is once fixed, it is to continue, until a serious and deliberate determination to reside elsewhere, is actually carried into effect. Absences of longer or shorter duration from one's usual home, often occur, and the domicil remains unchanged.

Residence and change of place are facts which are obvious, and cannot be mistaken; but in fixing a domicil, they are un-

important, unless accompanied by the intention of remaining, or of removing not to return, which are more uncertain, and often to be found in a variety of circumstances having a nearer or more remote bearing upon the question.

An individual under excitement, and the dominion of angry feelings may express a full determination to leave his residence and the town in which it is situated, and a temporary absence may thereupon follow, and still his domicil may not be changed thereby. Those knowing his temper and habits may be thoroughly satisfied, that his intention was not such as he declared. Early attachments to a place of residence, connexions of blood or affinity, ties growing out of the acquaintances formed in youth, often bind one to a particular spot, and induce him there to pass his moments of leisure, especially when he has no family located in another place. And these are circumstances material in determining the intention of the individual thus influenced, when he may move from one place to another. The character of his home, his mode of life, his habits and his disposition, may be important aids in coming to a result on the question of intention. The removal accompanied with the declaration of a resolution to abandon his residence, of a person possessing known decision of character, firmness of purpose, not subject to sudden excitement, generally believed to carry into effect his expressed intentions, would and ought to make an impression on the mind different from similar declarations and acts of one of an opposite character. We think the instructions to the jury were correct.

It is insisted that the testimony of Dillingham, of the offer of the pauper to hire with him in May or June, 1831, in Turner, was improperly excluded. It is settled, that when one is doing a certain act, declarations of his motives and intentions at the time are admissible. It is part of the *res gestae.* At the time the individual is actually leaving the place where he has resided, when he cannot foresee the consequences of a declaration of his intention, and there is no apparent inducement to speak falsely, such declarations are a part of his acts, and are important evidence. But when he is doing no act,

in itself indicative of a change of place, for one purpose or another, we are not aware that the verbal expression of his intention can be received. The cases show that such testimony is proper only as accompanying the act, which act is material to the issue, and without the act it is not evidence.

We are unable to see how this evidence could have aided the jury, if allowed to be laid before them. It seems to us irrelevant. The Court are to judge of the relevancy, and the jury of the effect of evidence. A person may be absent weeks, months and years and his domicil remain unaffected, and no tie which binds him to his home in the least degree weakened. That this pauper was absent between May and July, 1831, was not disputed; but the question was, as to the intention which he entertained in his absence, on the subject of leaving his former home; and his offer to hire in Turner we think would not tend to settle that question.

Neither do we see that the testimony offered and rejected conflicts at all with the statement made by the pauper. From the report of the evidence he said nothing of that offer, and on that ground the ruling is not subject to objection.

Judgment on the verdict.

Charity Vance *versus* Robert Vance.

In the St. 1821, c. 40, "concerning dower," the word *jointure* was used in its well known and established legal sense; and must be a freehold estate in lands or tenements, secured to the wife, to take effect on the decease of the husband, and to continue during her life at the least, unless she be herself the cause of its determination.

But by that statute no jointure can prevent the widow from having her dower, unless made before marriage, and with the consent of the intended wife.

A legal jointure cannot be composed partly of a freehold, and partly of an annuity not secured on real estate.

Marriage is a good consideration for ante-nuptial contracts, and they are binding upon the parties, when fairly made, although there be no trustee or third party named in them.

There can be no estoppel by executory covenants not to claim a right which is first to accrue afterwards.

It is only where there is a warranty of title, that covenants can operate to bar or rebut a future right not then in existence.

The covenants of the wife with her husband, before the marriage, that she will not claim dower in his estate, cannot operate by way of release, estoppel, or rebutter, to bar her of her dower.

If the widow, after the decease of her husband, refuse to receive the provision made for her as the consideration of her covenants, this, too, would prevent the covenants from depriving her of her dower.

The demandant, in her writ, claimed dower in the premises, as the widow of William Vance, deceased. She proved the marriage, seisin of the husband during the coverture and until his death, and a demand of dower of the defendant, as tenant of the freehold.

The tenant then read in evidence an indenture between the demandant and the said William Vance, of which a copy of the material parts follows.

"This indenture of two parts, made the fourth day of August, in the year of our Lord one thousand eight hundred and thirty-two, by and between William Vance of Readfield, in the county of Kennebec, Esquire, of the first part, and Charity Stafford of said Readfield, single woman, of the second part, witnesseth, that for and in consideration of a marriage intended to be shortly had and solemnized between the said William Vance and the said Charity Stafford, and the sum

of one dollar to be had and received by the said William Vance, as a marriage portion with the said Charity Stafford, and for that a competent jointure may be had, made and provided for the said Charity Stafford in case the said marriage shall take effect, and for the settling and assuring the lands or tenements hereinafter mentioned, and other pecuniary compensation, to and for the use of her the said Charity Stafford, agreeably to the terms and for the purposes hereinafter mentioned, limited and declared, pursuant to the agreement made upon the contract of the said intended marriage, he, the said William Vance, hath granted, bargained, alienated, and confirmed, and by these presents doth grant, bargain, alienate and confirm unto the said Charity Stafford, to have and to hold in her actual possession, a certain piece or parcel of land, with a dwellinghouse thereon, situated in said Readfield, (described.) To have and to hold the said demised premises with their appurtenances to her, the said Charity Stafford, and assigns, for their use and benefit as hereinafter mentioned, limited, expressed and declared, that is to say, to remain for the use and behoof of the said Vance and his heirs until the said marriage between him and the said Charity Stafford, his intended wife, shall be had and solemnized, and from and after the solemnization thereof, to the use and behoof of the said Charity and her assigns, for and during the natural life of him, the said William Vance, and afterwards so long as she shall remain his widow, single or unmarried, only reserving to the said Vance the privilege during his natural life, in trust for her and for her use and benefit, to preserve and support the same and to prevent waste or destruction thereof, and to make such additions and improvements on the same, for the benefit of the said Charity, as he may think proper, all of which is to be for her use and benefit so long as she remains his widow, single or unmarried, and no longer. And also the said Vance has agreed and doth hereby agree that the said Charity shall have paid her out of his estate, by his heirs, executors or administrators, the sum of one hundred dollars a year, from and after his decease, to be paid in semi-annual payments, so long as she shall remain his

widow, single and unmarried. The aforesaid rents, tenements, and sums of money to be for her jointure and in full satisfaction of her dower or thirds which she may claim or have in any lands, tenements, or hereditaments whereof or wherein he, the said William Vance, shall at any time during his life be seised or possessed of; and the said Charity on her part, in consideration of the jointure aforesaid and a bond bearing even date with this instrument, made and delivered to her by the said Vance in the penal sum of ten thousand dollars, conditioned for the quiet enjoyment of the aforesaid premises and the payment of the one hundred dollars a year, to be paid in semi-annual payments for the term aforesaid, hereby agrees and solemnly obligates herself never to demand, or receive, nor suffer any one for her or in her name, to demand or receive, any dower or thirds in any property, lands, tenements, or hereditaments which the said Vance may be seised or possessed of during his lifetime or die seised or possessed of. In witness whereof the parties aforesaid have hereunto interchangeably set their hands and seals, this day and year last aforesaid."

This instrument was signed and sealed by the parties, was witnessed, and delivered to the said Charity Stafford a few days before their marriage.

On August 18, 1841, the administrator of the estate of William Vance offered to the plaintiff performance of the said indenture, and notified her that the house named therein was ready for her, but no money was produced. She replied, that she would have nothing to do with it.

The counsel for the defendant contended, that the instrument made provision for the plaintiff in the nature of a jointure; or if not, that it contained covenants, grounded on a valuable consideration, which barred her of dower in the estate of said William Vance.

Whitman C. J. intimated a different opinion, and the defendant consented to be defaulted, reserving liberty to move to have the default taken off, in case the whole Court should be of opinion, that the indenture did provide for her a join-

ture, or contain covenants, which would bar the plaintiff of her claim to dower.

Bradbury and *Morrill* argued for the tenant, and contended, that the demandant was not entitled to recover, because she had barred herself of dower according to the well settled and established rules of law.

She was barred by the jointure secured to her by her expected husband, and accepted by her, shortly before the marriage. The jointure is good, and comes within the definitions found in the best authorities. Co. Lit. 36, b; Vernon's case, 4 Coke's R. 1; Moore, 103; Leon. 311; Bac. Abr. Jointure, B; *M'Cartee* v. *Teller*, 2 Paige, 511; Same case, 8 Wend. 267. An estate for life unless she determines it by her own act, is a good jointure. Same authorities, and 1 Cruise, Dower, c. 5, § 20; Jointure, c. 1; 2 Bl. Com. 124; Bracton, 202; *Hastings* v. *Dickinson*, 7 Mass. R. 153; *Gibson* v. *Gibson*, 15 Mass. R. 106. There is no distinction between an estate for life and during her widowhood. They are alike a bar to dower. 4 Dane, 683; *M'Cartee* v. *Teller*, 8 Wend. 267. When the jointure is granted and accepted before marriage, as in this case, no acceptance after the death of the husband is necessary. Acceptance afterwards is necessary only when the jointure is granted during the coverture. A jointure made and accepted before marriage could not be waived and dower claimed after the death of the husband. Co. Lit. Tit. 5, § 41. Our statutes have not changed the law in this respect, as it was before their enactments, since the St. 27 Hen. 8, c. 10, § 8.

But if the demandant is not barred of her dower by the provision made and accepted as a jointure, she is effectually estopped and barred by her covenants in the indenture between herself and her late husband before the marriage. If she recovers her dower, the representative of her late husband, will be thereby entitled to recover of her the amount of the damage sustained by such recovery. This operates as a bar and rebutter to all claim in this suit. *Gibson* v. *Gibson*, 15 Mass. R. 106.

Wells argued for the demandant, and insisted, that the defence set up was wholly insufficient to preclude the plaintiff from maintaining her action.

Our statute in force at that time on this subject, St. 1821, c. 40, provides that she may be barred of dower only "where such widow, by her own consent, may have been provided for by way of jointure, prior to the marriage." To bar her of her dower, it must be a bar to dower at common law, modified by the St. 27 Hen. VIII, c. 10. The smallest estate which can operate as a bar to dower by way of jointure, is a life estate. Co. Lit. 36; 2 Bl. Com. 133. *Hastings* v. *Dickinson*, 7 Mass. R. 153. And the estate must not be fettered with any conditions. 1 Roll. Abr. 652; Co. Lit. 36. Here a very important condition was imposed. If one condition may be imposed, another may be, and thus the object of the law be entirely destroyed. It is said, that it is sufficient, if the estate is for life, unless she determines it by her own act. This qualification does not apply to the nature of the estate granted as a jointure. That must be for life at least. It applies only to some after act of her own, as by joining in an alienation of the estate by fine and recovery in England, or by deed with her husband here. Co. Lit. 36. There was no *acceptance* in this case to bar the demandant. An acceptance, to have that effect, must be after the right of dower has accrued. To make an estate during widowhood a bar of dower, she must accept such estate after her right to dower has actually accrued by the death of the husband. 4 Kent, 55, 56, and cases cited. And this is laid down as law in the cases cited for the tenant in 2 Paige, 511, and 8 Wend. 267. And the jointure must be a fair equivalent for dower, both at law and in equity. 4 Kent, 56; Co. Lit. 37.

The demandant is not estopped from recovering her dower by any covenants in the indenture.

No right can be released, until it has accrued. This indenture was made before marriage, and she had no contingent, or possible claim to dower in this estate. If this is an estoppel, then any agreement under seal must also be an estoppel. It is

the contract of marriage made afterwards, which gives the claim to dower.

But had this been such jointure as would have barred the demandant of dower, at its inception, it could have no such effect now. Where the consideration, or any portion of it fails, the right of dower accrues. *Hastings* v. *Dickinson*, 7 Mass. R. 153; *Gibson* v. *Gibson*, 15 Mass. R. 106. The demandant has received nothing, although the time of payment had long been past before dower was demanded. A mere offer to pay, without the production of any money, is not a tender.

The opinion of the majority of the Court, TENNEY J. giving no opinion, was prepared by

SHEPLEY J. — The statute of 1821, c. 40, § 6, provides, that the widow may claim dower in lands, tenements and hereditaments, of which the husband was seised 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. The word jointure must have been used in its well known and established legal sense. As introduced by the statute of 27 Hen. 8, c. 10, § 6, the definition of a legal jointure was given by Coke, and the requirements to constitute one stated, in his commentary on that statute. Co. Lit. 36, b. It must be a freehold estate in lands or tenements secured to the wife, and to take effect on the decease of the husband, and to continue during her life at the least, unless she be herself the cause of its determination. As early as 1647, it was ordained by a colonial regulation, that every married woman, "that shall not before marriage be estated by way of jointure in some houses, lands, tenements or other hereditaments for term of life," shall have her dower. There does not appear to have been any modification or repeal of that ordinance in the revision of the statutes in Massachusetts in the year 1799. And the statute of 27 Hen. 8, c. 10, with

the definitions and constructions appended to it by text writers and decided cases, and as modified by this ordinance, must be regarded as the foundation of the enactment in the statute of this State. It is true, that there are important differences in the law of jointure between the English statute and that of this State. By the former a jointure made in conformity to its provisions would not be binding on the widow, without her consent, if made before marriage; and also if made after marriage and assented to by the widow, after the death of her husband. But by the latter, no jointure could prevent the widow from claiming her dower, unless made before marriage and with the consent of the intended wife. There is however no authority in either of them for considering, that a legal jointure can be composed partly of a freehold estate and partly of an annuity not secured on any estate. It may be true, that the estate secured to the widow in this case by the ante-nuptial agreement or deed of the fourth of August, 1832, although limited *durante viduitate,* would have constituted a good jointure within the statute of this state, if the widow before her marriage had consented to receive it as such. But it is not necessary to decide this point; for it is not the estate alone, that she consents to receive as a jointure, and in satisfaction of dower. The deed recites, that "the aforesaid rents tenements, and sums of money to be for her jointure and in full satisfaction of her dower;" and she covenants in consideration of the jointure aforesaid, composed of the estate and annuity together, never to demand her dower. And the Court cannot say, that she was provided for by way of jointure, that is, by an estate for life in lands or tenements, by her own consent before marriage.

It is contended, that if the widow be not barred of her dower by the estate conveyed as a jointure, she is by her covenants in the deed. Marriage is a good consideration for ante-nuptial contracts, and they are binding upon the parties, when fairly made, although there be no trustee or third party named in them. *Wood* v. *Jackson,* 8 Wend. 9. *Roane's Ex.* v. *Hern,* 1 Wash. C. C. R. 47. The widow in consider-

ation of the estate and of a bond providing for the payment of an annuity of one hundred dollars a year, "agrees and solemnly obligates herself never to demand or receive, nor suffer any one for her or in her name to demand or receive, any dower or thirds in any property, lands, tenements, or hereditaments, which the said Vance may be seised or possessed of during his lifetime, or die seised or possessed of." The history of the law shows the occasion of the enactment of the statute of 27 Hen. 8, c. 10, and exhibits the legal difficulties, which prevented the wife from barring herself of dower by any acts of her own. These were, that no right could be barred until it had accrued. That no right to an estate of freehold could be barred by a collateral satisfaction. That a release before marriage could not be effectual, because at the time of making it, she had no title to dower, and the release could not bar a right, which accrued afterward. And during the marriage she had no legal capacity to execute one. The covenants cannot therefore at law be pleaded as a release, for the release itself would not be effectual. And it was so decided in *Hastings* v. *Dickinson*, 7 Mass. R. 153. An attempt was afterward made to make them effectual by way of estoppel; but the Court decided, that there could be no estoppel by an executory covenant. *Gibson* v. *Gibson*, 15 Mass. R. 106. And in that case the Court say, they have considered, whether the covenants might avail by way of rebutter, and conclude, that they were not extinguished by the marriage; but that they could not so operate in that case, if there had been a failure of consideration. In this case there is no failure of consideration. If the widow has not received the benefit of the consideration for her covenants, it is because she chose not to receive it. But it is only where there is a warranty of title, that covenants can operate to rebut or bar a future right not then in existence. Co. Lit. 265. *McCrachen* v. *Wright*, 14 Johns. R. 193. There is however another difficulty in considering the covenants as a bar. The widow has rejected the provision in the deed, and has neither taken the profits of the estate, nor received the annuity. The estate of her late husband has had

the benefit of this rejection; and has in effect received, by not being obliged to part with them, the income of the estate and the amount of the annuity; which must be taken into consideration in estimating the damages, which may be claimed for a breach of the covenants. It was said in the case of *Gibson* v. *Gibson*, that at most, the widow would be liable only in an action on the covenants for the difference between the value of the dower and the provision made for her by the deed. And it cannot be justly claimed, that she should lose the income of the estate and the annuity, and still be deprived of her dower, by allowing the covenants to be pleaded by way of rebutter.

Judgment for demandant.

JOHN A. FRENCH *& ux. & al. versus* THOMAS ROLLINS.

Where one enters into the actual possession of land under a deed thereof in fee, and holds the same premises adversely to the claim of any one else, he thereby commits a disseisin against the title of any one not recognizing the right of his grantor to convey to him in fee.

If a tenant by the curtesy makes a conveyance of the estate in fee, he thereby creates a forfeiture of his estate, and the reversioner has an immediate right of entry.

Prior to the late revision of the statutes, there was no provision that the right of entry of heirs should be extended to twenty years next after the time when an intervening estate would have terminated by its own limitation, notwithstanding any forfeiture thereof.

WRIT of entry, demanding the southwest quarter of lot No. 106, in Belgrade. The facts, pertinent to the questions decided, appear in the opinion of the Court. A nonsuit was ordered by consent, which was to be set aside, if the demandant was entitled to recover.

Vose & Lancaster, argued for the demandants, and in their arguments cited *Brown* v. *Wood*, 17 Mass. R. 68; *Barnard* v. *Pope*, 14 Mass. R. 434; *Shumway* v. *Holbrook*, 1 Pick. 114; Stearns, 33; Co. Lit. 181 (a), 257 (b); *Ken. Pur.* v.

Springer, 4 Mass. R. 416; *Boston Mill Cor.* v. *Bulfinch*, 6 Mass. R. 229; *Little* v. *Libbey*, 2 Greenl. 242; 1 Johns. R. 156; 9 Johns. R. 163; 4 Taunt. 16; 1 Cowp. 62; *Millay* v. *Millay*, 18 Maine R. 387; 8 Johns. R. 262; 4 Kent, 30; *Davis* v. *Mason*, 1 Peters, 503; *Tilson* v. *Thompson*, 10 Pick. 359; *Wells* v. *Prince*, 9 Mass. R. 508; *Bruce* v. *Wood*, 1 Metc. 542; *Melvin* v. *Pro. Locks & Canals, &c.* 16 Pick. 137, and 17 Pick. 255; *Wallingford* v. *Hearl*, 15 Mass. R. 471; *Stevens* v. *Winship*, 1 Pick. 327; 12 East, 141; *Small* v. *Proctor*, 15 Mass. R. 495; 4 Kent, 482; *Stearns* v. *Godfrey*, 16 Maine R. 158; *Alden* v. *Gilmore*, 13 Maine R. 178; *Peters* v. *Foss*, 5 Greenl. 182.

Wells argued for the tenant, and cited *Melvin* v. *Pro. L. & C. on Merr. River*, 16 Pick. 137; Plowden, 353; Angel on Lim. 152; St. 1821, c. 72; *Poignard* v. *Smith*, 6 Pick. 173; Co. Lit. 29 (b).

The opinion of the Court was drawn up by

WHITMAN C. J. — It appears that the original right to the premises demanded was in the Proprietors of the Kennebec purchase; and that those proprietors, in 1795, in a partition by them made, assigned to the right of John Hancock, one of those proprietors, he then having deceased, lot numbered 106, of which the demanded premises are a part; and that the title to the same came by descent to Lucy Spear, wife of Samuel Spear. She deceased in 1810, leaving the demandants, her children by the said Samuel, her only heirs; and the said Samuel as tenant by the curtesy, who lived till 1821, or 1822.

On the thirtieth of January, 1813, Samuel Spear made a deed conveying the demanded premises in fee to John Rollins, the father of the tenant, at that time in the actual possession thereof. John Rollins has since deceased, leaving the tenant his heir. From the time of receiving his deed till his decease, two or three years since, John Rollins continued in the actual and notorious possession of the premises, so conveyed to him, and transmitted the same to the tenant, who has since continued so to possess the same. John Rollins, after

receiving his deed, must be regarded as having held the same premises adversely to the claim of any one else; and thereby to have committed a disseisin against the title of any one not recognizing the right of his grantor to convey to him in fee. This disseisin was continued by the said John and the tenant down to the time of the institution of this suit; and is relied upon by the tenant in his defence.

Samuel Spear, when he made his said deed, being but a tenant by the curtesy, thereby created a forfeiture of his estate; and gave his children, the plaintiffs, an immediate right of entry. 2 Inst. 252, a; Cruise, Title V. Curtesy, ch. 11, § 36. Prior to the revision of the statutes, which took place since this action was commenced, there was no provision that the right of entry of heirs should be extended to twenty years, next after the time when an intervening estate would have terminated by its own limitation, notwithstanding any prior forfeiture thereof. By the statute of 1821, c. 62, § 4, it is provided, that no person, unless by judgment of law, shall, at any time thereafter, make any entry into any lands, tenements or hereditaments, but within twenty years next after his right or title first descended or accrued to the same. The right of entry of the plaintiffs having accrued in 1813, twenty-eight years before the time of the commencing of this suit, they must be deemed to have been barred of a right to maintain the same.

But, if the principle of the provision in the Revised Statutes had been in operation, it does not appear, by the case as made out, that the plaintiffs' right of entry would have remained to them. The time when their father died is not precisely ascertained. It was in 1821 or 1822. It may have been in 1821, and before March of that year, and so after the lapse of twenty years. It would have been incumbent on the plaintiffs, under this provision, to have proved that it was within twenty years before the entry by them made, which they have not done.

Nonsuit confirmed.

CHARLES L. EUSTIS *versus* ABIEL HALL *& als.*

Where the plaintiff, being then the owner of a township of wild land, made a contract with a person to erect a mill and barn thereon, and before these were finished, three of the defendants went to explore the land with the view of purchasing it, and stated to the contractor, that "*if they should purchase, they wished him to carry out the contract he had made with the plaintiff, in the same way as if the plaintiff had continued to own the land;*" and the purchase was made by all the defendants, and afterwards two of them signed a paper, directed to the plaintiff, wherein it was stated, that "*agreeable to our understanding we believe it right you should account to*" the contractor for a certain specified amount, "*it being due him from you or us;*" and the plaintiff then paid that sum and brought this suit therefor; *it was held,* that the action could not be maintained.

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

Assumpsit against Hall and nine others.

The plaintiff was formerly owner of a township of wild land, and had contracted with one Hanscom to erect a barn and a mill thereon. While Hanscom was progressing with the work, three of the defendants went to explore the tract with a view (as they said) to purchase it jointly with the other defendants, and they there told Hanscom, that, "if they should purchase, they wished him to carry out the contract he had made with the plaintiff in the same way as if the plaintiff had continued to own the land." The defendants soon afterwards made the purchase. Hanscom was called by the plaintiff and testified, that after the purchase he expended, in completing the erection $25,68; that in making this expenditure he considered himself as acting for the defendants, and charged the bill to "owners of Eustis tract;" that the plaintiff told him he must look to the defendants for the pay, and that it was understood and agreed between the plaintiff and himself, at the time the said purchase was made, that the plaintiff was not to be liable to him for the subsequent expenditures. The plaintiff then read a paper signed by two of the defendants of the following tenor: — "Mr. Charles L. Eustis. Sir. Agreeable to our understanding, we believe it right you should account to J. B. Hanscom for the following articles: —

"The mill saw	7,00
"Also the nails used for the barn	18,68
	25,68

it being due him from you or us. Farmington, December 25, 1834."

Hanscom afterwards presented the paper to the plaintiff and received from him the amount therein mentioned, in payment for the bill. It is to recover back this money that this action is brought.

The plaintiff then offered to prove that the subscribers to that paper were duly authorized to act in the matter in behalf of all the defendants, and there proposed to rest his case. Hereupon the Judge expressed an opinion that the evidence did not show any sufficient authority in the plaintiff to pay the money on account of the defendants, and thereby to constitute himself their creditor. A nonsuit was thereupon ordered, and the plaintiff filed exceptions.

Mc' Cobb, for the plaintiff.

Lancaster, for the defendants.

The opinion of the Court was afterwards drawn up by

WHITMAN C. J. — There does not seem to be sufficient evidence of privity of contract between the plaintiff, in this case, and the defendants, to create a liability on their part. The memorandum introduced shows, that the two individuals, who signed it, were of opinion that the amount due to Hanscom ought to be paid, either by them or the plaintiff, and that they thought it belonged to the latter to pay it. He thereupon paid it. The plaintiff's chief reliance, must have been upon the testimony of Hanscom, who says, that three of the ten defendants, while exploring the tract of land, on which the expenditure was about to be incurred, said to him, that, if they bought it, they wished him to carry out the contract, he had made with the plaintiff, in the same way, as if he should continue to own the land. This was but the expression of a wish, on their part, without evidence that they had any authority to

make any contract whatever, that should be binding upon the others. Hanscom, however, as he says, after he found that they had made the purchase, understood that he was at work for them, and was to look to them for his pay. Whatever evidence there was, then, tending to prove a contract, if it can be considered that there was any at all, was to that effect only as between the defendants and Hanscom. The evidence, that, at the time of the purchase by the defendants, or at any other time, it was agreed between them and the plaintiff, that they were to assume his contract with Hanscom, was very limited, to say the least of it. It could not therefore be considered that the defendants were ever originally all jointly liable to pay the amount claimed either to Hanscom or to the plaintiff; and there is as little reason to infer, that the plaintiff paid the amount due to Hanscom at the request of the defendants, with an understanding on their part, that it was to be for their benefit, or on their account. The exceptions are therefore overruled and the nonsuit confirmed.

HOWARD PETTENGILL, *Pet. for cert. versus* COUNTY COMMISSIONERS OF KENNEBEC.

It is not necessary, that the common convenience should be promoted, in order to authorize the establishment of private ways.

By the St. 1839, c. 367, "limiting the powers of County Commissioners," they were deprived of all power to lay out roads, except where the road should connect one town or plantation with another, or where a town should have refused to lay out a private way from a town or county road to the lot or lots of land, on which the petitioners should live.

While that statute was in force, the mere refusal of the *selectmen* to lay out a private way, where the *town* had not acted in the matter, did not give jurisdiction of the subject to the County Commissioners.

The County Commissioners had no power to establish or act upon private ways unless it appeared that the petitioners lived upon the lot or lots, which were to be opened to a town or county road.

THIS was a petition for a writ of *certiorari* to quash certain proceedings of the County Commissioners of this county.

It appeared, that the proceedings complained of were founded on a petition from Howard Pettengill, and Howard Pettengill, Jr. to the Commissioners, in December, 1839, setting forth that on Sept. 1, 1839, "they made application in writing to the Selectmen of the said town to lay out a road from their farm in Vassalborough, in a direction to intersect the public road, in such place as the public good may require, for the convenience and accommodation of the petitioners; that said application was duly presented to said Selectmen, who, on the 20th of said September, unreasonably refused and neglected to lay out said road; whereby your petitioners suffer great delay in getting from their farm to the public road aforesaid;" and praying that the same might be laid out and established. After the parties interested and the County Attorney had been notified and heard, in August, 1840, the Commissioners adjudged, "that common convenience and necessity do not require that the road prayed for by said petition, be located and established." And at the December term, 1840, the County Commissioners "ordered said report to be accepted and recorded, and the petitioners aforesaid to pay in to the treasurer of said county the sum of thirty-one dollars and seventeen cents, that being the amount of costs expended by said county in and about said petition."

Howard Pettengill presented his petition to this Court, praying that a *certiorari* might be granted, in order that the proceedings of the Commissioners might be quashed, for these, among other reasons.

1. It does not appear by the record aforesaid, that said Commissioners adjudged reasonable or unreasonable the refusal of the Selectmen of Vassalborough to lay out said road.

2. It appears by the record aforesaid, that the said Commissioners had no jurisdiction of the case presented.

At the May Term of this Court, 1842, it was agreed by the counsel, that the case should be argued in writing, and the arguments were afterwards furnished.

The case was very fully and ably argued, but as the statute, on the construction of which the case mainly turned, continu-

ed in existence but a very short time, and as the arguments cannot well be condensed, they will be but briefly noticed.

McCobb, for the petitioner, said that where it appeared by the records that the Commissioners had no jurisdiction, a *certiorari* would be granted as a matter of course. *Inhabitants of Pownal, petitioners*, 8 Greenl. 271.

The Commissioners had no jurisdiction. By the stat. 1839, c. 367, their powers are limited to cases in which towns or plantations shall refuse "to lay out," &c. It does not extend, like the stat. 1821, c. 118, to a refusal by the Selectmen, as well as by the town. The petition to the County Commissioners was entered after the act of 1839 had taken effect.

It does not appear from the records, that the road prayed for was from some town or county road to the lot of land *on which the petitioners lived*, as the statute requires. And in fact they did not live upon it.

They had no jurisdiction, because the record does not show that the Selectmen unreasonably delayed or refused to lay out the way. *State* v. *Inhabitants of Pownal*, 10 Maine R. 24; *Clark* v. *Rockwell*, 15 Mass. R. 221; *Williams* v. *Blunt*, 2 Mass. R. 207; *Bank of Cumberland* v. *Willis*, 3 Sumn. 472.

G. M. Weston, County Attorney, for the respondents, said, that the statute of 1839 was a very short one, very brief in its expressions, and, critically considered, somewhat incorrect, and inartificial in its terms. But its fair construction does not limit the right of appeal in the manner contended for by the petitioner. It was intended to confine the original jurisdiction of the County Commissioners to roads which were properly public highways, or county roads, and to restrain them from laying out roads wholly within any town, by virtue of their original authority. It did not intend to alter the existing laws as to appeals in cases of town or private ways. The refusal of the town or plantation to lay out a way, must be understood as a refusal by town authority, including both the laying out, or refusal by the Selectmen, and acceptance by the town.

The language made use of, on a fair construction, shows, that the petitioners did live on the land — that it was in their personal occupation.

As to the objection, that they had no jurisdiction because the record does not show that the Commissioners adjudged the refusal to be unreasonable, it is sufficient, that there is a wide distinction between the cases cited and the present one. In them, the controverted jurisdiction was over parties, against whom, if it existed, it was adverse. Here the jurisdiction, as against the petitioners for the road, who are the present petitioners, resulted from their own act, and became absolute, when they filed a petition, averring facts sufficient to give jurisdiction to the Commissioners, whether their averment was true or false.

The opinion of the Court was delivered June 3, 1843, by

Shepley J. — The petitioner, with another, applied to the County Commissioners at their December Term, 1839, stating, that the selectmen of the town of Vassalborough unreasonably refused to lay out a road from their farm to the public road, and asking that such a road might be laid out and established. The Commissioners notified and heard the parties; and in August, 1840, decided, that common convenience did not require, that the road should be laid out; and at the next term their report was accepted, and the petitioners were ordered to pay the costs. The Commissioners do not appear to have clearly distinguished between public highways and private ways. It is not necessary, that the common convenience should be promoted, in order to authorize the establishment of the latter description of ways. It is now contended in behalf of the petitioner, that the County Commissioners had no jurisdiction at that time of the subject matter of the petition. By the act of 1821, c. 118, § 10, jurisdiction was given to the Court of Sessions in such cases. And by the act of 1831, c. 500, § 3, that jurisdiction was transferred to the County Commissioners. The act of 1839, c. 367, provided, that "no board of County Commissioners shall have power to lay out any

road, or part of a road, in any town or plantation in this State, unless said road shall connect said town or plantation with some other town or plantation; or unless said town or plantation shall refuse to lay out a road for any person or persons from some town or county road to the lot or lots of land, on which such person or persons may live." The act would seem to have been drawn without much regard to the former acts upon the same subject. Its provisions were extraordinary, and they have not been incorporated into the Revised Statutes. By it the Commissioners were deprived of all power to lay out roads except in cases of two descriptions. The first class of cases was, where the road should connect one town or plantation with another; and the second, where a town should have refused to lay out a private way from a town or county road to the lot or lots of land, on which the petitioners should live. The argument of the Attorney for the county is, that such could not have been the intention, because a town was not authorized to lay out roads, but only to approve and allow of them when laid out by the Selectmen. And it is true, that if the statute were to receive a construction perfectly literal, the commissioners would have had power to lay out roads only in one class of cases, for there was no such class, as was contemplated by the words used in the second provision. And yet it is clear, that it was the intention to authorize them to revise the doings of towns in certain cases, when they had refused to act favorably for persons, who might desire roads from a town or county road to the lots on which they lived. And there being no such cases, where the Selectmen had not acted in the first instance in laying them out, the Legislature must have regarded the town as laying out the roads, when, according to the language of former statutes, it had approved and allowed them. As the roads could not be legally laid out and established by the Selectmen without the action of the town, the framers of the act seem to have regarded such action as the laying out of the roads.

It is also contended, that by the words, "unless said town or plantation shall refuse," the acts of the Selectmen, when

they refuse, should be included, on the ground that their acts are for that purpose to be considered as the acts of the town. Such a construction would have the effect to abolish all distinction between the acts of the Selectmen and those of the town in relation to this matter; while in all the previous legislation they were carefully separated and distinguished. The tenth section of the act of 1821, made provision for an application to the Court of Sessions to revise the proceedings of the Selectmen; and the eleventh section for an application for a revision of those of the town. And to the latter class of cases only, the act of 1839, seems to have alluded. The Selectmen were still left with power to lay out private ways as formerly, and their towns with power to act upon their reports; while the act took from the County Commissioners the right to revise the proceedings of the Selectmen in case of their refusal to lay out such a way; and the power to revise the proceedings of their towns, when their record was laid before them, and they refused to approve of the way, in all cases, except where the way prayed for should lead from a town or county road to the lot or lots of land, on which the petitioners should live.

But if the construction contended for by the attorney for the county could be adopted, the Commissioners would have had no power to revise the proceedings of a town except in this latter class of cases. The petition to the Commissioners in this case states, that the way desired would lead from their farm to the public road, but it does not allege, that they lived upon the farm. They might own it, "and suffer great delay in getting from their farm to the public road" without living upon it. Every allegation of the petition may be true without exhibiting a case, upon which the Commissioners, even under such a construction, would be entitled to act. And it appears to have been the design of the legislature, whatever may be the construction of the act in other respects, to prohibit the Commissioners from establishing or acting upon such ways, unless the petitioners lived upon the lots, which were to be opened to a town or county road. The record does not therefore

present a case, on which the Commissioners were authorized to act; and the writ of *certiorari*, must be granted.

DAVID S. FIFIELD *& al. versus* COMFORT C. SMITH *& al.*

A witness examined on the *voir dire*, and exhibiting an apparent interest in the case, may be permitted to show, by testifying further, that such apparent interest has been removed by writings or records, although not produced or present at the time.

ASSUMPSIT against ten persons, doing business as a Company in making scythes.

A. Gile was called as a witness by the defendants. He was objected to by the plaintiffs, and on their examination on the *voir dire*, he appeared to have had an interest in the event of the suit. The defendants then proceeded to examine him as to the sale of all his interest to R. B. Dunn, by deed. This was objected to by the plaintiffs, unless the deed or a copy of it from the registry was produced. WHITMAN C. J. presiding at the trial, sustained the objection, and the witness was excluded. The defendants filed exceptions, a verdict having been returned in favor of the plaintiffs.

May and *Morrill*, for the defendants, contended, that when the interest of a witness only appears by his own testimony, that it is competent to examine him in relation to the contents of writings or deeds, without producing them, to show that he had ceased to have an interest at the time of trial. *Miller* v. *Mariner's Church*, 7 Greenl. 51; *Marwick* v. *The Georgia Lumber Co.* 18 Maine R. 49.

Wells and *Howe*, for the plaintiffs, contended, that a new trial ought not to be granted on account of the rejection of the witness.

The opinion of the Court was afterwards drawn up by

WHITMAN C. J.—The bill of exceptions, in this case, states, that one Gile was introduced as a witness, by the de-

fendants, who, being put upon the *voir dire*, disclosed certain facts, which, as the Court considered, show him to be interested in the event of the suit; whereupon the defendants proposed to prove, by a further examination of the witness, that he had divested himself of his apparent interest in the cause, by conveyances, by deeds duly recorded. The Judge sitting in the trial ruled that such proof should be made, by an exhibition of the deeds or copies of them from the registry; to which the defendants took exception, which was allowed.

The authorities seem to show, very clearly, that, a witness examined on the *voir dire*, and exhibiting an apparent interest in the cause, may be permitted to show, by testifying further, that such apparent interest has been removed by writings or records, although not produced or present at the time. Greenl. Ev. 470; *Miller* v. *The Mariner's Church*, 7 Greenl. 51. The exceptions therefore must be sustained and a new trial be granted.

REUEL HOWARD, JR. *versus* AMAZIAH BROWN *& al.*

A poor debtor's bond must be executed by *the debtor* as well as by the sureties, or it will not be a good statute bond.

Nor will it be a good *statute bond*, unless the penalty be to the *amount required by the statute.*

But although the bond may not be signed by the debtor, or the penalty may be less than for double the amount of the debt, interest thereon, costs and officer's fees, still it may be a good bond at common law, and may be enforced as such.

In such case, unless the law be altered by the Revised Statutes, the amount of damages is to be determined by the Court.

However, if it be erroneously put to the jury to determine the amount of damages, and they are right in their estimation, a new trial will not be granted on that account.

Where judgment is rendered for the amount of the penalty of the bond, being sufficiently large to carry full costs, and execution issues for a mere nominal sum as damages, the plaintiff is entitled to full costs.

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

Debt on a poor debtor's bond. The plaintiff proved the execution of the bond by the defendants; that an execution in his favor against Jason W. Moor was in the hands of Leighton, a deputy sheriff, for collection; that Leighton arrested Moor upon the execution; that while Moor was under arrest he went with the officer to the defendants, who on being requested so to do, signed the bond, and Moor was released from the arrest; that Moor was present at the time, but did not sign the bond; that no reason was assigned why he did not; and that there were no conditions or agreement that the same should not be the bond of the defendants, unless signed by Moor. No evidence was offered to show that the condition of the bond had been performed. The defendants offered a witness to prove, that Moor, at the time was destitute of property. The plaintiff objected to the admission of the evidence, but the objection was overruled by the presiding Judge, and the witness was admitted, and testified that Moor was reputed to be poor. It

appeared that the penalty of the bond was not quite double the amount of the execution and officer's fees.

The Judge instructed the jury, that this was not a bond taken pursuant to the poor debtor acts of 1835 and 1836, but that it was a bond valid at common law, and that the jury might assess such damages as they believed the plaintiff had sustained by the breach of the bond. The jury returned a verdict for the plaintiff, and assessed the damages at one dollar.

To these rulings and instructions, the *plaintiff* filed his bill of exceptions.

The *defendants* also filed a bill of exceptions in the same case, from which it appeared that, at the trial, they contended, that the bond was not good either as a statute bond, or at common law, but was incomplete and void. The Court overruled this position, and decided, that although it was not a good bond by the statute, yet it was good at common law; and that if its execution had been proved, the plaintiffs could recover whatever damages he had sustained in consequence of its conditions not having been complied with.

After the verdict had been returned, the defendants contended that the plaintiff was entitled to recover but a quarter part as much costs as damages. The Judge directed that judgment should be rendered for the penalty of the bond, and ordered the execution to issue for one dollar damage and full costs. And the defendants excepted.

J. Baker argued for the defendants, contending that the bond was invalid and void. This is a collateral undertaking only as sureties for the performance of certain acts by the principal; and where there is no principal, there can be no sureties. The officer could not take such bond legally. It is against the policy of the law. It was incomplete, and of no binding force. *Bean* v. *Parker*, 17 Mass. R. 591; *Wood* v. *Washburn*, 2 Pick. 24; 1 Metc. & Perk. Dig. 433. The statute mode has excluded the common law mode, and the bond is not good at common law. *Gooch* v. *Stephenson*, 13 Maine R. 371; *Cutts* v. *Hussey*, 15 Maine R. 237.

If good in any way, it must be good as a statute bond. But it is not good as a statute bond, because it is not signed by the principal, and because the penalty is not for double the amount.

If the action can be maintained, the damages must be but nominal. It is not a statute bond, and the plaintiff has sustained no damages. If it be true that the question of damages should have been decided by the Court, and not by the jury, it has been repeatedly settled, that no new trial will be granted on that account, if the verdict is right.

H. A. Smith argued for the plaintiff, contending, among other things, that as the debtor had been discharged from arrest in consequence of the giving of this bond by the defendants, and could not be again arrested on the execution, and there was no illegality in the transaction, they should not be permitted now to say that it is of no binding force.

The statute does not require, that the debtor should sign the bond. It is the voluntary act of the defendants, and they might well stipulate, that another should do certain acts. It is within both the letter and spirit of the law. *Vallance* v. *Sawyer*, 4 Greenl. 62; *Cutter* v. *Whittemore*, 10 Mass. R. 442; *Haskins* v. *Lombard*, 16 Maine R. 140. As it respects the defendants then, at least, it should be considered a good statute bond.

But if the bond declared upon is not a good statute bond, it is good at common law. If the creditor chooses to accept it, though less favorable to him, than he was entitled to have, the defendants cannot complain. The creditor may waive any thing which is merely for his advantage. The bringing of the suit upon the bond, is an acceptance of it. If therefore the omission of the signature of the debtor, and the fact that the penalty is less than it should have been, prevent its being good under the statute, we are entitled to judgment upon it as a common law bond. *Kimball* v. *Preble*, 5 Greenl. 353; *Pease* v. *Norton*, 6 Greenl. 229; *Clap* v. *Guild*, 8 Mass. R. 153; Rev. St. c. 148.

The bond was not subject to chancery. The defendants have bound themselves that the debtor should do certain things, or that they would pay the debt and costs, as stipulated damages. *Gowen* v. *Gerrish*, 15 Maine R. 273; *Howe* v. *Gammon*, 14 Maine R. 250.

The damages should have been estimated by the Court, and not by the jury. *Hathaway* v. *Crosby*, 17 Maine R. 448.

The opinion of the Court was afterwards drawn up by

TENNEY J. — The acts of 1835 and 1836 for the relief of poor debtors provide, that the bond shall be given by the debtor, and shall be in double the amount for which he was arrested or imprisoned. All the requirements must be contained in the condition; and if defective in that respect, it is not a statute bond. We think the debtor himself should execute the bond, in order to comply with the provision. The Court have heretofore settled, in the case of *Pease* v. *Norton & als.* 6 Greenl. 229, that the amount for which the debtor is imprisoned is the debt, costs and fees, and that there must be a precise conformity thereto, that the bond may be a statute bond. The one in the case at bar fails in both these particulars, and cannot be enforced in the manner contemplated in the acts referred to. The creditor has however put it in suit and has thereby accepted it. Is it a bond at common law? It is contended that it is not, inasmuch as it purports upon its face to be made for principal and sureties to execute, and the former has not become a party to it. It has been regarded by the defendants' counsel, as analagous to a bail bond, which has been adjudged invalid, unless signed by the principal. *Bean* v. *Parker*, 17 Mass. R. 591. Bail is subject to liabilities and entitled to privileges differing in many respects from those of other sureties; and one is the power, which he has at all times and places over the principal, authorizing imprisonment, till the liability is discharged. The language of the Court in the authority cited, may apply to other cases, but the question before them related exclusively to the validity of a bail bond, and the decision was upon the ground, that it was an undertaking *sui generis*. The

case, *Wood, Judge,* v. *Whittemore & al.* 2 Pick. 24, contains only the disposition of the action; none of the reasons for the opinion, entertained by the Court, are reported. We apprehend the case at bar is distinguishable from that of bail; though the object sought in both may be to some extent similar; but the relation existing between the principal and surety is in many respects different in the two, one from the other. We cannot believe that a surety in a bond, like the one here in suit, has power without legal process, to take the person of the debtor at any time and commit him to prison against his consent. When he has become his surety, he has taken upon himself the peril of injury, and can resort to him for damages, if any arise, in an action, as in other instances of suretyship. And we are not aware that in undertakings of this kind, sureties have powers, superior to those possessed in ordinary contracts; or that the obligee therefore, is restricted more than he is, in a bond purporting to be from several, who are not represented as holding the relation of principal and sureties, and a part only have in fact executed it. So far as the obligee of a bond, or the promissee in a note is concerned, the principal and sureties are equally liable. *Howe* v. *Ward,* 4 Greenl. 199.

If the view, we take, be correct, how does the obligation, which we are now considering, differ from those, which have been fully examined, wherein solemn decisions have been pronounced? *Cutter* v. *Whittemore,* 10 Mass. R. 442; *Scott & al.* v. *Whipple & als.* 5 Greenl. 336; *Haskins & al.* v. *Lombard & als.* 16 Maine R. 140. It does not appear in this case, that there was any condition or reservation, at the time the defendants executed the instrument. They voluntarily executed it, and suffered it to pass without objection into the hands of the officer, who made the arrest. We see nothing which induces the belief that they expected or wished the debtor to sign it. There is good reason to suppose that the intention of the parties was, that it should be binding according to its terms, and we know of no authority, which leads us to doubt, that such intention should be carried into effect. We

think it a bond at common law, and can be legally enforced as such.

The Court, under the authority to hear in chancery, conferred in the statutes of 1821, c. 50, § 2, are to determine what shall be the damages to be received in such cases. The statute of 1830, c. 463, does not apply. *Hathaway* v. *Crosby & al.* 17 Maine R. 448. The question of damages was therefore not properly submitted to the jury; but when the jury have from the evidence come to such a result as the Court approve, it has not been usual for the latter to interfere. The case finds that the debtor was reputed to be poor, and no counter proof was adduced, and we cannot perceive that the estimation was erroneous. Judgment for the penalty of the bond and full costs; and execution for a nominal sum in damages was properly ordered.

Plaintiff's and defendants' exceptions overruled.

JAMES MCLELLAN *versus* THE COUNTY COMMISSIONERS OF KENNEBEC.

A committee, agreed on and appointed instead of a jury, to assess the damages occasioned by the location of a county road, cannot act by a majority; but their proceedings will be void, unless they all concur in the result arrived at.

THIS was an appeal, under the provisions of the St. 1841, c. 196, from a decision of the County Commissioners, accepting the report of a committee agreed upon and appointed to assess damages occasioned by the location of a county road through the land of McLellan. The report was accepted at the December Term of the County Commissioners' Court, 1841. The whole of the committee attended, heard the parties, and consulted together as to the assessment of damages. Two of them signed the report of the committee, and the third made a certificate, that he was present with his associates,

viewed the premises, heard the parties, and consulted with his associates, but dissented, and declined signing the report, because he thought the damages awarded were inadequate.

F. Allen, for McLellan, said that an appeal was the proper mode to obtain redress. St. 1841, c. 196, § 2.

The report of the committee to assess the damages ought not to have been accepted, because it was signed by but two of the committee. All the members of the committee must concur in the report, or their proceedings are unauthorized and void. *Towne* v. *Jaquith*, 6 Mass. R. 46; *Greene* v. *Miller*, 6 Johns. R. 39; Kyd on Awards, 106; *Com.* v. *Ipswich*, 2 Pick. 70; *Jackson* v. *Hampden*, 16 Maine R. 184.

G. M. Weston, County Attorney, for the respondents, contended that the committee were to be considered as public officers, the decision of a majority of whom is valid. Where they all acted, but one dissented, because he differed in opinion, as in this case, the committee has the same right to act by the majority, as selectmen, assessors, or the County Commissioners themselves. The case of *Jackson* v. *Hampden*, cited for the original petitioners, does not deny the power of a majority to act, but merely decides that all should have notice, and an opportunity to act. All officers may act by majorities. Jurors, if they are entitled to be called officers, are an exception.

The opinion of the Court was prepared by

WHITMAN C. J. — The appeal is from a decision of the Commissioners, on their acceptance of a report of a committee, appointed to assess the damages accruing to the appellant, from the location of a highway. Exceptions were taken to the report of the committee, because it was signed by two only, of the three appointed on the commission. It appears, however, that the third commissioner attended with the other two, but, not being satisfied with the result to which they came, declined signing the report.

The statute of 1821, c. 118, § 1, authorizing the appointment of a committee, under the circumstances of this case, provides, that the Court may "hear and finally determine the

same by a new committee, if the person complaining and the agent for the town, (now the County Attorney,) in which the highway is laid out, can agree thereon." Otherwise they are to do it by a jury. The counsel for the appellant insists that the doings of committees, so appointed, are void unless they all concur in the result arrived at; and likens it to the case of an arbitration or reference, where, if the parties have not otherwise agreed, the report, to be effectual must be signed by all the referees. It must be conceded that there is some resemblance between the two cases; especially when referees are appointed by rule of Court. The Court would seem to hear and determine the cause as much, in one case, as the other. The appointment in either case is by the agreement of parties. The whole subject matter in controversy is embraced equally in each. The Court would be equally as powerless in the one case as in the other, without the agreement of parties. Its province is either to accept, reject or recommit the report. If the parties, in a case of the kind before us, agree on a committee, the statute must be regarded as imperative upon the Court to make the appointment. It can neither do it, nor refuse to do it, upon its own mere motion. The appointment, then, in substance and effect, is the work of the parties, and constitutes a special, and not a general agency; and the right to proceed by a majority does not take place.

This differs altogether from the case of the authority of public bodies, proceeding to act by their selectmen, assessors, overseers of the poor and committees; and from all elections of directors, authorized to aid any corporation to carry on and manage its concerns. Those come within the principle laid down in *Grindley* v. *Baker*, 1 Bos. & Pul. 229, "that where a number of persons are intrusted with power not of a mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will control."

The decree and judgment of the County Commissioners must therefore be reversed and annulled.

WILLIAM H. THORN *versus* ELISHA S. CASE.

The officer enrolling soldiers in a militia company is presumed to have done his duty; and if the soldier would deny that he was eighteen years of age, by the St. 1834, c. 121, § 23, the burthen of proof is on him to show that he was not eighteen.

If it appears by the record, that the enrollment of the soldier was made prior to his being warned to do the service, it is sufficient, although the precise day of the enrollment may be left uncertain.

If the time and place of the meeting of the company are stated in the notice, and it is handed in due time to the soldier by the person directed to warn him, the notice is good without any other date.

In an action to recover a fine, if the fact does not appear by the record, it is competent to prove by parol evidence that the defendant did not meet at the time and place appointed.

Where a record is required by the militia law to be made and kept as an official act, the record is sufficient evidence of the facts stated therein, without producing the original minutes from which it was made.

THE original action was debt by Case, as clerk of a company of infantry in Readfield, to recover of Thorn the fine imposed by the statute for non-appearance at the May inspection of said company in 1841.

The organization of the company; the appointment of Case to be clerk; and the limits of the company were proved. It appeared by the records of the "Readfield Guards," a company of light infantry, that the defendant had enlisted therein, and had done duty in that company in the years 1837 and 1839. It was admitted, that the defendant was a member of said light infantry company, and belonged thereto until the same was disbanded, in March, 1841. No other evidence of his age was offered.

To prove the enrollment of Thorn in said company, the plaintiff offered the record of the roll of said company, "as corrected on the eleventh day of September, 1840. On the 4th page of the record, and at the head of the page in the column headed, "time of additional enrollments made after the first Tuesday of May," and at the bottom of the page, was entered the date, April 26th, 1841; upon said page and between the dates standing at the head and foot of the page,

were borne the names of twenty-five individuals, among which was that of the defendant. The clerk testified that all the names upon that page were entered there under the date of April 26, 1841. This evidence was objected to by the counsel of the defendant, but admitted by the justice. The defendant's name was also found on the record of the roll of said company "as corrected on the 1st Tuesday of May, 1841," and in no other place upon the books of the company.

To prove notice to the defendant, the warning officer testified, that he gave the defendant a written notice in hand, at least four days before the day of inspection of said company. The defendant then introduced the notice of which the following is a copy.

"Militia of Maine. — To William H. Thorn. You being duly enrolled as a soldier in the company of which Joseph Sanborn is commanding officer, are hereby ordered to appear at the usual place of parade of said company, Town House in Readfield, on Tuesday the fourth day of May, 1841, at one o'clock in the afternoon, armed and equipped as the law directs, for military duty and inspection, and there wait further orders.

"Dated at Readfield, this —— day of —— 184 —

"By order of the Commanding Officer, John S. Hains."

To prove the non-appearance of the defendant the record of the roll of said company was introduced, "as corrected on the first Tuesday of May, 1841," and in the column headed, "absent," against the name of the defendant was marked "absent." The clerk stated in evidence, that the defendant was not present and did not answer to his name. Upon being asked by defendant's counsel, how he knew that defendant was absent, the clerk answered that he judged he was absent from the fact of his being marked absent on the record, in the column headed absents, and further stated that the record introduced was not the roll from which the names were called on the day of inspection, and upon which the absentees were originally minuted, but was, as it purported to be, a record of that roll.

The defendant made these objections.

1. There was no sufficient evidence of the defendant's liability to be enrolled.

2. That there was no sufficient evidence of defendant's enrollment four days previous to the time of inspection.

3. That the notice given was fatally defective, not being dated.

4. That there was not sufficient evidence of his non-appearance, the check roll being the only proper evidence to that point.

The objections were all overruled by the justice at the trial, and judgment entered against the defendant, to which rulings and decision of the said justice he excepted, and brought his writ of error, and assigned the same objections as causes of error.

Howe, for the plaintiff in error, contended that as no particular date was affixed to the name of Thorn upon the record of the roll, and in the proper column, it must be understood to have been placed there at the time the roll was revised, when he was not liable to be enrolled in this company, being then and until long afterwards a member of a volunteer company. St. 1834, c. 121, § 12; *Hill* v. *Fuller*, 14 Maine R. 121. The testimony of the clerk to show that it was placed upon the record on another day, was inadmissible. *Richards* v. *Killam*, 10 Mass. R. 239; *Saxton* v. *Nimms*, 14 Mass. R. 315; *Thayer* v. *Stearns*, 18 Mass. R. 109; *Gay* v. *Wells*, 7 Pick. 217; *Sawtelle* v. *Davis*, 5 Greenl. 438.

The warning was insufficient, because it leaves the person in doubt, whether the paper was designed to be an authentic instrument. *Macomber* v. *Shorey*, 15 Maine R. 466; *Howard* v. *Harrington*, 4 Pick. 123; *Cobb* v. *Lucas*, 15 Pick. 7. The date is an essential feature, and the want of it, is not cured by the insertion of the time of inspection.

The record of the roll, being a mere transcript of the roll upon which the delinquencies were originally noted, is not sufficient evidence of the absence. The clerk is liable to make mistakes in transferring his marks of absence from the check

roll to the record, and the original entries should be produced. *Comm.* v. *Paull*, 4 Pick. 251; *Comm.* v. *Peirce*, 15 Pick. 170.

The clerk was incompetent to supply the want of the check roll. And even if competent, he does not substantiate the record, as his testimony is not founded upon personal knowledge or recollection, but upon the state of the record itself.

Morrill, for the original plaintiff, said that the admission, that Thorn was a member of the volunteer company, estops him from denying his liability to be enrolled in the standing company, when the other was disbanded; or at least puts him upon proof to rebut the presumption arising from that fact. *Haynes* v. *Jenks*, 2 Pick. 172; *Robinson* v. *Folger*, 17 Maine R. 206.

The company to which the defendant had formerly belonged, had been disbanded in March, 1841, and it was the duty of the plaintiff, as clerk, to enter his name on the roll of the company within the limits of which Thorn resided, and to designate in the column headed, "time of additional enrollment," the time when the enrollment was made. *Sawtelle* v. *Davis*, 5 Greenl. 438. The time was made sufficiently certain by the dates at the top and bottom of the page. If on this point there was any doubt, the clerk was a competent witness to explain it. *Robinson* v. *Folger*, 17 Maine R. 206.

It was not necessary that the notice should have been dated at the bottom. It was enough, that it distinctly showed the time when and the place where the company was to meet. The law gives no forms for notices. The warning officer testified that he gave the notice to the defendant at the proper time, and all was done which the law required. *Comm.* v. *Derby*, 13 Mass. R. 434; *Macomber* v. *Shorey*, 15 Maine R. 466; St. 1834, c. 121, § 21.

The original paper from which the company was called, is seldom preserved. It should be recorded, and the record is the proper evidence to prove who was present, and who was absent. And besides, in this case, the clerk testified that he was absent.

The opinion of the Court was drawn up by

SHEPLEY J. — The first error alleged is, that there was no sufficient evidence that the plaintiff in error had arrived at an age to authorize his enrollment. The officer enrolling is presumed to have done his duty, and if so, the burthen of proof is imposed upon the person to be enrolled by the twenty-third section of the act. And this also was a question of fact to be decided by the magistrate, and there is no reason to believe, that he decided erroneously.

The second error alleged is, that there was no sufficient evidence of enrollment four days before the time for inspection. The bill of exceptions states, that the "plaintiff offered the record of the roll of said company as corrected on the 11th September, 1840; on the fourth page of said record at the head of said page in the column headed, "time of additional enrollments made after the first Tuesday of May," and on the bottom of said page was entered the date of April 26, 1841." The time of the additional enrollments would seem to be made certain by the date both at the top and bottom of the column, prepared in the blank forms for that purpose. But it was decided in *Hill* v. *Fuller*, 2 Shep. 121, to be sufficient, if it appeared by the record, that the enrollment of the soldier was made prior to his being warned to do the service.

The third error alleged is, that the notice was defective. It ordered him to appear at the usual place of parade for the company, "on Tuesday the fourth day of May, 1841, at one o'clock in the afternoon." In the case of *Macomber* v. *Shorey*, 3 Shep. 466, there was no certainty respecting the year to be obtained from the date or otherwise, in which the duty was to be performed; and the notice was left at his last place of abode. In this case the notice was handed to the soldier, and he could not be in doubt about the time when the duty was required, or whether the notice was a regularly authorized order for that occasion, and not some old paper of a former year thrown into his dwelling without authority.

The fourth error alleged is, that there is no sufficient evidence, that he did not appear at the time and place as ordered.

There was the testimony of the clerk, that he did not; and such testimony was held to be admissible in the case of *Rollins* v. *Mudget*, 16 Maine R. 340. The record also stated it, and when a record is required to be made and kept as an official act, it is not readily perceived upon what principle of law, it can be alleged, that the original paper, from which it was made, is better evidence, than the record verified by the official oath of him, who makes it.

Judgment affirmed.

ELISHA BARROWS *versus* WILLIAM BRIDGE *& al.*

If a poor debtor's bond, given since the Revised Statutes were in force, be not taken for precisely double the amount for which the debtor stood liable, it is not a statute bond, and is good only at common law.

THE parties agreed upon a statement of facts.

Debt on bond, dated 18th January, 1840, in the penal sum of $237,02. The officer holding an execution in favor of the plaintiff against said Bridge, arrested him on December 30, 1839. Bridge signified his intention to give bond as allowed by law in order to procure his liberation from arrest, whereupon the officer prepared the bond in its present form, except that it bore date of December 30, and handed it to said Bridge to be executed. It was delivered to the officer on January 18, 1840, with the date altered to its present form. The additional interest was not added. The condition of the bond was never performed. The plaintiff insisted that the bond is valid as a statute bond, entitling him to judgment according to the Revised Statutes, c. 148, § 39. The defendants insisted that it is valid, not as a statute bond, but only at common law, and propose to prove by witnesses that Bridge was destitute of property, with a view to reduce damages. It was agreed, that the action should be defaulted, if the Court should be of opinion with the plaintiff on the point aforesaid, and that judgment should be rendered according to the provisions of Revis-

ed Statute, c, 148, § 39. But if otherwise, the damage is to be assessed by a jury.

At the May Term, 1842, it was agreed that the case should be argued in writing. Arguments were afterwards furnished by

Potter, for the plaintiff — and by

McCobb, for the defendants.

On June 3d, 1843, the opinion of the Court was delivered by

WHITMAN C. J. — The bond in this case does not appear to have been taken for precisely double the amount for which the debtor stood liable, and therefore is not a statute bond, and is good only at common law. The plaintiff therefore can recover only the actual damage sustained, which is, according to the agreement of the parties, to be assessed by a jury.

JOSEPH P. HOPKINS *versus* PELEG BENSON, JR. *& al.*

A petition for a review is not an action within the meaning of the Revised Statutes, c. 115, § 56; but the Court has power to award costs for the respondents, in such case, under the provisions of § 88 of the same chapter.

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

This was a petition to the District Court for a review of a judgment rendered in that Court, whereby the petitioner was charged as the trustee of one W. Hopkins. The petitioner also prayed for leave to amend his disclosure. After a hearing of the parties on the petition, the District Judge, "ordered that judgment should be rendered, that said Joseph take nothing by his petition, and that the respondents recover their costs for the present term of said Court."

The petitioner filed exceptions.

Wells and *May*, for the petitioner, contended that as there was an express authority in the former statute, empowering the Court to grant reviews on petition, St. 1821, c. 57, § 5, "to award the respondent his costs," and an omission of that,

or any corresponding provision in the Revised Statutes on the same subject, c. 123, the Court has now no power to award costs in such case. The subject of costs on application for reviews was not intended to be taken up in any general chapter, for in the next chapter, respecting "actions of review," it is expressly provided, that the party prevailing in the review shall recover his costs. Nor do either of the sections in chapter 115, relating to "Proceedings in Court," extend to a case like this. The first, § 56, relates merely to actions, and not to petitions. Nor could the legislature have intended to include this case in the other provision, § 88. This is wholly unlike the cases mentioned in that section. And besides, as petitions for reviews are of much more frequent occurrence, than those applications mentioned by name, it would not have been brought in under "any like process."

Emmons, for the respondents, relied upon the Revised Statute, c. 115, § 88, as giving power to the Courts, in their discretion, to award costs to the respondents. This chapter contains general provisions, relating to classes of cases. This comes within the class mentioned in § 88.

The opinion of the Court was drawn up by

TENNEY J. — The petitioner excepts to the allowance of costs to the respondent, insisting that it is unauthorized by any statute. A petition is not an action within the meaning of the Revised Statutes, 503, c. 115, § 56, which allows costs to the prevailing party in all actions. But in the same chapter, § 88, p. 507 & 8, it is provided, that "on application for a writ of *certiorari*, *mandamus* or *quo warranto*, on behalf of any private person, or for *any like process*, the Court in their discretion, may allow costs to any person notified, and appearing as a respondent, and issue execution against the applicant." Is a writ of review embraced within the meaning of the words "any like process?" There is not a perfect similitude in the three writs mentioned one to the other; consequently those referred to in this language cannot in every respect be like

them. Writs of *certiorari*, *mandamus* and *quo warranto* do not necessarily issue from the same Court. Some may be to a Court of inferior jurisdiction, and some are against an individual; the form is essentially different and the object sought is dissimilar. "Like processes" are such, undoubtedly, as have some features in common with all those which are named. A writ of review, like them, is issued by an order of the Court applied to, after a hearing, upon a petition; a process is made and served upon the other party, and entered in Court; and thereon the parties are heard, and a judgment rendered. The object in each is to revise and correct or restrain the proceedings of Courts, or individuals, claiming to have therefor legal authority, but which are alleged to be erroneous or defective. If a writ of review is not embraced within the terms used, it is not easy to determine what was intended; and we are not to suppose that the Legislature employed this language for no purpose.

Exceptions overruled.

ATWOOD M. PRAY *versus* SAMUEL G. STINSON.

Where the sickness is occasioned by the climate, without the fault of the seaman, or of the officers of the vessel, the expenses of the cure, by the maritime law, are a charge upon the vessel.

But by the acts of Congress of the United States, if the vessel be furnished with a chest of medicines, accompanied with proper professional directions for administering them, in accordance with the provisions of those acts, the bill of the physician for attendance upon a seaman, sick on board at a port, is to be paid by such seaman.

And the rule is the same, whatever may be the nature of the disease, even if it be a violent and dangerous one, as the yellow fever.

The desire of the seaman to be removed on shore, cannot change the rights and the relations of the parties. His judgment, in such case, must necessarily be subjected to that of those who are by law entrusted with the prudential concerns of the vessel and crew for the common good of all.

Nor can the sickness and absence of the master on shore make a difference. The law devolves his duties, during such absence, upon the mate, who, in the absence of evidence to the contrary, it presumes, is able to perform them properly.

Where it was a proper case for medical advice, and the physician was called, without any request from the seaman, because the danger was such, that the laws of the place, as well as the feelings of humanity, required that he should be, the law will imply a promise from him who received the benefit of the services, to pay for them.

If the laws of the place require that the physician's bills for attendance upon a seaman should be paid by the vessel before she can leave port, and the amount is paid by the master, it must be considered as paid for the seaman's use during the voyage, in extinguishment of so much of his claims. In a suit against the owners for wages, it is not, therefore, necessary that such payment should be filed in set-off.

STATEMENT of facts. It is admitted in this case, that the plaintiff sailed in the brig Partridge from Bath to Havana in Cuba, and that the defendant is part owner of said brig, and is liable to pay the plaintiff such sum as he is legally entitled to recover; that the plaintiff was in the employment of the defendant, as aforesaid, two months and fifteen days, in 1841, at seventeen dollars per month, amounting to forty-two dollars and fifty cents; that the plaintiff was paid seventeen dollars and seventeen cents at the time he shipped, and also hospital money, being fifty cents, making seventeen dollars and

sixty-seven cents. And it is also admitted, that the plaintiff was sick while said brig was at Havana, and that while sick he remained on boad said brig; that said sickness was the yellow fever, of a very dangerous character, and that the defendant paid for the physician, who attended upon the plaintiff, twenty-nine dollars, being for medical attendance of said physician for the plaintiff during said sickness. And it is further admitted, that by the laws of Cuba, all foreign vessels are liable for physicians' bills, and cannot leave the port until they are paid, and that no pass to clear from the fort will be allowed, unless a certificate of the payment of said bills is made by the officer of the customs; that by the laws of Cuba aforesaid, there is a forfeiture to a considerable extent, if any seaman dies on board a foreign vessel without his having a physician from the port to attend upon him; and also there was, during said voyage and during said sickness, a medicine chest on board said brig, suitably and legally supplied with all necessary and proper medicines, agreeably to the laws of the United States; that during said time of sickness, the captain of said brig was sick and on shore, and that after the plaintiff had been sick two or three days, while lying on deck on his bed under an awning, he said he should rather go on shore to be sick than to remain on board of the brig; and that this was said in the hearing of the mate of said brig, the captain being sick on shore, at that time. The brig was of 194 tons burthen, and had on board a captain, mate, cook and five seamen.

It is further agreed by said parties, that the plaintiff was on board said brig in the capacity of seaman; that the sum paid by the defendant to said physician may be taken into consideration by the Court in the same manner as if the sum paid by the defendant to said physician had been filed in set-off; that the directions prescribed by law for the use of said medicines accompanied the medicines, and were in all respects such as the law required; and that if the Court should be of opinion that the plaintiff is liable to the defendant for said sum so paid, judgment shall be rendered for the defendant for his costs. But if the Court should be of opinion, that the plaintiff is not

liable for said sum, so paid by the defendant, then the plaintiff is to recover his wages as aforesaid with interest from the date of the writ, and his costs. If the Court should be of opinion that the demand of the defendant ought to have been filed in set-off, although judgment should be rendered for the defendant as aforesaid, yet the plaintiff shall be entitled to his costs up to and including April Term of the District Court, 1842.

Danforth, for the plaintiff, said that by the maritime law, it was well settled, that every sick seaman was entitled to be cured at the ship's expense; and contended that the law, in this case, was not changed by the statutes of the United States on this subject. The true construction of the U. S. St. of 1790, c. 29, and of 1805, c. 88, is believed to be, that in cases where the medicine chest and directions are on board, and the proper persons present to administer the medicines, and thus are a substitute for the attendance of a physician, the owners are not liable; but in all other cases they are. *Brig George*, 1 Sumn. 151; same case before District Judge, ib. 591; Curtis on Rights of Seamen, 111. This was a dangerous case of the yellow fever, where the medicine chest was useless, and the captain was sick on shore, and incapable of administering medicine.

The plaintiff desired to be put on shore, and he should have been. The owners are clearly liable to pay the expenses of a seaman while sick on shore. 1 Peters' Adm. Dec. 256. The owners cannot avoid their liability by the refusal of the persons on board their ship to do their duty.

The laws of Cuba, which are to govern in this case, require that a physician should be called to a seaman sick on board a ship in Havana, and provide that the ship should be detained if it is not done. The physician, in this case, was called by the mate, without the request or desire of the plaintiff. He was then employed for the benefit of the owners, to prevent the detention of the vessel, as well as called by them; and they should not charge the expense to the plaintiff.

But if our own laws are to govern, the result will be the same. The physician was not employed at the request of the

plaintiff, and even if he had been, the owners had no right to pay the bills, and make the plaintiff their debtor.

Wells, for the defendant, contended that the laws of the United States had exempted the owners from the payment of the bills of a physician employed to attend upon a seaman on board their vessel, when there was a medicine chest on board, according to the provisions of those statutes. The laws of the United States make no distinction between different descriptions of sickness, or between cases in port or at sea. Abbott on Shipping, 481, note; 1 Pet. Adm. Dec. 256; *Harden* v. *Gordon*, 2 Mason, 541; *The Brig George*, 1 Sumn. 151; Gilpin's R. 447.

The statute regulations on this subject repeal the law before that time existing, as part of the maritime law. *Towle* v. *Marrett*, 3 Greenl. 22; *Comm.* v. *Kimball*, 21 Pick. 373.

It is no benefit to the seaman, to have the bills of physicians paid by the owners, because in such case there would be a corresponding reduction of wages. There is no more reason why such bills should be paid by the owner of a vessel, than by the owner of a house or a farm, where the person taken sick was at work.

The laws of the place, where the plaintiff was taken sick, made the owners liable to pay the bills, and the amount is so much paid to him. The plaintiff would only be entitled to the balance, and that has been paid to him, and the action must fail.

The opinion of the Court was drawn up by

Shepley J. — The sickness may be considered as occasioned by the climate without the fault of the seaman or of the officers of the vessel. And in such a case, by the maritime law, the expenses of the cure are a charge upon the vessel. The act of Congress, c. 29, § 8, requires, that ships or vessels of a certain description should be provided with a chest of medicines, accompanied by proper professional directions for administering the same; and in default thereof that the master shall pay for all advice, medicine, or attendance of physicians,

By an additional act, c. 88, the provisions of the former act were extended so as to embrace a class of vessels including the one in which the plaintiff sailed. In the case of *Walton* v. *The Ship Neptune*, 1 Peters' Ad. Dec. 152, it was admitted, that the weight of authority required the construction then given to the first act of Congress; that, "the ship, by the act of Congress, is bound to furnish medicines or pay the physician's bill; but the sailor, when the ship is so furnished, must pay for chirurgical or medical advice and assistance."

And although learned judges have expressed their doubts, whether the act ought to have received such a construction, their reasons have never been deemed sufficient to authorize a change; and this has been admitted to be the general and well established construction, subject to certain exceptions. And if such were not the original intention, there has been ample time for legislative interposition to effect a change and correct the error. The fact, that there has been no such interference in this commercial country for so long a course of years, tends strongly to establish the accuracy of the construction made by the judicial tribunals. The case of *Harden* v. *Gordon*, 2 Mason, 541, decided, that the vessel is liable, although provided with a chest of medicines, "for board, lodging and nursing, while the sick seaman is on shore." In the case of the *Brig George*, 1 Sum. 151, where the mate being sick went on shore for his own relief, for the safety of the crew, and for the interest of all concerned, it was decided, that all the expenses of the cure, including medical advice and attendance, were a charge upon the vessel, although she was provided with a chest of medicines as the act requires. In the case of the *Brig Forest*, Ware's R. 420, it was considered, that the act could exempt the owners from the charge for medical advice and attendance only, "when the seaman can have the benefit of the medicine administered under the printed directions for its use by the master or some person fit to be entrusted with so delicate a duty." And it was accordingly decided in that case, when the master, mate and four seamen were sick and unable to administer the medicines, that the

vessel was chargeable for medical advice and attendance upon the seamen on board, although properly provided with a chest of medicines. In the case of *Holmes* v. *Hutchinson*, Gilpin's R. 447, it is said, "it must now be taken to be the law of the United States under our act of Congress, that in the case of an ordinary sickness, not infectious or dangerous to the crew, so as to render a removal from the ship prudent or necessary, and when no such removal is made, and the ship is provided with a medicine chest according to the act of Congress, the medical advice of the sick seaman is not chargeable to the ship." It is not perceived that this doctrine, as has been supposed, is at all at variance with that asserted in the case of the *Brig Forest.* The general rule only is here asserted, which was admitted in the case of the *Brig Forest;* while very properly it was not allowed to operate in that case, because the seaman without his own fault was deprived of the very benefit, which it was the design of the act to afford him, when it exempted the owners.

There is nothing in this case to exclude it from the operation of the general rule, unless it can be found in the nature of the disease, the yellow fever; or in the sickness and absence of the master; or in the desire of the seaman to be removed from the vessel. Judge Peters, in a note, 1 Peters' Ad. Dec. 256, says; "where one of a crew is seized with an infectious disease, he should be removed from the rest and sent on shore at the ship's expense for the safety of the whole and the advantage of the owner, who must count on extra disbursements, if he will trade to ports and places liable to such casualties." This remark formed no part of an opinion in a decided case; nor can it be considered as a statement of any principle of law. It is but an expression of his opinion respecting the duty of the master under the circumstances stated. And the reason given by him for requiring it, is not the cure of the sick seaman, but the preservation of the health of the rest of the crew, and the advantage of the owners. It will hardly do for judicial tribunals to take upon themselves to establish one invariable rule for the treatment of a sick seaman

sinking under an infectious or other disease, instead of leaving it to be determined according to the circumstances attending each case, by those to whom the law has entrusted that duty. There may be ports and places, in which it would be most inhuman to pursue the course pointed out in that remark. Judge Hopkinson, in the case cited from Gilpin's R. seems to afford it some countenance, while he is not satisfied with the reasoning. He says, "This is well, when the sick man is taken from the ship for the safety of the crew and the advantage of the owner, but I do not feel the force of any claim on the part of the seaman, because the vessel is trading to a port or place liable to dangerous diseases. This he knew when he made his contract; and if it exposed him to extra expenses, as well as risk, it may be presumed, that he took them into the calculation in fixing the price of his services, the amount of his wages." There is nothing in the act of Congress authorizing any distinction respecting the liability of the owners or master on account of sickness by different diseases, infectious or otherwise, or on account of the danger of the sickness. Nor is there any thing stated in this case, which shews, that the yellow fever might not be expected to be cured as certainly by the medical advice and attention to the sick man on board, as by a removal on shore, with such accommodations and comforts as a common sailor might obtain in that port. It is not to be presumed, that the officers of the vessel did not conduct with humanity and prudence, and for the best interest of the sick and all concerned. And it is not the duty of the Court in the absence of all testimony on these points, to determine, that the expenses of sickness occasioned by a certain disease are to be borne by the owners, when they are exempted in like circumstances, if it be occasioned by other diseases. There would be found as little reason as law for the promulgation of such a general rule, that would be irrespective of the circumstances of each particular case.

The desire of the seaman to be removed on shore cannot change the rights or relations of the parties. His judgment in such cases must necessarily be subjected to that of those

who are by law entrusted with the prudential concerns of the vessel and crew for the common benefit of all.

Nor can the sickness and absence of the master, on shore, make a difference in the case. The law devolves his duties, in such case, upon the mate, who, it presumes, is able to perform them properly. And there is no evidence in this case, that he did not. It is objected, that the services were not performed at the request of the plaintiff, and that payment cannot therefore be exacted of him. It appears to have been a proper case for medical advice, and the physician appears to have been called, because the danger was such, that the laws of the place, as well as the feelings of humanity, required, that he should be. And under such circumstances, the law will imply a promise from him, who has received the benefit of the services, to pay for them. In the case of *Holmes* v. *Hutchinson*, the physician was called by the master, and the seaman was considered as liable to pay for his services.

There is nothing therefore in this case, which exempts it from the operation of the general rule of law, which, as modified by the act of Congress, relieves the owners, and charges such expenses to the seaman.

It is agreed, that by the laws of the place the physicians' bills must be paid by the vessel, before she can leave the port. The amount therefore must be considered as paid for him from the vessel during the voyage, and therefore liable to be deducted from his wages. The vessel is regarded by the maritime law as his debtor, and the account is to be adjusted between him and her accordingly, by considering what she has paid for his use, to be paid in extinguishment of his claims.

Judgment for the defendant.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN,

ARGUED AT JUNE TERM, 1842.

SAMUEL HILTON *versus* JOHN DINSMORE.

If a promise by the defendant to pay the previously existing debt of a third person, be grounded upon the consideration of funds placed in his hands by the original debtor, with a view to the payment of this debt, as well as upon an agreement on the part of the plaintiff to forbear to sue, it is an original undertaking, and not necessarily to be evidenced in writing.

But it is denied, that a promise to pay the prior debt of another, on the consideration merely of forbearance to enforce payment, is valid, unless the promise be in writing.

ASSUMPSIT. In one count in the writ, the plaintiff alleged, that John Dryden was indebted to him for the balance due on two promissory notes; that on, &c., the defendant, in consideration that Dryden had put property into his hands for that purpose, and in consideration that the plaintiff would forbear to sue said notes, promised to pay the same notes to the plaintiff; that he did forbear to sue Dryden, of which the defendant had notice, and thereby became liable, and in consideration thereof promised to pay the amount due on the Dryden notes to the plaintiff. The facts are stated in the opinion of the Court.

At the trial, a nonsuit was directed, which was to be set aside, if the plaintiff was entitled to recover.

H. Belcher, for the plaintiff, contended: —

1. The promise made in this case was made on a good consideration, and does not come within the statute of frauds. It need not, therefore, be in writing. *King* v. *Upton*, 4 Maine R. 387; *Russel* v. *Babcock*, 14 Maine R. 138; Roberts on Frauds, 232.

2. We claim to recover also on the ground, that the defendant had received property from the original debtor to pay this debt, and had the same in his hands for that purpose at the time the promise was made. *Smith* v. *Berry*, 18 Maine R. 122; *Packard* v. *Richardson*, 17 Mass. R. 122.

R. Goodenow, for the defendant, said this could not be an original promise, because the notes against Dryden were not given up, and the right to maintain a suit upon them against him remained unimpaired.

It was therefore a mere collateral promise to pay the debt of Dryden, made while that debt was in existence, and was so to continue. The promise relied on, not being in writing, comes within the statute of frauds, and the plaintiff is not entitled to recover upon it. Our statute is the same in substance as the English statute of frauds, and the construction should be the same. *Wain* v. *Warlters*, 5 East, 10; *Saunders* v. *Wakefield*, 4 B. & Ald. 595.

The cases of *Packard* v. *Richardson*, and *King* v. *Upton*, cited for the plaintiff, merely go to say, that the *consideration* for the promise need not be stated in the writing, but affirm the doctrine, that the promise itself must be. If the promise be to pay the debt of another, it must be in writing, or it is void. *Stone* v. *Symmes*, 18 Pick. 467. In the present case the plaintiff gave up nothing, promised nothing, and suffered no injury. It was merely advice gratuitously given by the defendant to the plaintiff; and the plaintiff must also fail, because there was no consideration for the promise, had it been made in the mode required by law.

The opinion of the Court was afterwards drawn up by

Whitman C. J. — It appears in this case, that the plaintiff

held certain notes of hand against one John Dryden; and proved that after they became due, the defendant sent him word, that "Dryden had put property into his hands, wherewith he could help him to his pay; and that he would do it, if he would not sue the notes." The plaintiff replied to the messenger, that "he would be easy, as he thought Dinsmore was good." Of this the defendant was soon after informed by the same messenger.

The plaintiff did not sue Dryden, but after waiting a reasonable time, and not receiving his pay from either Dryden or the defendant, he called upon Dryden, without effect, for security; but received from him, at different times, small portions of the amount due; and finally, to recover the residue, commenced this action against the defendant, upon the promise made by him as before stated. The defence is, that under the statute of frauds, the promise, not being in writing, was nugatory.

The decisions upon this branch of the statute have been such as to render it somewhat difficult to ascertain, with precision, the rule to be applied to the ever varying circumstances attending the different cases arising under it, or seeming to be referable to it. Mr. Chief Justice Kent, in *Leonard* v. *Vredenburgh*, 8 Johns. R. 39, has undertaken to distribute the decided cases into three classes. The first is composed of collateral undertakings, coincident with, and founded upon the original consideration and promise; the second, of undertakings subsequent to the original indebtment; and the third, arising out of some new and original consideration of benefit or harm, moving between the newly contracting parties. The two first he considers to be within the statute of frauds; but that the last is not.

To support a promise in either case there must be some consideration of advantage to one, or detriment to the other of the parties to the collateral undertaking. In the second class, it would seem, a consideration may consist of delay or forbearance or other inconvenience to the creditor, or slight incidental advantage to the promissor. But in every such case

the promise must be evidenced by writing. 1 Saund. 211, note, *Watson* v. *Randall*, 20 Wend. 201; *Stone* v. *Symmes*, 18 Pick. 467; *Farley* v. *Cleveland*, 4 Cowen, 432, and 9 ib. 639.

The case of *Russel* v. *Babcock*, 14 Maine R. 138, may seem to sanction a different doctrine. The undertaking in that case was not evidenced by writing, yet Mr. Justice Emery, in delivering the opinion of the Court, is reported to have said, that "the engagement of the defendant is to be deemed an original undertaking, on consideration of forbearance, most liberally extended to pay the debt of Sprague." If this was in reality the ground of decision in that case, and the abstract of the reporter is to that effect, we should be constrained to say, that it is unsupported by the authorities. But the case contains a statement of other grounds, which might have influenced the decision. Those were, that the defendant, after the commencement of the suit, had said "he should lose nothing as Sprague had made him secure. From this it may have been considered as inferrable, that at the time of the promise to pay the debt, he had received of the debtor funds with which to pay it; and that this was the real consideration for the promise. If so, it might come within the third of the classes of Chief Justice Kent, arising out of some new and original consideration of benefit, &c. and be supported upon the authority of the case of *Farley* v. *Cleveland*, and cases therein cited.

The result of those cases, summed up, and elaborately considered by Mr. Chief Justice Savage, would seem to be, that, if the defendant had received a valuable consideration for the purpose from either party, distinct from and independent of that of the original debt, and, thereupon, had promised payment, it would be an original undertaking, and not necessarily to be evidenced by writing; as in the case of being furnished with funds for the purpose of paying the debt; or where the plaintiff, having a lien upon property to secure his debt relinquished it to the benefit of the person promising to pay it; or

where the debtor, in consideration of the promise, had been discharged.

The case at bar must fall into this class; otherwise the plaintiff cannot recover; for the promise relied upon was after the indebtment, and was not in writing. The question then is, was the promise of the defendant grounded upon the consideration of funds placed in his hands by the original debtor with a view to the payment of this debt, as well as upon an agreement on the part of the plaintiff to forbear to sue? There was evidence in the case which might have tended to show, that funds were so placed in his hands. This evidence consisted of admissions on his part supposed to be to that effect. If from these the jury might have inferred such a fact; and should have been satisfied that there was the promise to pay, relied upon by the plaintiff, their verdict might have been for the plaintiff; and looking at the evidence as reported we do not think it certain that they might not have so found.

The nonsuit therefore must be taken off; and the action will stand for trial.

AMASA CRAFTS *versus* HENRY FORD.

The title acquired by the levy of an execution upon land, is not impaired, should it be shown, that the execution was issued upon a judgment recovered by one of two payees of a note, and it did not appear how he became entitled to recover the judgment in his name alone.

Where a prior deed from the debtor to a third person, of the premises levied upon, is fraudulent as to the title of the execution creditor, even if such fraudulent grantee can object to any informality in the levy, it is good against him, where his objection is, that both the debtors chose an appraiser, when the land was the sole property of one of them.

THIS was a writ of entry to recover a small lot of land in Farmington with a dwellinghouse thereon. The demandant claimed title by a levy on it as the estate of Henry Ford, Jr. and Arthur Morse. On the trial, before SHEPLEY J. it appeared in evidence, that there was an error in describing the lot, in that part of the line, which states it to commence, on the

south line of the land of Henry Russ, and to be in another place bounded by his land, there being another lot between the land intended to be levied on and the land of Russ. In other respects the bounds were correctly described. For this cause, and for defects apparent in the proceedings in making the levy, the counsel for the tenant contended that the demandant obtained no title thereby. But for the purpose of enabling the jury to find the facts, these objections were overruled. Morse never had any title to the lot levied upon, and the return of the officer stated that the debtors chose an appraiser. Henry Ford, Jr. conveyed a tract of land, including the premises demanded, to Ebenezer Bean by deed dated Nov. 7, 1835, recorded the 11th of December of the same year. The demandant proved by Elnathan Pope that he wrote and witnessed the execution of that deed; that it contained all the real estate of Henry Ford, Jr.; that he was then embarrassed, and failed in business, whether before or after cannot say; that Bean was a brother-in-law of Ford, Jr. having married his sister; that he saw nothing paid, nor any security given; that the parties were present, and stated, that Bean was to pay a certain sum in cash to pay Ford's debts, two or three hundred dollars, which it was said Bean had in his house near by, in specie, and they were to go there and make the payment; that another part of the consideration, amount not recollected, was to be paid by certain debts or claims which Bean held against the tenant, Henry Ford, the father of Henry Ford, Jr.; and that a remaining portion of the consideration was to be applied by Bean for the benefit and support of Henry Ford, Sen.

It appeared, that Henry Ford, Sen. had paid the consideration for the purchase of the estate, when it was conveyed to Henry Ford, Jr. The report of the case states, that a question was made, whether the deed was not so made by the procurement and hand of Henry Ford, Jr. but the finding of the jury negatived any fraud in this particular. On this testimony the jury were instructed, that if they believed that the agreement between Ford, Jr. and Bean as to the purchase of the land, had been carried into effect, that deed must be regarded

as fraudulent, as against Henry Ford, Jr.'s prior creditors, unless Henry Ford, Jr. was under some legal obligation to support his father, of which there was no evidence.

The notes upon which the demandant obtained judgment, to satisfy which the levy was made, were made by the judgment debtors to the judgment creditor and one Perham, and it did not appear how or when Perham parted with his interest in them to the demandant. One of the notes was dated the 11th of May, 1832, the other the 24th of November, 1834. The counsel for the tenant contended, that the demandant could not be considered in law as a prior creditor, but the Court decided otherwise. The verdict was for the demandant.

If in giving these opinions or instructions, the Judge was in error, the verdict was to be set aside; and if the defects in the levy are such as to prevent the demandant from obtaining any title under it, he was to become nonsuit.

H. Belcher argued for the tenant, and cited, *Herring* v. *Polly*, 8 Mass. R. 113; *Banister* v. *Higginson*, 15 Maine R. 73.

Wells argued for the demandant, and cited, *Tibbets* v. *Merrill*, 3 Fairf. 122; *Herring* v. *Polly*, 8 Mass. R. 113; *Buck* v. *Hardy*, 6 Greenl. 162; *Johnson* v. *Whitwell*, 7 Pick. 71; *Harris* v. *Sumner*, 2 Pick. 129; *Barney* v. *Norton*, 2 Fairf. 350; *Damon* v. *Bryant*, 2 Pick. 411; *Howe* v. *Ward*, 4 Greenl. 195; *Read* v. *Davis*, 5 Pick. 388.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff claims under a levy, on the estate demanded, as the property of Henry Ford, Jr. and one Morse. Before the levy the estate had been conveyed, by said Henry, Jr. to one Bean, under whom the tenant claims to occupy the same. It appears, that the cause of action, on which the plaintiff's judgment was recovered, was originally evidenced by two notes of hand, given by the said Henry, Jr. and said Morse, bearing date, the one in 1832, and the other in 1834; and the deed to Bean was made in the year following. The notes were originally given to the plaintiff and one Perham; but suits were instituted on them by the present plaintiff

alone. How he came by the right to recover the judgment in his own name alone does not appear; nor is it material that it should. It is sufficient that it stands so recovered. The plaintiff was, therefore, a creditor at the time of the conveyance to Bean; and, as such, had a right to set up fraud to obviate its effect upon his levy. The proof on the part of the plaintiff was such, that the jury found the conveyance to have been fraudulent as against creditors.

The deed upon which the tenant relies having thus been found to be fraudulent, as against the plaintiff, is, as to him and his levy, to be treated as a nullity. Bean and his tenant, the defendant, may, therefore perhaps, be regarded as strangers, and as such having no right to question the regularity of the levy. *Buck* v. *Hardy*, 6 Greenl. 162. However this may be, according to the case of *Herring & al.* v. *Polley*, 8 Mass. R. 113, they are precluded from taking the ground relied upon. A levy is a statutory mode of conveyance; and in this case it may be likened to a conveyance by two persons jointly of real estate, of which one only is the owner, in which case the conveyance would be effectual to pass the estate of the one owning it.

It was objected at the trial, that the levy was defective by reason of an error in the boundary set forth; but in the argument of the case reserved this ground was not insisted on.

It was further objected, as it appeared, that the consideration originally paid for the land, when purchased by Henry, Jr. was paid by Henry, Sen. the tenant, that, so far as it affected his rights, under the conveyance to Bean, the same could not be regarded as fraudulent. But no explanation of that transaction appears, from which an inference can be made, that the money paid by him was not Henry, Jun's or due to him, or not intended as an advancement, Henry, Jr. being his son, or as a gratuity. We cannot therefore consider this objection as of any weight. And, moreover, it does not appear, that, in the conveyance to Bean, any reservation was inserted for the benefit of the tenant. He has, therefore, no ground upon which he can be sustained against the claim of the plaintiff.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET,

ARGUED AT JUNE TERM, 1842.

JOHN G. DUDLEY *versus* AURIN Z. LITTLEFIELD *& al.*

A note, given to J. M. P. and J. W., who were copartners in the purchase and sale of lands, as the consideration of a deed of certain land, was indorsed by one of them by the partnership name of P. & W. by the prior consent of the other who was not then present, in payment of a debt due by them; and *it was held*, that the note was legally indorsed and transferred thereby.

Where a note was signed by one of two copartners in trade, by the name of their partnership firm, and given as the consideration for the purchase of real estate, conveyed to both by his procurement, to which the other had never assented, and of which he had no knowledge until afterwards, and this transaction was wholly out of the line of their business, and known to be so by the payees; but subsequently this partner, in his own name and under his own hand, joined with the other in a bond to a third person, stipulating to convey the same land on the performance of certain conditions, and at the same time disclaimed any interest therein, avowed that he did it only for the benefit of his copartner, and declared that he would never participate in the profits thereof; *it was held*, that he had so confirmed the doings of his partner, as to be holden on the note.

Where a note, given in the name of a partnership, was indorsed for a valuable consideration before it become payable, and the indorsee had no other knowledge of its origin, than that it was given for land purchased, *it was held*, that this was not sufficient notice to him, that the signature of the partnership name had been unauthorized.

If a promissory note has been indorsed and transferred to an indorsee for value before it fell due, and is available in his hands, want of consideration cannot be set up as a defence against his indorsee, although the latter had been notified before the transfer to him, that the note was without consideration.

ASSUMPSIT upon a note for $1625, bearing date August 17, 1835.

The testimony at the trial before WESTON C. J. is given in full in the report of the case, but as the substance will be found in the opinion of the Court, it seems to be unnecessary to make any additional statement.

After the evidence was all before the jury, the defendants contended that if the jury were satisfied, that the land, the conveyance of which formed the consideration of the note, was of no value, then there was no consideration for the notes of Pollard & Wheeler to Warren, and no consideration for the defendants' notes to Pollard & Wheeler.

The Judge ruled, that the land was of some value, and instructed the jury, that they were bound in law to consider it of some value; that the value of land did not depend upon the uses to which it might be applied; but if it had at the time a marketable value, whatever it could be sold for fairly, and without fraud, was its value; that however worthless and useless lands or things might be for all necessary purposes of life, yet still, if they could be fairly sold for any thing, they had a marketable value, and whatever they could be sold for was their value; that many vendible articles were found to be entirely useless, and yet still, what they could be sold for, was the true measure of their value; that if there was no fraud, Warren could recover any notes given him for the land, and so also could Pollard & Wheeler, and the plaintiff claiming under them; that any sum or land to the value of a barleycorn is a sufficient consideration to support a promise; that if the defendants have paid more than the land is really worth to Warren and to Pollard & Wheeler, as there was value in the land, they are bound to pay all they promised for it by their notes; that a gross inadequacy of consideration is evi-

dence of fraud; but in this case there was an adequate consideration in the estimate they put upon it, if there was no fraud, especially as Warren made no representations, and Wheeler & Pollard examined the land for themselves.

The verdict for the plaintiffs was to be set aside, if the ruling or instructions were erroneous.

Wells, for the defendants, contended, that the dealing in lands on joint account, could give no power to one to indorse a note in the name of both. There can be no partnership in the purchase and sale of lands. The transfer must be made by deed, and one cannot sign for another without authority under seal. The note therefore was not legally transferred to the plaintiff, and the action cannot be supported. *Lowell* v. *Reding*, 9 Greenl. 85; Bayley on Bills, 49, 52, 115; *Smith* v. *Whiting*, 9 Mass. R. 334; *Pitts* v. *Waugh*, 4 Mass. R. 424; *Burgess* v. *Lane*, 3 Greenl. 165.

Littlefield & Kerswell were partners only in the purchase and sale of goods, and this note was given for the consideration of a tract of land. Kerswell could not lawfully make the partnership liable by a note given in the name of the firm by him without the knowledge of his partner. He gave no prior authority, or subsequent assent. Littlefield is not liable upon it. *Man. & Mech. Bank* v. *Winship*, 5 Pick. 11; *Munroe* v. *Cooper*, ib. 412. His subsequent signing of the deed, conveying away the land according to Kerswell's request, under protest that he would have nothing to do with it, cannot amount to a ratification. Kerswell procured the conveyance to him, and he was the proper person to take the land back. Littlefield's performing a mere act of common honesty, stating why he made the conveyance, cannot be construed into an affirmance of a contract made without authority from him.

The defendants had the same right to set up want of consideration in this suit, as if the action had been brought in the name of the payees. Warren, the first indorsee, was informed what the consideration of the note was, and indeed had an interest in it. The note was given for the same land purchased by the payees of Warren. *Knapp* v. *Lee*, 3 Pick. 452; *Hatch*

v. *Dennis*, 1 Fairf. 244. And the plaintiff was expressly informed by Littlefield of the facts, before he took the note.

The Judge erred in ruling, that the jury must necessarily consider the land to be of some value. It was not a question for him, but for the jury, to determine. And the decision made by the Judge was wrong, and founded on erroneous principles. It was that the value of the land was what it would sell for, and that having been sold for something, was conclusive evidence, that it was worth something. The practical effect of the ruling is, that if one man can cheat another in the sale of land, the price thus obtained is its true value. *Fowler* v. *Shearer*, 7 Mass. R. 22; *Dickinson* v. *Hall*, 14 Pick. 217; *Bliss* v. *Negus*, 8 Mass. R. 46; *Shepard* v. *Temple*, 3 N. H. R. 455; Bayley on Bills, 538; *Gates* v. *Winslow*, 1 Mass. R. 65; *Wyman* v. *Heald*, 17 Maine R. 329; *Cutler* v. *How*, 14 Pick. 293; 1 Story's Eq. 248.

N. Weston, for the plaintiff.

One partner may negotiate a note belonging to the partnership, and make use of the partnership name in so doing. It is wholly immaterial what the consideration was, provided the note belonged to both as partners. Besides, if the note belonged to them as joint owners, and not as partners, one with the assent of the other might make the indorsement in payment of a debt due from both. It is unnecessary to write the names at length, when the identity is proved.

Although Littlefield was not originally liable, and would not have become so, unless he adopted the act, yet this was done, and he became liable, when he entered into the new bond to a stranger, and joined in the deed. If he did not derive any benefit personally, but allowed his partner to have the whole, it could make no difference. He should have conveyed back to the grantor all interest he derived under the deed.

The note was clearly good in the hands of Warren, and the defendants could not set up want of consideration as a defence. Being available in his hands, he could sell it to any other person, who would succeed to all his rights, whatever notice the

purchaser might have had. *Smith* v. *Hiscock*, 14 Maine R. 449; *Trull* v. *Bigelow*, 16 Mass. R. 406.

There was no evidence in the case, that Warren ever saw the land, or knew any thing of it personally. Fraud was not pretended. The instruction, as matter of law without the illustrations, was merely this, that the marketable value of lands at the time, is the measure of value, where there is no fraud. Utility is not the only standard of value. A large portion of the articles sold have their value only in the fancy, such as diamonds and lace. There can be no other test of value in the transactions of life, than the marketable value at the time the contract is made or is broken.

The opinion of the Court, TENNEY J. taking no part in the decision, having once been of counsel in the action, was drawn up by

WHITMAN C. J. — The plaintiff sues as an indorsee of a note of hand, purporting to have been made by the defendants, to John M. Pollard and John Wheeler, payable to them or their order in two years from August 17, 1835; and indorsed in blank by Wheeler, by putting thereon the names "Pollard & Wheeler." And Wheeler was introduced by the plaintiff, at the trial and testified, that he was authorized by Pollard, to negotiate the note to Isaiah Warren, in payment of a debt, which was due to him from them; and that in pursuance thereof, he indorsed it as above; and delivered it to Warren, long before it became payable; who gave credit therefor by indorsing the amount on a note he held against them. He further testified, that he and Pollard were copartners in buying and selling land.

It was objected by the defendants, that there could be no such partnership; and that the indorsement of the note, in the manner above stated, was no transfer of it. These objections are believed not to be sustainable. We do not see why there may not be a copartnership in buying and selling land, as well as in any other vendible property. It is an agreement merely to share in the profit and loss of negotiations. The rules

for transferring land may be different from those for the transfer of personal estate; but that can make no difference in the result, as to profit and loss. Copartners in trade often connect the purchase and sale of real estate, with their other negotiations; and the profit and loss relative thereto goes into the general account thereof; the only difference being, that a different form is used in transferring real estate from that which is requisite in the transfer of personal property. Notes, taken for the price of real estate, may be transferred, as if taken for any thing else; and we cannot regard the transfer of the note, made as before stated, otherwise, than as effectual for the purpose. It was an indorsement by a name which payees might well assume for the purpose; and the indorsement may be well declared upon, as having been made by them, by the name of Pollard & Wheeler; especially when accompanied, as in this case, by proof, that the indorsement was specially authorized by Pollard, the other payee.

It was next objected, on the part of Littlefield, one of the defendants, that the note was signed by his copartner in trade, by the name of their copartnership firm, and that it was given for the consideration for a purchase of real estate, to which he had never assented; and in reference to the negotiation for which he had no knowledge, till after the purchase by his copartner; and that the negotiation was wholly out of the line of the business of the copartnership, of which Pollard & Wheeler were well knowing. To obviate this objection the plaintiff proved, that, after the purchase, a certain individual received a bond, signed by Kerswell & Littlefield, the said Littlefield having personally executed the same, in which it was conditioned, that the defendants would convey the land, so purchased by them, to him upon certain terms and conditions therein expressed, the said Littlefield, at the same time, disclaiming any interest therein, and avowing, that he only did it for the benefit of his copartner and declaring, that he never would participate in the profits thereof. The Judge, sitting in the trial, nevertheless ruled, that this was a ratification of the purchase, and rendered the note, on this ground, unobjec-

tionable on the part of Littlefield. To this ruling the counsel for the defendants excepted. The fact being established, the Judge undertook to pronounce the legal effect thereof. This, it is believed, he might well do. But it is contended that he misjudged as to the legal effect of the act. It is insisted that Littlefield's constant declarations, that he would have nothing to do with the negotiation, and that he would not participate in the fruits thereof, did away the effect of his act in executing said bond. To us it seems, that, to render his declarations available to himself, he should have done no act inconsistent therewith. If he would avoid a note given by his partner, in the partnership name, upon the ground that it was unauthorized by their course of business, he should wholly have abstained from doing any act, whereby the property, being the consideration for which the note was given, might become alienated to any third person. If he would rid himself of it, in any way, or do any act concerning it, he should have offered to the grantors a relinquishment of any possible benefit he might have it in his power to derive from it. In such case his acts would have been consistent with his declarations. But when he undertook to aid his partner, by agreeing to convey the land for his benefit, although upon a contingency, he cannot be regarded otherwise, than as having confirmed the doings of his partner, in making the purchase, so far at least as it respected their liability on the note in question.

But the case shows that Warren became the indorsee of the note, for a valuable consideration, and before it had become apparently discredited. And it does not appear that he had any other knowledge of its origin than, that it was given for the land. This could not afford him any ground to apprehend, that the signature of a partnership firm had been unauthorized. For it is certainly no uncommon occurrence for copartners to purchase land, and give their securities for the consideration in the partnership name. This could not fail to have been known to be the case, during the rage for speculation in wild lands, which characterized the period in which this note had its origin. A note so taken by an indorsee has been held

to be available in his hands although it might have been given in the name of a partnership firm, in furtherance of a negotiation not within the scope of the partnership concern ; and even although the note were wholly without consideration in its inception.

It is said, however, that the note was given for the same land, which the payees had purchased of Warren ; and that he well knew the land to be valueless ; and, therefore, that the note was without consideration and void. But we do not see that the case presents the slightest evidence, tending to show any such knowledge on his part. It does not appear that he had ever seen the land ; and he found the payees willing to purchase of him, according to the weight of testimony, at one dollar and twenty-five cents per acre, after they had, with two assistants, been upon the land, and explored it to their satisfaction. And, moreover, we do not, by any means, gather from the testimony detailed in the case, that the land was to be considered as valueless. We therefore regard the note, while in Warren's hands, as having been valid and recoverable.

But it is further contended that the plaintiff, the present holder, who took the note of Warren, when overdue, had been previously cautioned not to purchase it, and had been told, by said Littlefield and others, that it was without consideration ; and had been signed by his (Littlefield's) partner, without any authority from him to use the partnership name for such purpose. The answer to all which is, that the note was, unquestionably, good in the hands of Warren, of whom the plaintiff purchased it ; and that Warren could lawfully transfer to any one else any claim, which he had by virtue of it. We therefore, consider the verdict of the jury to have been properly returned for the plaintiff ; and that judgment must be entered thereon.

TICONIC BANK *versus* LEVI JOHNSON.

When the payee of a promissory note writes the words, "*holden without demand or notice,*" on the back of the note, and signs it, and another person writes his name directly below it; whether this is or is not to be considered a waiver of demand and notice on the part of the second indorser, an agreement by him to waive demand and notice may be proved by oral evidence, or may be inferred from circumstances.

Where a note is discounted at a bank for the benefit of the first indorser, and the money is passed to his credit as a deposit, and a portion of it remains in the bank until the note becomes payable; it would seem to be optional with the bank to retain this money in part payment of the note, or not. The omission to retain it, cannot destroy the right to recover of another indorser the full amount.

Where the cashier of a bank has made an entry on the bank books, that a certain note had been discounted at a certain time, it is competent for him to testify that the entry was in fact but conditional, and made without authority, and that the note was not then discounted.

By accident the report of the case never came into the hands of the Reporter. The facts appear, however, to be sufficiently stated in the opinion of the Court, to understand the questions of law involved in the decision.

Wells and *Hutchinson* argued for the defendant, and cited, *Farmer* v. *Rand*, 14 Maine R. 225; *Central Bank* v. *Davis*, 19 Pick. 373; *Smith* v. *Hiscock*, 14 Maine R. 449; *Gowen* v. *Wentworth*, 17 Maine R. 66; *Goddard* v. *Cutts*, 2 Fairf. 440; Bayley on Bills, 150, 398; *Creamer* v. *Perry*, 17 Pick. 332; *French* v. *Grindle*, 15 Maine R. 163.

Boutelle argued for the plaintiffs, and cited, *Fuller* v. *McDonald*, 8 Maine R. 213; *Drinkwater* v. *Tebbetts*, 17 Maine R. 16; *Boyd* v. *Cleavland*, 4 Pick. 525; *Taunton Bank* v. *Richardson*, 5 Pick. 436; *Barker* v. *Parker*, 6 Pick. 80; Chitty on Bills, (9th Am. Ed.) 535, and notes.

The opinion of the Court was drawn up by

WHITMAN C. J. — This action is against the defendant as an indorser of a negotiable note of hand. No demand on the makers was proved. The plaintiffs contended that the defendant had agreed to waive any such demand. To prove this

they relied upon the indorsement of the defendant, which was in blank, but directly under the name of M. P. Norton, the payee, on the back of the note, over which had been written by Norton, when he indorsed the note, the words, "holden without demand or notice;" and upon the testimony of one Perkins, the cashier of the bank, who stated, that, on the second of January, 1837, Norton presented the note for discount; and it was then agreed to discount it, if he would indorse it, waiving demand and notice; and get the defendant to do the same, to which Norton assented; and received one hundred dollars in anticipation on account of it; and was to receive the residue after the defendant should have indorsed it; that, on the tenth or eleventh of the same January, he received a letter from the defendant, saying he would indorse the note, left by Norton at the bank for discount against Dwinell & als. for $1500, for his, Norton's accommodation; that, between the tenth and eighteenth of the same month, the defendant called at the bank, when the note was presented to him for his indorsement, whereon he read the words, "holden without demand or notice," over Norton's name; and asked if he should place his name immediately under Norton's, to which he, the witness, replied, that he had better do so, as it would save the necessity of demand and notice; to which the defendant assented, and immediately so placed his name.

The plaintiffs insist that by so placing his name on the note he waived demand and notice; but it may well be questioned, whether the mere placing the name of the defendant under that of the payee, over whose name a waiver was placed, although so written as to apply to one or many, would render him liable without demand and notice. In *Central Bank* v. *Davis*, 19 Pick. 373, it was held, that the contracts of indorsers on notes are several; and that words waiving the right to notice, over the payee's name, applied only to the payee. The words, in that case, might be applied to the plural, as well as to the singular number. Yet the Court say, "the waiver was an essential part of the indorsement; and materially affected the liability of the first indorser. It was his several act, and

does not bind any one else; and further, "then follows the blank indorsement of the defendant, which the holder has a right to fill up; but, in doing it, he is not at liberty to write just what he pleases over the name; but is bound by mercantile usage, which on this point has the force and certainty of law."

In *Farmer* v. *Rand*, 14 Maine R. 225, cited by the counsel for the defendant, however, it was decided that, "we waive demand and notice," over the name of the payee, might be applied to the subsequent indorsers. This may seem to be in conflict with the reasoning of the Court in *Central Bank* v. *Davis*.

But however this may be, the case at bar is distinguishable from the case of *Farmer* v. *Rand*, in one particular. The waiver here is in language, which may admit of a singular, as well as of a plural application. In that case the word "we" would embrace, necessarily, all who could properly be, by the other words in connexion with it, included.

The other grounds relied upon by the plaintiffs, as to this point, are more clearly tenable. The agreement to waive demand and notice may be proved orally, or be inferred from circumstances. *Fuller* v. *McDonald*, 8 Greenl. 213; and *Bank* v. *Davis*, before cited. There does not seem to be any room to doubt, that the defendant perfectly understood the agreement between him and the plaintiffs, that demand and notice were to be waived. What transpired between him and the plaintiffs, or their cashier, plainly shows it to have been so.

The defendant, however, insists that, from the memorandum made by the president of the bank, it is to be presumed, that not more than eleven hundred dollars of the amount credited for the note, had been paid when the note fell due; and contends, that what then remained thereof might and should have been retained. But the cashier testifies that the whole was deposited to the credit of Norton, and paid out as he drew checks for it. Whether the whole had been actually paid out at the time the note fell due, or not, does not appear. And from the authority cited, Bayley, 398, it only appears, that the

plaintiffs might have retained a balance remaining deposited to the credit of Norton, when the note became due, if they had thought it proper to do so. It was clearly optional with them to do so or not.

It was further objected, that the agreement with Norton was usurious, and therefore void. But our statute on that subject, does not vacate the contract, *in toto*, for that cause. Only an abatement of the excess, over lawful interest reserved or taken, could be claimed, together with costs for the defendant. There was, however, no specific agreement for an excess of interest, over and above the legal rate. But the ground taken is, that the operation of the transaction, as indicated by the memorandum of the president, had the effect to secure more than six per cent. interest. But no agreement appears to have been made with any such intent, or for any such purpose. The cashier states that the money was placed to the credit of Norton, and paid out as he drew checks for it; and, of course, it does not appear, in the language of the statute, that there was "actually reserved or taken above the rate of interest prescribed by law." The proposition of Norton, taken in connexion with the memorandum of the president, seems to show merely an indication of the times and the manner of using the funds, which Norton's necessities would be likely to call for; with a view, on his part, doubtless, to induce the bank to make the loan, rather than any binding stipulation between the parties.

The defendant further contends, that it appears on the cashier's books, that the note had been discounted, and the amount credited by him on the second of January; and that the note, thereupon, became absolutely the property of the plaintiffs; so that the indorsement of the defendant, some ten or fifteen days afterwards, was without consideration, and therefore was, as to him, *nudum pactum*. It appears to be true, that the cashier did so enter the negotiation upon his books; but he testifies, that this was done, by him without express directions therefor, as was occasionally done, when notes were provisionally discounted; but that, till the terms were complied with, nothing,

except the one hundred dollars, advanced in anticipation, would have been paid out.

It appears clearly, that there was no other understanding between the parties than, that this note should be received, and the credit given provisionally, viz. upon its being indorsed, waiving demand and notice by the defendant. By its being so indorsed the negotiation became absolute, and not before. And we cannot doubt but that it was competent to the plaintiffs to show this, notwithstanding the entry of the cashier, under the circumstances testified to by him, upon his books. No such unqualified entry constituted, or was in accordance with the real agreement between the parties.

We therefore think the default must stand; and that judgment must be entered accordingly.

Mem. — TENNEY J. having been of counsel in this case, took no part in the hearing or decision.

ABRAHAM WING *versus* THOMAS KENNEDY *& al.*

If it be shown by parol proof that a poor debtor's bond was in fact executed on a day subsequent to its date, the obligors are, for the purpose of making a computation of time of performance, bound by the date of the bond and recital of the day of arrest.

Where the surety in such bond did not read it, and was truly informed of the date of the bond and of the day of the arrest of the debtor, but was misinformed as to the time when by its terms the conditions must be performed, and where there was no fraudulent design, he cannot be relieved from his liability by the terms of the bond.

DEBT on a poor debtor's bond, bearing date Aug. 4, 1839. At the trial, before WHITMAN C. J., after the evidence was introduced, the plaintiff became nonsuit, reserving liberty to move for a new trial, in case the whole Court should be of opinion, that the action might be maintained.

The material facts are all given at the commencement of the opinion of the Court.

Webster, for the plaintiff, said the contract here was to do certain things within six months from the date of the bond. Any evidence, the effect of which is to extend the time of performance, varies and alters the effect of the written contract. Parol evidence is inadmissible for that purpose.

It is said, that a deed takes effect from its delivery, and not from its date. This rule applies only to the conveyance of real estate. But here the date is a material part of the contract, and as material, as the day stated, when performance is to be made by a future day certain, fixed in the instrument. 2 Stark. Ev. 543, 544, and 551, and cases cited; 2 Johns. R. 230; 4 Barn. & Cres. 408.

If the date is to be changed by such testimony, it may change the nature of the contract, and turn a statute bond into a common law bond.

To permit such evidence would be to contradict the return of the officer. The law requires, that the officer should return when he took the bond, and return the bond with his precept. The return of an officer cannot be contradicted, unless in a suit against him for a false return. Com. Dig. Return, G.; *Bott* v. *Burnell*, 9 Mass. R. 96; Same case, 11 Mass. R. 163; *Estabrook* v. *Hapgood*, 10 Mass. R. 313; *Slayton* v. *Chester*, 4 Mass. R. 478; *Bean* v. *Parker*, 17 Mass. R. 591; *Winchell* v. *Stiles*, 15 Mass. R. 230; *Stinson* v. *Snow*, 1 Fairf. 263.

The bond recites, that the debtor was arrested on the day of its date, and he is estopped from denying it.

But there should not have been a nonsuit, because, if the bond is to be considered as taking effect from the time the witness said it was signed, still it is good at common law, and the action can be maintained.

J. S. Abbott, for the defendants, contended that the officer's return was not contradicted by the evidence objected to, because it does not appear that this is the bond referred to by him.

The action was commenced within six months from Sept. 4, the time the bond was actually signed, if the evidence is ad-

missible to show the fact. The only inquiry then is, whether we are at liberty to show the mistake. If we may, the suit is prematurely brought.

The rule is, that all mistakes in date may be shown. 2 Stark. Ev. 557, 572, and cases cited. Mistake in the date of a replevin bond, and of a writ may be shown. *Chandler* v. *Smith*, 14 Mass. R. 313; *Johnson* v. *Farwell*, 7 Greenl. 370.

The opinion of the Court was drawn up by

SHEPLEY J. — This suit is brought on a poor debtor's bond, bearing date August 4, 1839; and it recites, that the defendant, William Kennedy, was then arrested on the execution in favor of the plaintiff against him. The officer's return on the execution states the arrest to have been made on that day. It appears, that the part of the bond which was not printed, including the date and time of arrest, was written by the principal in the bond; and that it was signed and sealed, when neither the officer, nor the creditor was present. And that this was done on the fourth day of September following. The subscribing witness states "that the surety in said bond, not having spectacles with him at the time of putting his signature to the bond, could not read it, but was told that if the principal should surrender himself within six months from that time, he would be saved harmless." There is nothing in this testimony to prove, that the bond was not antedated by the principal for the purpose of making it conform to an arrangement made with the officer, that he should obtain one bearing that date to correspond with the date of the arrest. And the fact, that he wrote it and inserted the date and the day of arrest corresponding thereto, is suited to impress the mind with the belief, that such was the case. And the proof, that the bond was executed on the fourth of September does not prove, that the debtor was not arrested on the fourth of August, and allowed to procure and present a bond as soon as opportunity would permit. The effect of proof that the bond was in fact executed on a day subsequent to the date, has been considered

in the case of *Cushman* v. *Waite*, in the county of Penobscot, where it was shown, that the signers were in such case, for the purpose of making a computation of time, bound by the date of the bond and recital of the day of arrest.

The surety does not appear to have been misinformed respecting the date of the bond or the day of arrest, while he was so with respect to the legal effect of it. And there is no indication, that this was done with any fraudulent design. There is nothing in the testimony, which shows, that he was not truly informed both of the date of the bond, and the day of the alleged arrest of the debtor. And nothing therefore to relieve him from his obligation. The nonsuit is to be taken off, and the case is to stand for trial.

JAMES DINSMORE *versus* THOMAS DINSMORE *& al.*

To take a contract out of the operation of the statute of limitations, it is not necessary that the admission of indebtedness should be in any very precise or set terms. It is sufficient, if the evidence be such, that it can satisfactorily be deduced, that the party to be charged meant to be understood, that he owed the debt.

Nor is it necessary, that the precise amount due should have been named by the party to be charged in his acknowledgment. It is quite sufficient, if he admits an amount to be due nearly approximating to the amount claimed; and the precise amount may be proved *aliunde*.

A new promise, made by one of two joint and several promisors, will take the case out of the operation of the statute of limitations as to both.

ASSUMPSIT upon a joint and several promissory note, given by the defendants to the plaintiff. The facts stated in the report of the case are all to be found at the commencement of the opinion of the Court.

J. S. Abbott, for the defendants, contended that the acknowledgment of one of two joint and several promisors made after the demand has already become barred by the statute, is not sufficient to take it out of the operation of the statute of limitations. *Sigourney* v. *Drury*, 14 Pick. 387.

But here was no promise to pay, and no acknowledgment that any thing was due on this demand. It is not sufficient to bring the case within the later decisions on the statute of limitations. *Perley* v. *Little*, 3 Greenl. 97; *Porter* v. *Hill*, 4 Greenl. 41; *Deshon* v. *Eaton*, ib. 413; *Thayer* v. *Mills*, 14 Maine R. 300. It was a mere agreement to do an act afterwards on a condition, which was never performed. *McLellan* v. *Allbee*, 17 Maine R. 184.

The testimony is not sufficient to prove that the conversation, be it a promise or not, related to the note sued in this action. It could not be understood to apply to a debt due from him and from another. The particular debt must be specified. *Pray* v. *Garcelon*, 17 Maine R. 145.

Boutelle, for the plaintiff, said that it was well settled, that the new promise of one of several joint and several promisors was sufficient to take the demand out of the statute as to all.

Here was an acknowledgment of present indebtedness, and a promise to pay also. There was no condition in the promise. No time being fixed, it was to be done on demand, within a reasonable time to get the note from Gardiner. *Barnard* v. *Bartholomew*, 22 Pick. 291; *Cambridge* v. *Hobart*, 10 Pick. 232; *Whitney* v. *Bigelow*, 4 Pick. 110.

The promise refers directly to this note. No other was mentioned, and the sums were nearly the same. If any other demand existed between the parties, it was incumbent on the defendants to show it. *Bailey* v. *Crane*, 21 Pick. 323; *Barnard* v. *Bartholomew*, before cited.

The opinion of the Court was drawn up by

Whitman C. J. — The plaintiff's declaration is on a note of hand for $217,67, with interest, bearing date Oct. 17, 1831. The reliance in defence is upon the statute of limitations. To avoid the operation of the statute the plaintiff introduced a witness who testified, that, about two or three years previous to the time of trial, he was owing the defendant, Thomas Dinsmore, a large sum of money; and that the plaintiff applied to him (the witness) to become accountable to him (the plain-

tiff) for a debt, which, he said, the said Thomas was owing him, of two or three hundred dollars; that he, the witness, assented to do so, if said Thomas would agree to it; that the plaintiff thereupon requested the witness to converse with said Thomas on the subject; that he soon after saw him, and stated to him, that the plaintiff had spoken to him to see if he could make a turn of the amount he owed the plaintiff, being two or three hundred dollars; and asked him if the plaintiff had spoken to him about it. He replied, yes; —That he, the witness, then inquired of him if he was willing, or had concluded to do it. He said he was, when he should have got his note against the witness; that it was at Gardiner; and that he should get it when he could see his son there. Upon this evidence the parties agreed, that a default should be entered; but that, if the Court should be of opinion that the evidence was sufficient to obviate the effect of the statute, the default was to stand, otherwise that it should be taken off, and a nonsuit entered.

It is contended, that the evidence introduced does not show an acknowledgment of indebtedness; and if it does, that it does not show, that the note in question was the indebtedness referred to in the acknowledgment.

As to the first of these points, it is clearly not necessary, that the admission should be in any very precise set terms. It is sufficient if the evidence be such, that it can satisfactorily be deduced, that the party to be charged meant to be understood to concede, that he owed the debt. Even his acts may be sufficient for the purpose; for a man's acts sometimes indicate more satisfactorily the operations of his mind even than his words. Hence the payment of a part of the debt is a tacit acknowledgment of indebtedness for the residue. If there be items in a running account, some of which were within, and some not within six years, the whole would be unaffected by the statute. If A should request B to pay part of a note which C held against him, and charge it to him, A, could any one doubt that it would take the note out of the statute, although B should not comply with the request? In

the case at bar the defendant, Thomas Dinsmore, admitted that the plaintiff had requested him to set off the debt, which the witness owed him, to the amount of two or three hundred dollars, and that he had consented to do so, by way of payment of the same amount due from him to the plaintiff. He only excused himself from doing it at that time, because the note, which he held against the witness was not then at hand. The witness and the defendant must have understood each other, at the time; and that the negotiation was to be perfected, whenever the latter should have obtained his note from Gardiner. The conversation between them could have imported nothing else. It was in effect, not only a recognition of a debt due to the plaintiff, but a promise to pay it in the mode proposed.

In the case of *Greenleaf & al.* v. *Quincy & al.* 3 Fairf. 11, Mr. C. J. Weston, speaking of a certain conversation, between a witness in that case and one of the defendants, remarked, that "this, of itself, did not amount to a clear admission of existing indebtedness; but the witness, who was authorized to demand the debt for the plaintiffs, understood him (the defendant) to assent to his proposition, that it should be turned against one, which was due from the witness to his (the defendant's) brother. What the witness understood, the jury must have found to be true." And the verdict was sustained. In *Arnold* v. *Dexter*, 4 Mason, 122, the defendant, on having his note presented to him for payment, remarked, that it was as good as money. Here was no direct acknowledgment of indebtedness; nor any promise to pay the amount named in the note. It was held, nevertheless, that it was tantamount to both. The note could not be as good as money unless it was actually due; nor unless he meant to pay it.

As to the recognition by Thomas Dinsmore, if made deliberately and understandingly, it was for him to show, that it referred to some debt, other than the one in question, if such were the fact. Mr Justice Morton, in *Baily* v. *Crane*, 21 Pick. 123, where the statute was set up in defence, remarked, that, "as the defendant has not shown that there was any

other debt due from him to the plaintiff, his letter, containing an acknowledgment, must be presumed to apply to the note in suit." And Mr. C. J. Parker, in *Whitney* v. *Bigelow*, 4 Pick. 110, a case of a defence grounded upon the statute, in which the defendant had said to a third person, that he was going to see the plaintiff; and complained that the plaintiff was driving him too fast; and that he was willing to pay, but could not get the money; remarked, that, whether the declarations referred to this debt or some other, "was a fact to be tried by the jury. And they were at liberty to infer the fact from the circumstances proved; and no other debt or demand against the defendant, and in favor of the plaintiff, being shown to exist, we do not well see how any other inference could be made." And the decision in *Baillie* v. *Lord Inchiquin*, 1 Esp. Cases, 435, is explicitly to the same effect. The burthen of proof, in such cases, is most clearly upon the defendant. In the case at bar there is not even the slightest pretence, that the acknowledgment could have reference to any other debt. No suggestion of the kind appears to have been made.

It is not important, that the precise amount due should have been named by the defendant in his acknowledgment. It is quite sufficient that he admitted an amount to be due nearly approximating to the amount claimed. The precise amount may be proved *aliunde*. In *Bird* v. *Gammon*, 3 Bing. N. C. 883, Mr. C. J. Tindal said, that "a general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the statute of limitations," and all the other Judges expressed themselves to the same effect in that case. In *Barnard* v. *Bartholomew*, 22 Pick. 291, an objection of this kind was considered and overruled. It was adjudged, that, as the plaintiff had, by other evidence, made that certain and definite which was general and indefinite in the admission, it was sufficient.

It was contended in argument, in the case at bar, that, this being a joint and several note, the admission of one would not bind both; and the case of *Sigourney* v. *Drury*, 14 Pick.

387, was cited in support of the position. That case, however, was assumpsit on a joint and several promise; and the payment of interest by one within the six years, was held to take the case out of the statute against both. Mr. C. J. Shaw, however, in the course of his elaborate reasoning, in that case, suggests, that if the admission were merely oral, or after the six years had elapsed, so that the statute had become a bar, it would deserve consideration whether it should be allowed to revive the promise against both; and seems to be inclined to think that it would not; but reserves himself for the consideration of those questions, when they shall require a decision. His doubts would seem to have been suggested by what fell from Mr. Justice Bayley, in *Atkins* v. *Tredgold*, 2 Barn. & Cres. 23. That cause, however, was not decided upon any such ground; and the language of the learned Judge was an *obiter dictum.* The question there, was, whether a payment of interest by a surviving co-promisor revived a debt against the executors of the deceased promisors; and *it was held*, that it did not; as the death of one rendered the contract several against the survivor.

But there would seem to be much reason for considering the doubts of Mr. C. J. Shaw as controlled by the case of *Whitcomb* v. *Whiting*, 2 Doug. 652, in which Lord Mansfield, and his associates, clearly contemplated no such exception; and his Lordship emphatically places an admission, by a partial payment, and by verbal acknowledgment, upon the same ground. And in *Perham* v. *Raynal & al.* 2 Bing. 306, Mr. C. J. Best remarked, that it had been supposed the decision in *Whitcomb* v. *Whiting*, was not law; but, said he, "I should be slow to decide that any thing, which fell from Lord Mansfield is not law." The C. Justice, in the same case, remarked, if the acknowledgment of one, where only one is sued, will prevent the operation of the statute of limitations, so also will the acknowledgment of one, where three are sued. If we were to decide otherwise we should establish an anomaly in the law; because in other cases an acknowledgment of one of many, who are jointly concerned, is binding on the others."

The C. Justice, at the time, had the case of *Atkins* v. *Tredgold* before him; and if there were any such exception, as intimated by Mr. Justice Bailey, it is inconceivable that he should not have noticed it, as it would have tended directly to negative the generality of his position, that when one of many in a joint concern makes an admission, it is binding on the whole; and to introduce the supposed anomaly into the law. Doubts upon this point may have arisen from looking at the admission, necessary to take a case out of the statute of limitations, as constituting a new, independent and substantive promise, which all the authorities go to show that it does not.

In *Smith, adm.* v. *Ludlow & al.* 6 Johns. 267, it appeared, that the defendants dissolved a partnership, before existing between them, on the 31st of December, 1801, and gave due notice of it; and in June, 1808, one of the defendants made an acknowledgment, which the Court considered sufficient to bind both the defendants. This was more than six years after the debt accrued. It did not occur to the learned Court, that, because six years had elapsed, one of the defendants could not revive the debt against both. And in *Patterson* v. *Patterson*, 7 Wend. 441, where a verbal admission was made, twelve years after the dissolution of a copartnership, by one of the copartners, that a debt was due, the same decision was repeated, without the slightest allusion to any question, arising from the lapse of time between the dissolution and the acknowledgment; or from its being a verbal, instead of a written admission. It is believed, that before the passage of the late English statute, requiring all admissions, to take a case out of the statute of limitations, to be in writing, no doubt has ever existed, that a verbal admission for the purpose was equivalent to an admission in writing. Upon a careful review of the circumstances of this case, and the authorities bearing upon them, we are of opinion, that the default must stand; and that judgment be entered accordingly.

EBENEZER H. NEIL *versus* ENOCH FORD *& al.*

In an action upon a poor debtor's bond, made prior to the statute of 1839, c. 366, *it was held*, that if it appeared that the Justices, who administered the oath to the debtor, had acted only in pursuance of a citation issued on an application made directly to the magistrate by the debtor, instead of from the prison keeper as the law then required, that they had no jurisdiction of the matter, and that their proceedings would have been illegal and void, if the legislature had not interposed by that statute, and given to the defendants the right to have the action tried by a jury, to ascertain the amount of loss actually sustained, if any, as the measure of the plaintiff's damages.

On such trial, if it be shown, that the oath had been administered by the magistrates, it is still competent for the plaintiff to prove, "that at the time the oath was administered to the debtor, there was personal property, money, debts, credits, or real estate belonging to the debtor in the hands of his surety on the bond, sufficient, in whole or in part, to pay the execution referred to in said bond."

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

Debt upon a poor debtor's bond, dated Dec. 18, 1837, in the penal sum of $84,34. The bill of exceptions referred to papers, which were not copied as part of the case. The facts, however, appear in the opinion of the Court. The exceptions were filed by the plaintiff.

This case was continued at the June Term, 1842, to be argued in writing. If any arguments were furnished, they have not fallen into the hands of the Reporter.

D. & L. Kidder, for the plaintiff.

Greene, for the defendants.

The opinion of the Court was prepared by

SHEPLEY J. — This was a suit upon a poor debtor's bond. The defence presented was a performance of the condition. To establish it a certificate of two justices of the peace and of the quorum was introduced, which stated, that the debtor had caused the creditor to be notified according to law, and that the legal oath had been administered to him within the time prescribed. This would have been sufficient unless controlled by other testimony showing, that the justices had no jurisdic-

tion of the case. *Granite Bank* v. *Treat*, 6 Shepl. 340. The bill of exceptions states, that "the plaintiff then read, no objection having been made, the citation to plaintiff dated 19th of December, 1837, with the officer's return thereon dated Dec. 30, 1837." From inspection of these papers, which are made part of the case, it appears, that the application of the debtor was made to a justice of the peace and not to the keeper of the prison, and that the citation was issued on that application. This testimony, having been admitted without objection, was legally before the Court. It is one of the first principles of law, that the Court must notice and consider all the legal testimony introduced, in coming to a conclusion upon the rights of a party. The facts stated in the testimony were apparent. The statutes of 1835, c. 195, and of 1836, c. 245, had received a construction, which determined, that the legal mode of procuring a citation was by an application to the prison keeper. *Knight* v. *Norton*, 3 Shepl. 337; *Hanson* v. *Dyer*, 5 Shepl. 96. The process, which formed the substratum for the proceedings of the justices in this case was not then such a process as the statutes required. It was not merely an erroneous; it was an illegal process. And this Court decided, in the first of the two cases before named, that the application being the foundation of all subsequent proceedings, must be in conformity to the statute provisions to give jurisdiction to the justices. This was but the statement of what was supposed to have been a well established and admitted doctrine. It was no new doctrine. It had been declared by the highest judicial Courts in other states to have been an old and established doctrine. In the case of *Bigelow* v. *Stearns*, 19 Johns. R. 39, C. J. Spencer, in delivering the opinion of the Court, said, "I consider it perfectly well settled, that to justify an inferior magistrate in committing a person, he must have jurisdiction not only of the subject matter of the complaint, but also of the process; and person of the defendant." He also said, "if a Court of limited jurisdiction issue a process, which is illegal, and not merely erroneous; or if a Court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause

without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void; and in the case of a limited or special jurisdiction the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such case becomes a trespasser." The same doctrine had been declared in the case of *Smith* v. *Rice*, 11 Mass. R. 513. Mr. Justice Jackson, in delivering the opinion of the Court, said, "but if it appear, that the Judge of Probate has exceeded his authority; or that he has undertaken to determine the rights of parties, over whom he has no jurisdiction, whether the want of jurisdiction arise from their not having been duly notified, not regularly before him, or from any other cause; or that he has proceeded in a course expressly prohibited by law; in all such cases the party aggrieved, if without any laches on his part, he has had no opportunity to appeal, may consider the act or decree as void." The same doctrine was again stated in the case of *Slasson* v. *Brown*, 20 Pick. 439, by Mr. Justice Dewey in delivering the opinion of the Court. That was a case arising out of a suit upon a poor debtor's bond; and one of the questions presented was, whether the justices had jurisdiction because there was a misnomer in the notice to the creditor. The opinion states, "the ground of defence in a case like the present is, that the magistrates had no jurisdiction of the case. This want of jurisdiction arises from the failure on the part of the debtor to comply with the regulations of the statute."

In the case now under consideration, the application to the justice not being in conformity to the provisions of the statutes, was illegal, and being the foundation of all the subsequent proceedings, the justices had no jurisdiction of the case; and their proceedings must have been adjudged void, if the legislature had not interposed by the statute of 1839, c. 366; which provides in cases like the present, that the defendants shall have a right to have the action tried by a jury, who, if the party has not sustained any damages, may return a verdict for the defendants "notwithstanding there may have been in law

a breach of the condition of the bond. And the plaintiff in such action may introduce any proper evidence tending to show, that the surety or sureties of such debtor had in his or their hands and possession at the time of the administration of said oath to said debtor personal property, money, debts, credits or real estate, of the property of such debtor sufficient in whole or in part to pay the execution referred to in said bond." The bill of exceptions states, "the plaintiff then offered to prove, that at the time the oath was administered to Ford there was personal property, money, debts, credits, or real estate belonging to said Ford in the hands of his surety, Palmer, sufficient in whole or in part to pay the execution referred to in said bond;" and that such proof was rejected. It will be perceived, that the plaintiff was entitled to the introduction of such proof, and that it was erroneously excluded.

Exceptions sustained.

THE INHABITANTS OF ATHENS *versus* THE INHABITANTS OF BROWNFIELD.

Where a notice in writing respecting paupers is sent by the overseers of one town to those of another *by mail*, under the provisions of St. 1835, c. 149, (Rev. Stat. c. 32, § 44,) it is not necessary that the postage of the notice should be paid by the town sending it.

And where a notice, thus sent by mail, arrived at the town to which it was directed, but the overseers declined to take it, and it was sent to the general postoffice as a dead letter, no copy thereof having been retained by the overseers sending it, *it was held*, that it was competent to prove the contents of the notice by parol.

THIS was an action to recover for the support of a pauper and her children, alleged to have had their settlement in Brownfield. At the trial before WHITMAN C. J. the plaintiffs proved, that a notice in due form was made out, containing the information and request proper in such cases, directed to the overseers of the poor of Brownfield, signed by the chairman of the overseers of the poor of Athens as such, put into

the form of a letter, and superscribed to the overseers of Brownfield. This letter was put into the mail at Athens, but the postage was not paid. It reached the postoffice in Brownfield in due time to have given seasonable notice to the overseers of the poor of that town, if they had taken the letter from the postoffice, which they could not have done without paying the postage. They declined to take the letter, because the postage had not been paid, and it remained in the postoffice at Brownfield, until it was forwarded to the general postoffice as a dead letter, as required by law. The defendants offered parol proof of the contents of the letter, no copy having been kept by the overseers of Athens. The defendants objected to the admission of such evidence, but the objection was overruled, and the testimony was received. The paupers had no settlement in Athens.

A nonsuit was entered by consent, which was to be taken off and a default entered, if the sending of the notice and the proof of it, were sufficient to entitle the plaintiffs to recover.

Hutchinson, for the defendants, said that the law must be strictly pursued to charge a town with the support of a pauper. The notice must be in writing, and if sent by mail, the postage must be paid. The town to be charged is not liable to pay the expense of notice. The legislature did not intend to impose such burthen, and they had no right to do it. *Groton* v. *Lancaster*, 16 Mass. R. 110.

The parol evidence was improperly admitted. Better evidence could have been produced. The plaintiffs might have sent to Washington, and obtained the original, or a copy, and should themselves have retained a copy. 1 Stark. Ev. 386.

Greene, for the plaintiffs, contended that the notice was legally given, under the provisions of the St. 1835, c. 149. The duties of town officers, and the duties and liabilities of towns are prescribed by the law. The legislature have power to prescribe any mode of giving notice, they choose. The statute says that the notice shall be sufficient, if sent by mail, and arrives at the town to be charged. It is equivalent to actual

delivery. The statute does not require the postage to be paid by the town sending the notice.

The evidence of the contents of the notice was properly admitted. The law does not require the town officers to keep a copy of the notice. And if one had been kept, it would not have been evidence. The best evidence attainable is admissible. 1 Stark. Ev. 386, 389; *Taunt. &c. Turnp.* v. *Whiting*, 10 Mass. R. 327; *Welch* v. *Barrett*, 15 Mass. R. 380; *Central Bank* v. *Allen*, 16 Maine R. 41.

At a subsequent day in the same Term, the Court, by TENNEY J. remarked that the provisions of the statute of 1835, c. 149, respecting notice, appeared to have been complied with by the plaintiffs. The notice was put into the postoffice in Athens, and arrived at Brownfield. The statute does not require that the town sending the notice should pay the postage of the letter. It is not necessary, that the postage on notices in relation to bills of exchange and promissory notes should be paid by the parties sending them. And the legislature might think it the most convenient to leave the postage to be paid by the town to which the notice was sent.

The notice had gone beyond the control of the plaintiffs, and had probably been destroyed, without their fault. The parol evidence was rightly admitted.

The nonsuit must be taken off
and the defendants be defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PISCATAQUIS,

ARGUED AT JUNE TERM, 1842.

STEPHEN FREEMAN *versus* JAMES RANKINS.

Where one is the owner of goods, and has a right to take immediate possession, he may maintain an action of trespass for taking them.

And if the plaintiff in such action, and also the person in whose actual custody the property was, should represent generally, that the plaintiff did own another article of the same description of property, when he did not own it, he would not thereby deprive himself of the right to recover damages for the taking of the article which was in fact his property.

If some part of the instruction of a District Judge to the jury should be found to be incorrect; yet if on the whole instruction, the erroneous part became immaterial, and the party excepting was not injured by it, a new trial will not be granted.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Trespass to recover the value of a cow, taken by the defendant, a deputy sheriff, who claimed to justify the taking by virtue of a writ against the plaintiff, Stephen Freeman, as his property.

The exceptions state, that the plaintiff called Forest Turner, who testified, that in 1836, he and the plaintiff made a bargain, that the plaintiff and his family were to live with him; that as a remuneration for their support he was to have the

plaintiff's labor and the use and whole benefit of the cow and her increase, while they lived together; that this is the same cow for the taking of which this suit is brought; that the plaintiff had no other cow; that the cow had three or four calves, which had been disposed of by the witness; that the plaintiff had a right to leave when dissatisfied; but that he had lived with him to the present time; that the plaintiff had a right to control this cow; that there was a heifer two and an half years old on the place, which came of this cow; that if the plaintiff went away, this cow was his; and that there was another cow besides this on the place. Roland Freeman testified, that he was present when the bargain was made; that Turner was to support the plaintiff, who was witness' father, and family, and have his labor and the use of this cow; that Turner was to have the benefit of this cow and her increase; that there was a heifer two and an half years old which came of this cow; and that the plaintiff had a right to dispose of or sell this cow at any time he saw fit.

The defendent then called Daniel Dennett, who testified, that in a conversation with Forest Turner, he wished to purchase this heifer of Turner, who said he could not dispose of her, for she was not his, but belonged to Freeman; and that he then called on the plaintiff, who said the heifer was his, but declined selling. He also called William Owen, who testified, that in the summer of 1840, in conversation with the plaintiff, he said the heifer was his, and that he wished to sell the cow.

This was all the evidence in the case. And thereupon the counsel for the defendant contended, that the evidence did not authorize the plaintiff to maintain this action; that there was a difference between the testimony of Turner and Freeman, and Turner had stated the contract truely; and requested the Judge to instruct the jury, that if the evidence of Turner was believed, the plaintiff had no right to maintin this suit; but that the suit, if maintainable, should have been brought by Turner; that if the heifer was the property of Turner, that if both he and Freeman held out to the world, that the heifer

belonged to the plaintiff; that the defendant was justified in making the attachment.

The presiding Judge declined to give such instructions; and instructed the jury, that if the owner of goods has parted with the possession upon a contract of lease, he cannot, while the contract remains in force, maintain an action of trespass against one who shall take them from the lessee; but that from the evidence in the case, it appeared, that the plaintiff had not parted with the possession of the cow, he living with Turner on his place; and that if he had parted with the possession, he had such a right to resume it, that he could maintain this suit. The verdict was for the plaintiff. The defendant filed exceptions to the refusal of the Judge to give the instructions requested, and to the instructions given.

J. Appleton and *C. A. Everett* argued for the plaintiff; and cited, *Nichols* v. *Patten*, 18 Maine R. 232; *Drinkwater* v. *Drinkwater*, 4 Mass. R. 357; *Neal* v. *Williams*, 18 Maine R. 391; Story on Agency, 419; 1 Story's Eq. 385; 6 Ad. & Ell. 419; 9 B. & Cr. 586; *Lunt* v. *Brown*, 13 Maine R. 238; *Wyman* v. *Dorr*, 3 Greenl. 183; *Vincent* v. *Cornell*, 13 Pick. 294; *Putnam* v. *Wyley*, 8 Johns. R. 432; 15 East, 609.

A. Sanborn argued for the plaintiff, and cited, 1 Chitty on Pl. 154; 2 Saund. 47, (b.); 3 Stark. Ev. 1439.

The opinion of the Court was drawn up by

Shepley J. — The testimony presented in this bill of exceptions might have authorized a jury to find, that the plaintiff at the time of the attachment was the owner of two cows; and that one of them was taken by the officer to apply the proceeds to the payment of his debts. The question presented for consideration however is not, whether a verdict for the plaintiff was properly authorized by the testimony; but whether the instructions to the jury were correct, and those requested properly withheld. The first request for instruction was, "that if the evidence of Turner was believed, the plaintiff had no

right to maintain this suit." According to the testimony of Turner the contract between him and the plaintiff existed only during pleasure, and the plaintiff had a right to take possession of the cow and determine the contract, whenever he pleased; and had also a present right to control her even without putting an end to the contract. When one is the owner of goods and has a right to take immediate possession, he may maintain an action of trespass for taking them. *Walcot* v. *Pomeroy*, 2 Pick. 121; *Lunt* v. *Brown*, 1 Shepl. 236. The second branch of the requested instructions was, that if the plaintiff and Turner "both held out to the world, that it was the heifer of the plaintiff, that the defendant was justified in making the attachment."

It was not to the cow attached and now the subject of controversy, that this requested instruction related. And a compliance with the request would have been in effect to declare erroneously the law to be, that if the plaintiff and Turner represented generally, that the plaintiff did own a piece of property, when he did not own it, he would thereby forfeit his right to another piece of property, which he did own.

It is also insisted, that the testimony did not authorize the instruction, "that the plaintiff had not parted with the possession of the cow, he living with Turner on the place." It is not necessary to inquire, whether this was strictly correct, for the jury were also instructed, "that if he had parted with the possession, he had such a right to resume it, that he could maintain this suit." The latter clause of these instructions being correct the former became immaterial, and the defendant was not injured by it.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT,

ARGUED AT JUNE TERM, 1842.

HENRY BLAKE *versus* JAMES IRISH.

When the verdict will necessarily charge one, or will discharge him from a fixed liability, he is incompetent to testify in the case; but where there is no fixed or certain liability, whether the plaintiff recovers or not, and his interest, if any, is contingent, a mere possibility that he may be charged, it goes to the credibility of the witness, and not to his competency.

In determining whether an instruction to the jury be, or be not, correct, it should be considered in connexion with the evidence in the case, and as applicable to it.

ASSUMPSIT on an account annexed to the writ.

In the report of the case, the parol testimony is all given at length, but the contracts in writing are merely referred to, and no copies of them were furnished to the Court, and none have come into the hands of the Reporter. Without them, the parol evidence would be of little use. Enough, however, perhaps may be found in the opinion of the Court to understand the points decided. There was also a motion to set aside the verdict as against the evidence.

The jury were instructed by SHEPLEY J. presiding at the trial, that the power given in writing by the defendant to Pollard was not sufficient to enable him to make the written con-

tract with the plaintiff; and that to enable the plaintiff to recover, he must prove that the defendant knew that he was at work in execution of it, and assented to, or made no objection to his proceeding and continuing to work, and execute it.

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

J. Appleton and *Prentiss* argued for the defendant, and cited, 2 Stark. Ev. 744; 8 Pick. 51; 14 Mass. R. 303; 3 Mason, 405; 9 Peters, 607; 3 Greenl. 429; 4 Mason, 296; 18 Maine R. 436.

Blake, for the plaintiff.

The opinion of the Court was drawn up by

Shepley J. — The first objection to the verdict is, that Barzillai Brown was an incompetent witness, being interested in the event of the suit. When the verdict will necessarily charge one, or will discharge him from a fixed liability, he is interested in the event of the suit. In this case no fixed or certain liability attaches to Brown, whether the plaintiff recovers or not. His interest, if any, is contingent, a possibility that he may be charged. In such case it goes to the credibility and not to the competency.

The second objection is, that the instructions were erroneous in stating, "that to enable the plaintiff to recover he must prove, that the defendant knew, that he was at work in execution of it [the contract between the plaintiff and Pollard] and assented to, or made no objection to his proceeding and continuing to work and execute it." The argument is, that the defendant might have known, that the plaintiff was at work in the execution of that contract for Brown or some other person and made no objection to it; and yet by the instructions would be made liable. This exception should prevail, if the jury could have so understood the instructions. But if they must, from the testimony before them and from the proceedings at the trial, have clearly understood the language to mean the same, as if it had been, that to enable the plaintiff to recover he must prove, that the defendant knew that he was at work

in execution of it for him, and assented to, or made no objection, it will amount only to a verbal criticism upon the language used in drawing up the report. The reported case and the testimony referred to in it show, that the plaintiff claimed to recover upon two grounds. First, that Pollard was authorized by the written agreement between him and the defendant, bearing date on the 15th July, 1835, to make the contract with him. Second, if he was not; that the defendant knew, that Pollard professed to be acting under that power, when he made the contract, and that the plaintiff was executing it under that belief, and yet made no objection, but assented to such execution. And the defence was, that Pollard had no authority from the defendant to make the contract, that he did not profess to make it as agent for the defendant, but for Brown or some one else; that the defendant did not know, that Pollard professed to be acting as his agent in making it, and that he did not know or approve of his executing it as if made for him. It cannot be necessary to state the testimony in detail to prove, that the jury must have understood the instructions as bringing their minds distinctly to the consideration of the testimony tending to show, that the plaintiff might recover on the second ground assumed by him, while he could not on the first. If any doubt can remain, it will be dispelled by presenting so much of the testimony as becomes necessary in considering the third objection; which is, that the defendant was but the agent of the owners and Pollard a sub-agent under him; and that if the defendant ratified the acts of Pollard in making the contract, he did not bind himself, but the owners for whom he was agent. The defendant, by the agreement of the 15th July, 1835, authorized Pollard, as his agent, to receive proposals for cutting, hauling and driving from one to ten millions feet of timber from the township during the next season. He engages to pay Pollard and makes no mention, that he is acting as agent for others, or that any other persons were interested.

Ira Fish testifies to a conversation with the defendant in the fall, and he thinks in September or October, 1835, and says,

"he inquired of me, what sort of an agent Joseph Pollard would make; and stated, that he had employed him to superintend the logging business on that township as an agent." "He requested me to use my influence with the settlers on No. 4 to go on and haul by the thousand, which I promised to do. I accordingly called on Henry Blake of No. 4 and several other settlers, among them Grant and Palmer, and advised them to go on and examine the timber on No. 5, and if they found a good chance, to cut and haul by the thousand." On the 26th of November following, Pollard, as agent, without stating for whom, made a written contract with the plaintiff, the same Henry Blake, to cut and haul logs from that township by the thousand. The contract says, the logs are "to be scaled on the bank, where they are hauled, by some person agreed by James Irish of Gorham, and his account shall be binding between the parties." What parties could have been intended, but the parties to the survey; and who are the parties to the survey but those, who agree upon the surveyor?

On such testimony, if uncontradicted, no mind can reasonably doubt, that the plaintiff believed, that he was making a contract with the defendant, not acting as an agent for others, but in his own right, through the agency of Pollard. Ira Fish further testifies, that in the first part of the winter in conversation between him and the defendant, the logging operations on No. 5 were spoken of, and that he received from the defendant no different impressions respecting them, who inquired of him, "how Mr. Blake was getting along in the logging business." The only testimony in direct conflict with this aspect of the case, is that of Pollard, who testifies, that in making the written contract with the plaintiff he acted as the agent of Brown; and that he had authority in writing from him to do so. That written authority is produced bearing date apparently Sept. 27, 1835. On inspection it appears, that the month and day of the month have been altered. Brown testifies, that it was not executed at the time, it purports to be dated. "That it was executed in the winter sometime after Blake had commenced hauling." "That he signed it at the suggestion of

Pollard," who "said, he had made a contract with Blake, and that witness might have it, if he chose. Witness said he would take it, and gave him the paper; but that Blake knew nothing of this arrangement to his knowledge." It appears to have been by this arrangement, as it is called, that Brown, by the agency of Pollard, received the lumber hauled by the plaintiff, and if the defendant be thereby a loser, it is, if Brown's testimony be credited, by the misconduct of his own agent, Pollard.

What evidence is there, that the defendant was during this time in fact acting as the agent of other persons, or that others were then interested?

Pollard in his deposition says, "In July, 1835, I commenced as agent of James Irish, and so continued through the then coming winter; and in the summer of 1836, I was appointed agent of the proprietors of said township. I knew no other agent in 1835. In 1836, Mr. Hersey was co-agent." Mr. Hersey's testimony does not contradict, but rather confirms Pollard in this particular. Brown says, "he settled the stumpage account with James Irish, who acted for Howe and Jones, James Read, and Tuckermans, of Boston, as he understood." But this is not stated to have been done, and it is not probable, that it was done, until the lumber had been received in the summer of 1836. There is therefore no satisfactory evidence, that the defendant did not act for himself only and design to do so, or that there were other owners before the summer of 1836. The fact, that others received payment for the agreed value of the lumber, which had been cut, is not inconsistent with a subsequent purchase by them with an agreement to receive the pay for the lumber, which had been cut the preceding winter.

It was a matter for the jury to consider, whether they would give credit to the testimony of either Pollard or Brown, or refuse it to both. It is not perceived, that they could be misled by the instructions; or that the Court is authorized to disturb their verdict.

Judgment on the verdict.

JAMES GREELY *& al. versus* WILLIAM HUNT.

Where a note is indorsed after it falls due, a demand on the maker and notice to the indorser are necessary to charge the latter, although such demand and notice might have been unavailing, by reason of the insolvency of the maker at the time of the indorsement and afterwards.

ASSUMPSIT against the defendant as indorser of a note given to him by one Joseph Smith, with the money counts. At the trial before SHEPLEY J. it was proved or admitted, that the plaintiffs sold goods to the defendant in the year 1834; that afterwards, in 1835, the plaintiffs received this note of the defendant, he indorsing it, in part payment for the goods; that at this time the note had been payable for more than a year; and that at the time the note was indorsed by the defendant, and received by the plaintiffs, Smith, the maker, was entirely destitute of property, and has so remained since. The witness by whom the taking of the note was proved could recollect no conversation in relation to the note, further than that it was taken in part payment for the goods, and there was no other proof of any circumstances or conversation in relation to the indorsement. There was no proof of any demand on the maker, or notice to the indorser.

The counsel for the plaintiffs contended, that there was a waiver of demand and notice to be inferred; and that they were entitled to recover on the money counts, as the note was no discharge of the original debt.

The Judge directed a nonsuit, which was to be set aside, if the plaintiffs were entitled to recover.

This case was said to have been argued at the June Term, 1841, when the present Reporter was not in office. It was continued *nisi* at the June Term, 1842, and the opinion of the Court was delivered prior to the succeeding law term.

Robinson & Cooley for the plaintiffs.

W. T. & J. H. Hilliard for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — The defendant indorsed to the plaintiffs a note of hand, in payment for goods purchased of them, against one Smith, who was, at the time, and ever since has been, utterly insolvent; and this action is brought to recover the amount of it. There was no evidence, nor was it even pretended, that there was any deception, or other unfair means used to induce the plaintiffs to take it. It does not appear that the plaintiffs, at the time made any inquiry as to the responsibility of Smith; nor whether they were acquainted with him or not. They, therefore, to entitle them to recover against the defendant, must depend upon the principles ordinarily connected with a contract of this kind.

This case can scarcely be considered as coming within the rules applicable to the responsibility of indorsers of notes of hand, and bills of exchange. The note had been long over due, when it was negotiated. A demand, therefore, upon the maker, when the note was at maturity, was out of the question. If the plaintiffs have any ground of claim, it must arise from considering the indorsement of the defendant, as in the nature of an original draft upon the maker for the amount due; and it has been held, that every indorsement of a bill or note is tantamount to a new draft. *Jones & al.* v. *Swan & al.* 17 Wend. 94. In such case the holder must give evidence of reasonable diligence to obtain payment of such new draft, and of notice in due season of non-payment to the drawer. In this case, there being no pretence of any such demand, nor indeed of any demand upon the maker or drawee, or of notice to the drawer, although such demand might have been unavailing, by reason of the utter insolvency of the drawee; yet, the authorities all concur in showing, that such insolvency of the drawee and maker of the note, forms no excuse for such a neglect. *Farnum* v. *Fowle*, 12 Mass. R. 89, and cases there cited.

From the evidence in the case the note appears to have been taken in payment for a precedent debt *pro tanto;* and the evidence reported furnishes no reason to conclude that it was

the intention of the parties, as contended on the part of the plaintiffs, to waive demand and notice.

Nonsuit confirmed and judgment accordingly.

JAMES B. FISKE *versus* JOSEPH C. STEVENS.

In an action by the payee of a draft against the drawer, where it appeared that the plaintiff was one of two assignees of the effects of the acceptor, *it was held*, that the burthen of proof was on the defendant, to show that the plaintiff, as assignee, had funds in his hands to go, either wholly or partially, to pay the draft.

Where an assignment of his effects was made by the acceptor of a draft for the benefit of his creditors, containing a release of the debtor from all his liabilities; and the payee of the draft, with the verbal approbation of the drawer, wrote upon the assignment in the list of creditors, a description of the draft, "for whom it might concern;" *it was held*, that this would not discharge the drawer from his liability.

ASSUMPSIT against the defendant as drawer of a draft of which a copy follows: — "Bangor, December 27, 1837. Six months from date, value received, please pay to the order of James B. Fiske, at the Eagle Bank, Boston, fifteen hundred dollars, and much oblige your obedient servant, J. C. Stevens. To Mr. Charles H. Hammond, Merchant, Bangor, Maine." It was accepted by Hammond, and indorsed by Fiske. The draft was read in evidence, and a demand and notice proved. Hammond was then called as a witness by the defendant, and testified, that in Dec. 1837, he applied to Fiske and Stevens to be sureties for him on a note; that the person of whom he had the money preferred a draft instead of a note; that thereupon he made out a draft, because it could be negotiated easier than a note; that he made the draft without reflection, supposing it would make no difference as to the liability of either Fiske or Stevens; that he, Hammond, failed and made an assignment of his property to the plaintiff and G. W. Brown, June 18, 1838. To the admission of all or any of this testimony the plaintiff objected, as going to explain, alter,

or vary the legal effect of the draft, and the signatures to the same. The plaintiff then produced the assignment and it appeared thereby, that under the list of creditors, parties to the assignment, there was the following entry in the handwriting of the plaintiff. "J. C. Stevens' dft. indorsed by James B. Fiske, payable at the Eagle Bank, Boston, for $1500, for whom it may concern." The assignment contained a release of all claims against Hammond. Hammond testified, that he had a conversation with both Fiske and Stevens in relation to their becoming parties to the assignment on account of this draft; that Stevens thought it would be best to have the draft put into the assignment, but expressly declined to sign it himself; that this was on the last day in which parties could come into the assignment; that he saw Fiske, after seeing Stevens, told him what Stevens had said respecting the draft, and stated also, that he did not view the remarks of Stevens in the light of a communication to be made to Fiske; and that Fiske thought it was best to have it in the assignment. Hammond had the whole amount of the money for the draft, neither Fiske nor Stevens receiving any part.

The counsel for the defendant then contended, that upon the evidence the plaintiff could not recover; that if the plaintiff was entitled to recover any thing, it could be only one half the amount of the draft; that the plaintiff having introduced the assignment of Hammond's effects to Brown and himself, the burthen of proof was on him to show, that he had not sufficient to pay this draft or a portion thereof. The Court was then holden by Shepley J. who instructed the jury, that the burthen of proof was upon the defendant to show, that the plaintiff had received sufficient, or any amount for the purpose; that upon the evidence, if they believed it, they must find for the plaintiff the amount of the draft and damages, and interest; that the law supposed every person to be acquainted with legal obligations; and that the defendant having signed as drawer and the plaintiff as indorser, the agreement or understanding stated by the witness, that they were to be sureties only, would not affect their liabilities.

The jury returned a verdict for the plaintiff for the full amount; and to an inquiry they had been requested, before going out, to answer, stated that, "they were not satisfied from the evidence, that there was any agreement, which would make the parties liable in any way different from what the law supposes."

M. L. Appleton, for the defendant, argued in support of the grounds taken at the trial; and cited 13 Mass. R. 138; 5 Serg. & R. 363; 10 Pick. 528; ib. 533; 10 Johns. R. 595.

T. McGaw argued for the plaintiff, and cited 19 Pick. 227; 11 Pick. 316; *Hunt* v. *Adams*, 7 Mass. R. 519; *Richards* v. *Killam*, 10 Mass. R. 239; *Eaton* v. *Emerson*, 14 Maine R. 340; *Church* v. *Barlow*, 9 Pick. 547; 3 Kent, 114; Bayley on B. 151, 192, 468; *Lincoln* v. *Bassett*, 23 Pick. 154.

The opinion of the Court was drawn up by

WHITMAN C. J.—The defendant contends that the verdict should not have been returned for the plaintiff, because he was one of the assignees of the effects of one Hammond, the acceptor of the draft declared upon, and has not yet accounted for the proceeds of those effects; so that it does not appear, but that he has realized enough to pay the draft.

The Judge at the trial ruled, and we think very properly, that, if there was any thing in the plaintiff's hands, which should go, either wholly or partially to the discharge of this draft, it was incumbent on the defendant to produce the evidence of it. This, it would seem, might easily have been done by calling on the other assignee to testify to the amount of assets received, and of the disposition of them; and thereby, to have shown whether the plaintiff had availed himself of any thing towards the draft or not.

It is next objected that as the plaintiff was assignee of said effects, and executed said agreement, which contained a release of Hammond from all his liabilities, he thereby discharged the defendant from his liability on the draft, he being merely an accommodation drawer for the benefit of Hammond, while

the plaintiff was an accommodation payee who had indorsed the bill for the like purpose.

It appears that the plaintiff executed the assignment, not absolutely as a creditor, as it respects this draft. He inserted the claim in the assignment as being for the benefit of whom it might concern; and it appears further, that it was put into the assignment by concert between the plaintiff and defendant, with a view obviously, that whatever of dividend might be realized on account of it, should be applied in diminution of the amount ultimately payable by the person liable in the last resort.

The salvo in the plaintiff's subscription, especially if it be taken in connection with the defendant's express wishes indicated in the testimony of Hammond, and communicated to the plaintiff, may well be considered as to the same effect, as it respects the liability of the defendant, as the one described in *Gloucester Bank* v. *Worcester*, 10 Pick. 528. The Court in that case say, "we think that it is very clear, from the assignment or indenture itself, independently of the parol evidence, that the plaintiffs did not intend to discharge the defendant from his liability as indorser, and that the discharge contained therein, of the maker by the plaintiffs, was by the approbation of the defendant."

Whenever the intent of the parties can be ascertained by an inspection of an instrument, it should prevail over phraseology of a seemingly different import. From an inspection of the assignment in evidence, no one could fail to understand, that it was no part of the intention of the plaintiff's subscription to it, to discharge any party to the bill in question, who might ultimately be liable to him thereon. This ground of defence, therefore we think, was not sustained.

The last objection urged by the defendant is, that at any rate, he was but in the condition of a surety with the plaintiff, and that, at most, the plaintiff can only recover of him the one half of the amount he may have been compelled to pay to take up the draft.

The fact necessary to sustain this ground of defence was negatived by the jury, which must be regarded as taking away the foundation, upon which alone, the position contended for, could be maintained.

On the whole, we think that the verdict must remain undisturbed, and judgment must be entered thereon.

GEORGE HALLEY & *al. versus* ELIJAH WEBSTER.

If it be proved that a testator, a short time before making his will, was of unsound mind, it throws the burthen of proof upon those who come to support the will, to show the restoration of his sanity.

It is competent for the party opposed to the establishment of the will to prove, that the testator, a short time prior to the making of the instrument, was insensible; that he was unconscious of what was going on around him; that he was much prostrated by his sickness; that he did not appear to know an intimate acquaintance; and that endeavors to converse with him proved ineffectual; the same being not mere matters of opinion, but facts.

But testimony is inadmissible, that a witness, called by the opposing party, had stated, "that he had lost his devotion; that he intended now to serve the devil as long as he had served the Lord; and that he had a pack of cards which he carried about in his pocket and called them his bible;" it not being in conflict with any statement he had made.

THIS was an appeal from the decree of the Judge of Probate, approving the last will and testament of Charles T. Halley, deceased. The appellants alleged that the deceased, at the time of making the instrument, was not of sound and disposing mind and memory; and an issue was formed for the jury, and tried before SHEPLEY J. The respondent had introduced and examined one Osmore, who had attended the deceased in his last sickness, and whose testimony had a tendency to show, that the deceased had a sound mind at the time of making the will. The heirs at law introduced evidence to discredit Osmore, and called a witness, who testified, that Osmore had told the witness, that he, Osmore, had lost his devotion; that he intended now to serve the devil as long as he had served the Lord; that he had a pack of cards with him which he carried

about in his pocket, and called them his bible." This testimony was objected to by Webster, but admitted. The heirs at law introduced certain depositions, and certain portions of them "*underscored with black lines*" were objected to by the respondent, but admitted. They were these: — "I endeavored to converse with said Halley but could not, because he was insensible." "He appeared to be very much prostrated with sickness, and did not appear to know Mr. F.", a neighbor. "He appeared at this time to be in a sog, and perfectly unconscious of what was around him." "I found him exceedingly prostrated." "He appeared at that time to be unconscious of what was transacting around him."

The counsel for the heirs requested the Court to instruct the jury, that if they were satisfied, that a short time before the making of the will, the testator was of unsound and non-sane memory, that the burthen of proof was upon the respondent to satisfy them, that he was of sound mind and memory at the time of executing it.

The Judge instructed the jury on that point, that if they were satisfied, that previous to the execution of the will the deceased was of unsound mind and memory, the burthen of proof would be upon the respondent to prove, that at the time of executing it, he was of sound mind and memory; and also that the lowest share of mind and memory which would enable a person to transact the ordinary business of life with common intelligence would be sufficient to answer the requirement of the law that he should be of sound and disposing mind and memory; and that so much mind and memory would be required.

The verdict of the jury was, that the deceased was not, at the time, of sound and disposing mind and memory; which verdict was to be set aside, if the testimony was improperly admitted, or the instructions were erroneous.

There was also a motion to set aside the verdict, because it was against the evidence.

Note. — At the argument on this motion it was said, that the evidence was not accurately reported. The Court re-

marked, that where such motion is made, it is the duty of the counsel for the party making it, to prepare a report of the evidence, and deliver it to the counsel of the opposing party. If it be not satisfactory, his view of the evidence should be furnished; and the Judge, who tried the action, should determine the points of difference; so that no question of this character should be raised at the argument.

Rogers and *J. Appleton* argued for the respondent.

In the course of their arguments, they cited 2 Eccl. R. 269, 369; 4 Eccl. R. 182; 5 Eccl. R. 211; 2 Stark. Ev. 1702; 4 Coke, 123, *Beverley's* case; 1 Swinb. on Wills, 112, 123; 2 Yeate, 48; 1 Hen. & Mumf. 276; Toller, 8; Powell on Dev. 146; 3 Brown's C. Cas. 443; 13 Ves. 87; 5 Johns. R. 144; 3 Atk. 173; 12 Ves. 450; 4 Wash. C. C. R. 262, 580; 9 Conn. R. 40; 7 Serg. & R. 90; 1 Pet. C. C. R. 164; 1 Eccl. R. 291; 3 Eccl. R. 258; *Brooks* v. *Barrett*, 7 Pick. 95; 1 Stark. Ev. 134; *Comm.* v. *Buzzell*, 16 Pick. 154; 7 East, 108.

Cutting argued for the heirs at law, and cited *Stone* v. *Damon*, 12 Mass. R. 488; *Breed* v. *Pratt*, 18 Pick. 115; 2 Phil. Ev. 191; and 5 Johns. R. 159.

The opinion of the Court was drawn up by

WHITMAN C. J. — The instructions of the Judge to the jury, as to the proof of sanity, were unquestionably correct. No position can be better established than that, if a testator, a short time before making his will, be proved to have been of unsound mind, it throws the burthen of proof upon those who come to support the will to show the restoration of his sanity. The Judge must be understood to mean a general and fixed insanity; and not a mere temporary delirium, such as takes place in a fit of intoxication. When a person is laboring under a typhus fever, which it would seem was the testator's disease, a suspension of the rational powers is often superinduced, of many days duration. And if the proof were, as the tendency of the testimony would seem to have been, that the testator had arrived to that stage in the fever, when such

suspension had, to a greater or less extent, taken place, so as to incapacitate him to make a will, those who would undertake to establish a will, thereafter made, during his sickness, should be holden to prove, that he had, at the moment of making his will, recovered the use of his reason. The authorities upon this point are collected, and well considered in Shelfor's treatise on Insanity, &c. p. 275 to 290, and clearly support the ruling of the Judge in this particular.

The testimony objected to, underscored by black lines, in certain depositions used in the case, we think was legally admissible. It was as to the appearance of the testator, when the deponents saw him. He appeared, they say, unconscious of what was going on around him; and much prostrated by his sickness; that he did not appear to know a certain individual; and that an endeavor to converse with him proved unsuccessful by reason of insanity. These were not mere matters of opinion, but facts, somewhat of a general cast, and combining many minute particulars. A cross-examination might have elicited the indications tending to establish the general facts. A witness might, in general terms, have testified that the testator was insane. It would have been competent for the adverse counsel to have inquired into the particulars conducive to the establishment of the general fact. So if a witness had testified that the testator was asleep, the particulars from which he became assured that such was the fact, might have been inquired into.

As to the testimony objected to but admitted, that one of the witnesses called by the appellee had stated, " that he had lost his devotion; that he intended now to serve the devil as long as he had served the Lord; that he had a pack of cards which he carried about in his pocket, and called them his bible," we think it should have been excluded. It was not relevant to the point in issue. The only effect of it was to disparage the witness. It did not conflict with any statement by him made; nor did it, according to the rules of evidence, directly tend to show that his general character for truth was bad. The admission of such testimony would be opening a wide door

for the introduction, without any definite limitation, of the idle conversations of a witness from his earliest manhood. In this instance the jury may have been seriously prejudiced by its introduction; and may have been led to place less reliance upon the witness' testimony than they otherwise would have done. The appellee could not have expected such an attack upon his witness; and therefore could not have come prepared to rebut it. Not being able to discover that it had not an undue effect upon the minds of the jury, in the conclusion to which they came, we think a new trial must be granted.

ABNER WEEKS *versus* RICHARD THOMAS.

A mortgagee in possession cannot be charged for rent by the mortgagor, so long as the premises mortgaged remain unredeemed; unless there be a special agreement between the parties to the contrary.

In an action where it appeared, that the money claimed was paid expressly towards a note which the defendant held against the plaintiff; and which had been afterwards sued by the defendant, and judgment recovered thereon, after an appearance therein, by his attorney, and after numerous continuances of the action; *it was held*, that the money could not be recovered back.

ASSUMPSIT on an account annexed for house rent, a count for use and occupation, and the money counts. The parties agreed on a statement of facts, from which it appeared, that on April 2d, 1836, the defendant conveyed certain land and buildings to the plaintiff, and at the same time the plaintiff made a mortgage thereof to the defendant to secure four notes given for the whole of the purchase money, all which have never been paid; that on the same day the premises were leased by the mortgagor, the plaintiff, to the defendant, the mortgagee, until January 1st, 1837, by an instrument in writing, on which was an acknowledgment of payment of the rent; that the defendant, before the conveyances, had been in the occupation of the premises, and continued so to occupy until May 1st, 1837, when he removed therefrom;

and that in November, 1837, the defendant indorsed the notes and assigned the mortgage to a third person.

The plaintiff also claimed to recover ten dollars and interest, as having been paid to be appropriated by the defendant in part payment of one of the notes given for the land, and which had not been so appropriated; and produced a receipt of which a copy follows: — "Received of A. Weeks ten dollars, to be indorsed on my note against him given April 2d, 1836, for $500, due July 15, 1836. Richard Thomas." The ten dollars have never been indorsed on the note referred to, but in January, 1837, a suit was brought thereon in the name of Thomas against the plaintiff, and entered at the May Term of the Court of Common Pleas, answered to by the attorney of said Weeks, and continued from term to term until the January Term, 1838, when judgment was rendered, without deducting the ten dollars, and this judgment has been fully satisfied. If the plaintiff was entitled to recover, the defendant was to be defaulted; and if not, a nonsuit was to be entered.

Wilson, for the plaintiff, contended that the plaintiff was entitled to recover for the rent, because the lease shew, that the defendant occupied under him, and not as mortgagee, and no entry under the mortgage took place.

The defendant promised to indorse the ten dollars on the note, but has never done it, and has received payment for the note. This entitles us to recover it in this action.

Prentiss, for the defendant, contended that the mortgagor could never compel the mortgagee, on any promise implied by law, to pay rent to him, and could only recover, in such case, by bill in equity on redemption of the mortgage. St. 1821, c. 39; *Newall* v. *Wright*, 3 Mass. R. 138; Hilliard's Abr. 277; 4 Kent, 156.

The plaintiff cannot recover on account of the ten dollar receipt. The note was put in suit, the plaintiff answered to the action, and had an opportunity to have had it allowed, if due. The judgment is a conclusive bar. *Whitcomb* v. *Williams*, 4 Pick. 228; *Homer* v. *Fish*, 1 Pick. 435; *Loring* v.

Mansfield, 17 Mass. R. 394; 7 T. R. 269; 3 Conn. R. 461; 3 Day, 36; 1 Root, 210; 7 Greenl. 44; 1 N. H. R. 233; 1 Metc. & Perk. Dig. 293.

The opinion of the Court was drawn up by

WHITMAN C. J. — This action, as to the charge for rent, cannot be sustained. A mortgagee in possession cannot be charged for rent by the mortgagor, so long as the premises mortgaged remain unredeemed; unless there be a special agreement between the parties to the contrary. In this case the mortgagee had agreed to pay, and had paid accordingly, rent for a certain time. The attempt here made is to raise an implied assumpsit to pay for rent subsequently; but no such implication is, under such circumstances, recognized or inferable at law. The mortgagee is the owner in fee, as between himself and the mortgagor; and surely it would be an anomaly to raise a promise by implication, on the part of the owner in fee, to pay rent to one, who at law is regarded, when in possession, as but a tenant at sufferance to the owner in fee.

As to the other item, of ten dollars, it appears to have been paid expressly towards a note, which the defendant held against the plaintiff; and which has been sued by the defendant, and judgment thereon recovered, after an appearance by the plaintiff therein, by his attorney, and after numerous continuances of the action. There must have been ample opportunity to have had the ten dollars allowed in set-off and payment; and the plaintiff must be regarded, through wilfulness or gross negligence, as having omitted to avail himself of it in defence *pro tanto*. It is the policy of the law to afford its aid only to the vigilant; and especially not to those who are grossly negligent.

Plaintiff nonsuit.

NATHANIEL LORD, Treasurer, *versus* JOHN LANCEY *& al.*

The St. 1836, c. 212, "concerning constable's and collector's bonds," embraces *cities*, as well as towns, parishes, and plantations.

After that statute took effect, a bond to F. W. treasurer of the city of Bangor, or his successor in office, is erroneously made; but nevertheless may be a good bond at common law.

But as it is not a statute bond, an action thereon in the name of a successor of F. W. in the office of treasurer of the city, cannot be maintained.

DEBT on a bond given by Lancey, as principal, and by the other four defendants as his sureties, to "Ford Whitman, Treasurer of said city of Bangor, in said capacity, in the sum of fifty thousand dollars, to be paid to said Ford Whitman, or his successor in his said office," and bearing date July 21st, 1836. Ford Whitman had been chosen treasurer, and John Lancey collector of the city of Bangor, for the year 1836; and Nathaniel Lord, the plaintiff, was treasurer at the time the action was commenced and at the time of the trial.

A default was entered by consent of parties, which was to be taken off, if in the opinion of the Court the action cannot be maintained, and in the name of the present plaintiff.

J. Appleton and *Warren*, for the defendants, contended, that the action could not be maintained on this bond, because it was given to Whitman, as treasurer, when the statute requires, that a collector's bond should be made to the city and approved by the city government. St. 1836, c. 212. This statute is imperative, and repeals all former acts. Although Bangor is a city, it is included under the name of town. A town incorporated as a city is still a town. A bond given to the wrong person is void, and not entitled to validity as a common law bond. *Purple* v. *Purple*, 5 Pick. 226; 1 Penning. 115.

But if the bond be valid, as a common law bond, the action must be brought in the name of the obligee, and not, as in this case, in the name of an assignee, or successor. It is only on a statute bond, that an action can be supported in the name of

a successor. 3 Dev. 284, 297; 4 Dev. 43; 2 Hawks, 1; Jacob's law Dic. Corporations; Co. Lit. 9 (a); 2 Porter, 345.

Cutting, for the plaintiff, contended that the statute of 1836, has no application to cities. It relates only to towns, parishes and plantations.

But if this is not a bond taken in pursuance of any statute provision it is good at common law. There is no statute forbiding a city or a town to take a bond to their treasurer and to his successor, to secure the payment of money belonging to such city that may come into the hands of the obligor. *Winthrop* v. *Dockendorff*, 3 Greenl. 363; 3 Call, 523; 1 Wash. C. C. R. 367; 2 Stewart, 507; *Morse* v. *Hodsdon*, 5 Mass. R. 316; *Freeman* v. *Davis*, 7 Mass. R. 200; *Arnold* v. *Allen*, 8 Mass. R. 147; *Burroughs* v. *Lowder*, ib. 373. A bond to any person interested is good. Every inhabitant of Bangor has an interest to have the tax money paid over, when collected. The obligee holds the bond in trust for the inhabitants of the city.

The action is rightly brought in the name of the present treasurer. The defendants expressly contract and oblige themselves to pay, not only to Ford Whitman, but to any other person, who may be treasurer of the city. The successor may be made certain, and the promise is directly to him.

The opinion of the Court was by

Shepley J. — The bond of a collector of taxes was formerly required to be made to the treasurer of the town. St. 1821, c. 116, § 23. The act of the 15th of March, 1836, c. 212, provided, that all bonds to be given by collectors of taxes should be given to the inhabitants of the towns, parishes, or plantations, for which they were chosen or appointed. The bond in suit was made by a collector of taxes and his sureties on the twenty-first day of July, 1836, to Ford Whitman, treasurer of the city of Bangor, to be paid to him or his successors in office. If the act of 1836 embraces cities, this bond should not have been made to the treasurer, but to the inhabitants. The act incorporating the city of Bangor, special laws, c. 436,

§ 5, provides, that "all taxes shall be assessed and apportioned and collected in the manner prescribed by the laws of this State relative to town taxes;" although the city may establish further and additional provisions on that subject. As the duties of a collector of taxes in the city are the same, in the absence of any further provisions, as those of a collector of town taxes, the security to be required of him would be the same, and it would seem must be made in the same manner. The city continues to be a town for all the purposes of taxation and collection, although under another name and with different powers for certain purposes. There can be little doubt, that it was the intention to make a change in the mode of making the bonds in all cases, where they were required of collectors of taxes; and apparently for the purpose of making an explicit provision for their approval by the proper officers of the towns, parishes, and plantations. The bond in this case must therefore be considered as erroneously made to the treasurer. It may nevertheless be a good bond at common law. *Winthrop* v. *Dockendorff*, 3 Greenl. 156; *Kavanagh* v. *Saunders*, 8 Greenl. 422; *Horn* v. *Whittier*, 6 N. H. R. 88; *U. States* v. *Tingey*, 5 Peters, 115. But the present plaintiff cannot maintain an action upon it. He is not a party to the contract, and has no interest in it. Nor can he claim to prosecute it as a trustee for others; for he is not, either by implication or by the provisions of any statute, appointed such trustee. It is contended in argument, that the defendants oblige themselves to pay to the successor of the obligee, that the plaintiff is such successor, and that there is therefore a contract between these parties. But this reasoning presents only the common case of a bond made payable to a person named and his assigns, with the well settled doctrine, that the assignee cannot at law maintain an action upon it in his own name. He can only do so by the provision of some statute authorizing it. And the successor in office can maintain a suit on a bond made to his predecessor only in cases authorized by statute. The statutes in this State give such authority only in cases where the bond is made in conformity to the provisions of a statute. In the

case of *White, Judge*, v. *Quarles*, 14 Mass. R. 451, the bond was made to Samuel Holton, a predecessor of the plaintiff in the office of Judge of Probate, and to his successors in office, and the decision was, that if not a probate bond, the action was not rightly brought in the name of the successor in office.

In the case of *Stuart* v. *Lee*, 3 Call, 421, the bond was made by the sheriff of a county and his sureties to Beverly Randolph as Governor, and his successors in office, when it should have been made to the justices of the county; and it was decided, that the plaintiff, being the successor of the Governor in office, could not maintain the action.

In the case of *Calhoun, Judge*, v. *Lunsford*, 4 Porter, 345, the bond was made by an assessor and collector of taxes to Richard S. Clinton, Judge, and his successors in office, when it should have been made to the Governor of the State and his successors in office; and it was decided, that the plaintiff, being the successor of Clinton, could not maintain the suit.

The default is to be taken off, and a new trial granted.

City of Bangor *versus* John Lancey & *al.*

On the twentieth of July, a tax list accompanied by a warrant, duly authenticated, was committed to the collector, but the tax list was not under the hands of the assessors, as the statute requires; and on the fourth of October following, a supplementary or additional tax list, correcting certain errors or omissions in the first list, and expressly referring to it as containing the assessment for that year, was signed by a majority of the assessors, and committed to the collector, the two lists containing the assessments upon the polls and estates of the inhabitants of the city for that year.

It was held: —

That it was a sufficient compliance with the requirements of the statute, that the lists should bear upon them the official sanction of a majority of the assessors, evidenced by their signatures.

That by signing the supplementary list and therein referring to the former list, the assessors made a distinct declaration in their official character, and under their hands, that both lists constituted the list of assessments for that year.

And that such list, as a whole, must be considered as duly authenticated and committed to the collector after the fourth of October.

Debt on a bond made by the defendants to the inhabitants of the city of Bangor, dated July 31st, 1837. The condition of the bond was as follows: — "The condition of this obligation is such, that whereas the said John Lancey has been chosen and qualified as collector of taxes for the said city the present year; Now if the said Lancey shall faithfully discharge his duty as collector of taxes, then this bond shall be void, otherwise the same shall be and abide in full force and virtue."

At the trial before Shepley J. the action was defaulted by consent, and it was agreed that if the Court should be of opinion, upon examining the evidence, that the plaintiffs are entitled to recover, the default was to stand. It was agreed that all records or copies, "as well as the original assessments, warrants and other papers, may be used by either party." No copies of any of the papers referred to, but of the bond, are found in the case. The case will, however, be sufficiently understood from the opinion of the Court.

J. Appleton and *Warren* argued for the defendants, and cited *Foxcroft* v. *Nevins*, 4 Greenl. 72; *Colby* v. *Russell*, 3 Greenl. 227; St. 1821, c. 116.

Cutting argued for the plaintiffs, citing *Johnson* v. *Goodridge*, 3 Shepl. 29 ; and *Ford* v. *Clough*, 8 Greenl. 334.

The opinion of the Court was drawn up by

SHEPLEY J. — As decided in the case of *Lord* v. *Lancey*, *ante* p. 468, the bond in this case was correctly made to the inhabitants of the city. It is insisted, that there has been no breach of it, because no legal assessment was committed to the collector. It appears, that on the twentieth of July, 1837, a tax list accompanied by a warrant duly authenticated was committed to the collector, but the tax list was not under the hands of the assessors, as the statute requires. On the fourth of October following a supplementary or additional tax list, correcting certain errors or omissions in the first list, and expressly referring to it as containing the assessment for that year, was signed by a majority of the assessors and committed to the collector. These two lists contained the assessment on the polls and estates of the inhabitants of the city for that year.

It was decided in the case of *Johnson* v. *Goodridge*, 3 Shepl. 29, to be a sufficient compliance with the requirements of the statute, "that the lists should bear upon them the official sanction of a majority of the assessors, evidenced by their signatures." By signing the supplementary list and therein referring to the former list the assessors made a distinct declaration in their official character and under their hands, that both lists constituted the list of assessments for that year. And such list as a whole must be considered as duly authenticated and committed to the collector after the fourth of October. The condition of the bond providing for the faithful discharge of the duties of collector, the defendant must be responsible for any neglect of them. The default is to stand, and the amount is to be ascertained as agreed.

JOSEPH R. INGERSOLL & *al. versus* JOHN BARKER.

Fraud is, almost always, a matter of inference from circumstances. Direct proof of it can seldom be expected. Concealment and disguise are often essential ingredients in it. It consists in intention, which if nefarious, will not be avowed; still it must be proved; and the question is, how shall it be proved. The answer is, by circumstantial evidence. A resort can be had to none other. The demeanor of the party implicated; the nature, tendency and effect of his acts, are to be carefully examined. A train of circumstances, sometimes more and sometimes less intimately connected with the particular act to be proved, may be presented, from which inferences may be drawn as to the object and design of the person charged with having committed the fraud.

If one obtain goods by means of fraudulent representations, and then assign them for the benefit of his creditors, the assignee not being himself a creditor, and no creditor having accepted the assignment when the assignee was fully notified of the fraud, the property cannot then be regarded otherwise than as virtually in the hands of the assignor and perpetrator of the fraud; and no rights can be subsequently acquired by any of his creditors by assenting to the assignment, adverse to him from whom the goods were fraudulently obtained.

THIS was an action of trover for 355 mill logs, alleged to have been converted by the defendant on July 15, 1839.

It was admitted by the defendant that John Black was the authorized agent of the plaintiffs.

Elijah L. Hamlin, called by the plaintiffs, testified that he was the agent of the plaintiffs, employed by Black, to obtain a settlement with Stephen S. Crosby for the logs, which had been cut by his men the preceding winter on land of the plaintiffs; that he called on him with a letter from Black containing an account of the logs, the price and quantity, and informed Crosby, that he was authorized to settle with him; that he and Crosby agreed where the logs were cut, and that the plaintiffs had before consented to retain a lien merely upon them as security for the stumpage, and the same were mixed with other logs of Crosby. The counsel for the defendant here made an objection to the admissions of Crosby, and the witness then proceeded to state what was said afterwards in a conversation between him and the defendant, Crosby being present, by which it appeared that the defendant was made ac-

quainted with the said admissions of Crosby. The witness stated, that after his first conversation with Crosby, he called upon him again on the 11th of June, 1839, and then relinquished the plaintiffs' claim to the logs in question by taking Crosby's note for the amount, in the number and quantity and price as mentioned in the writ, by reason of certain representations which Crosby made to him at the time, of his solvency, the amount of his property, his freedom from embarassment, his doing a snug business all within his own means, his not being in the habit of asking indorsers or indorsing for others, having a large surplus of property after paying every liability against him, and on request made, said he was not deceiving him, and many other facts stated by the witness, tending to show that Crosby represented himself to be possessed of much property; that the witness not knowing the situation of Crosby was induced to take his note payable in three months for the amount, and discharged the lien of the plaintiffs upon the logs; that on the 15th of July, 1839, having heard of the failure of Crosby, he called on the defendant, who informed him, that Crosby had assigned all his property to him for the benefit of his creditors; that the witness informed the defendant in what manner the logs were obtained, and the lien given up, and gave the defendant a history of the whole affair, and of Crosby's representations; and in the presence of Crosby recapitulated all the facts attending the sale; and thereupon demanded of the defendant the logs as the agent of the plaintiffs; that the defendant said he knew nothing about it and referred him to his attorney; that he called on the attorney and saw the assignment from Crosby to the defendant, and it was then signed only by Crosby and the defendant as assignee, which now appears thereon; that the defendant on being inquired of where the logs were, said they were at Milford, unsawed, and Crosby, in the presence of defendant, repeated it, and at the same time Crosby told the defendant that the logs inquired after by the witness were the logs purchased by him; witness told defendant, that the logs were the property of the plaintiffs; that witness and Crosby at that time agreed about all the facts as stat-

ed by the witness, and they differed only concerning the giving up of the logs; and no consent was given that the logs should be given up.

It was admitted that Crosby's liabilities were $27,790. The witness further testified, that he had since called on the defendant and he said that Crosby's property would pay but a few cents on a dollar.

The assignment was produced in the case and referred to. The note taken from Crosby was tendered to the defendant's counsel and was put on the files of the Court by the plaintiffs' counsel for the benefit of Crosby or the defendant, it having been refused by the defendant's counsel. There was no evidence that it had ever been tendered before. The plaintiffs then offered to show, that goods were obtained by Crosby, about the time of his obtaining the logs in question, of others by false and fraudulent representations. This was objected to, but TENNEY J. presiding at the trial, allowed it. Harvey Pond and Ephraim Moulton were called by the plaintiffs, and their testimony tended to show that they had sold Crosby goods by reason of representations made by him; and they offered to prove that the representations made to Pond were in February or March, 1839, and those to Moulton in Oct. 1838. This was objected to by the counsel for the defendant, but admitted by the Judge, they all having relation to his wants in order to carry on his lumber operations of 1839. And they said they should not have given him credit, but for his representations, and Moulton said those representations influenced him to let him have goods after Dec. 1838. Evidence was introduced tending to show Crosby's great indebtedness at the time of his representations to Hamlin, and also to the other witnesses, though not to the extent at the time he made them to the two last, as to Hamlin. The falsehood of his statements at the time he obtained the logs and the goods sold to him by others, and that he was then an embarrassed man, that he did obtain indorsers on his paper at the bank, and that he had mortgaged some of his real estate and household furniture, which mortgages were undischarged when he obtained the logs,

were stated by witnesses. The defendant called Crosby as a witness, whose testimony did not essentially contradict that of the other witnesses, but in some respects confirmed it, stating that he had given mortgages of real and personal property before that time, but when the negotiation took place with Hamlin it did not occur to him that such was the fact; and his testimony tended to show that he was ignorant of his real condition; that he had met with losses about that time and soon after; that his paper, which he thought he had provided for, was returned protested, which impaired the confidence of his friends in his ability to pay; and that in various ways he was grossly disappointed in his anticipations.

The counsel for the plaintiffs inquired of Harvey Pond the value of certain demands which had belonged to Crosby, and had been shown to Hamlin by the attorney of the defendant, on his being referred to him by the defendant, but which had been put into the assignment as Schedule B. This inquiry was objected to, but was allowed to be put by the Judge presiding. The counsel for the plaintiffs offered also to show that Crosby made false representations to said Pond in obtaining his name on a note to the bank on the 29th of May, 1839. This was objected to, but received. The defendant's counsel proposed to ask a witness called by the plaintiffs, who had become a party to the assignment, if he should have become a party, had he known that the amount of property demanded in this suit was to have been taken out. This was objected to by the plaintiffs' counsel and ruled out.

It was contended by the defendant's counsel, that this action could not be maintained, because the logs were mixed with others to which the plaintiffs had no title, and they could not be distinguished and separated; that as the property passed into the hands of the defendant without the knowledge of the creditors, who became the third party to the assignment, the plaintiffs could not maintain this action, even if the fraud of Crosby was satisfactorily proved; and that the action could not be maintained, because the plaintiffs had not returned, or offered to return, the note of Crosby till the time of trial.

On the foregoing evidence TENNEY J. presiding at the trial, instructed the jury, that the plaintiffs must prove the property to have been once theirs; and that the admissions of the defendant, and the statements of Crosby made in the presence of the defendant were evidence to this point. That this action could be maintained, even if the logs were so mixed with others of Crosby's that they could not be distinguished and separated, if they were satisfied, that they were the property of the plaintiffs. That this action could be maintained, notwithstanding the property had passed into the hands of the defendant, if he was notified of the facts, and the property was demanded and refused before the third party had come into the assignment, provided the plaintiffs could recover on other grounds. That it was not necessary for the maintenance of this action, that the note should be offered before the trial. That this action could be maintained, if Crosby had obtained the property by fraudulent representations, and the defendant had been notified thereof and the property demanded before the creditor's rights had attached, and that the latter could not be till they were parties to the assignment. That before the creditors had become parties to the assignment the property would be situated in the same manner as though it were in Crosby's hands. That in order to obtain a verdict, the plaintiffs must satisfy the jury, that the property was obtained by Crosby by representations which were false, known by him at the time to be false, made with a design to deceive and to obtain the property, and that the agent of the plaintiffs was thereby deceived. That if Crosby made false representations, and known by him to be false, the intention would be left to the jury, and intention to deceive would, as a matter of fact, be implied, unless there were facts and circumstances in the case to rebut such implication. That if Crosby was seriously called on by Hamlin to state the true condition of his affairs, and cautioned not to deceive him or himself, and Crosby represented his affairs to be prosperous and that he was a man of property, free from embarrassment, and he said this without giving himself time to reflect, when by reflecting he could have given a different ac-

count, and this want of reflection was through an indifference whether he spoke true or false, it was in effect making statements known to be false. And that if the logs were the property of the plaintiffs, if they were parted with by fraudulent representations of Crosby, if they were demanded by Hamlin, and refused before the assignment was executed by the third party, a conversion was made out, and their verdict would be for the plaintiffs.

The verdict was for the plaintiffs. If any of the rulings and instructions of the Judge were erroneous, the verdict was to be set aside.

Moody argued for the defendant, and cited 1 Stark. Ev. 140; 1 Phil. Ev. 117, 138; *Everett* v. *Wolcott*, 15 Pick. 97; *Buffington* v. *Gerrish*, 15 Mass. R. 156; *Gilbert* v. *Hudson*, 4 Greenl. 347; *Clark* v. *Flint*, 22 Pick. 231.

Hobbs argued for the plaintiffs, and cited *McKenney* v. *Dingley*, 4 Greenl. 172; *Seaver* v. *Dingley*, ib. 306; *Rowley* v. *Bigelow*, 12 Pick. 307; *Howe* v. *Reed*, 3 Fairf. 515; *Hawes* v. *Dingley*, 17 Maine R. 341; *Tryon* v. *Whitmarsh*, 1 Metc. 1; *Clark* v. *Flint*, 22 Pick. 231; *Thurston* v. *Blanchard*, ib. 18; *the Watchman*, 1 Ware, 232.

The opinion of the Court was drawn up by

Whitman C. J. — We are unable to see wherein the rulings of the Judge, who presided at the trial of this cause, or his instructions to the jury were justly exceptionable. Fraud is, almost always, a matter of inference from circumstances. Direct proof of it can seldom be expected. Concealment and disguise are often essential ingredients in it. It consists in intention, which, if nefarious, will not be avowed; still it must be proved; and the question is, how shall it be proved. The answer is, by circumstantial evidence. A resort can be had to none other. The demeanor of the party implicated; the nature, tendency and effect of his acts, are to be carefully examined. A train of circumstances, sometimes more and sometimes less intimately connected with the fraudulent act to be

proved, may be presented, from which inferences may be drawn as to the object and design of the accused.

Hence, to ascertain whether a person has passed counterfeit money, with an intention to defraud, we inquire, whether he has shortly before and afterwards passed off other similar money; and whether in any such instance he was given to understand that it was counterfeit; in this way making it evident that he must have known its falsity, and evincing a design to commit a fraud. A similar course of procedure has repeatedly been held applicable in cases in which goods have been obtained by false pretences. The case at bar was clearly of that character; and we do not discern that the Judge, in the trial of it, admitted proof, other than might fairly be allowed according to precedent, under the peculiar circumstances of the case.

It is objected, that the property in question had vested in the defendant as assignee for the benefit of creditors, before he could have had knowledge of any such fraud; and in argument, although it does not appear in the case, it is urged, that the defendant was also a creditor; and therefore must be deemed to have executed the assignment as such, as well as in the character of an assignee. But if it had appeared, that the defendant was in the condition of a creditor, as well as of an assignee; or if it had appeared that other creditors had assented to the assignment, before they were notified of the fraud here set up, it is at least questionable whether it would have been of any avail against the plaintiffs; especially as it is not presumable that they had become such after the fraudulent sale. If the property had been attached at the suit of any one of the creditors, so circumstanced, it is very clear that it could not have been held against the claim of the plaintiffs. *Buffington & al.* v. *Gerrish & al.* 15 Mass. R. 156.

But however this may be, it not appearing that the defendant was a creditor, and no other person, in the character of a creditor having accepted of the assignment, when the defendant was fully notified of the fraud practised upon the plaintiffs, the property could not then be regarded otherwise than virtually in the hands of Crosby, the assignor and perpetrator of the

fraud ; and no rights could be subsequently acquired by any of his creditors, by assenting to the assignment, adverse to those of the plaintiffs. And, besides, if the defendant were a creditor, and any lien upon the property assigned were created by his acceptance of the assignment as such, it does not appear that the property assigned, other than that claimed by the plaintiffs, would not have been amply sufficient for his indemnity. So that, in any just view of the case, as presented to us, we cannot come to the conclusion that the verdict ought to be set aside.

Judgment on the verdict.

ASA WALKER, JR. *versus* JOHN HILL.

Before the Revised Statutes were in force (c. 104, § 60,) a deputy sheriff might lawfully serve a writ, if he was not a party to the suit, although the action was for his benefit.

THE action was brought by the plaintiff as indorsee of a note. The defendant pleaded in abatement, "that Daniel P. McQuestin, deputy sheriff, the officer who made service of the writ in this case as deputy sheriff, was at the time of the alleged service of said writ, and still is, the true and lawful owner and holder of the note in said writ declared on, and that in truth and in fact said McQuestin is the real party in interest in said suit." The plaintiff demurred to the plea, assigning five causes of demurrer. The Court in the decision of the question, considered it only as a general demurrer, and therefore it becomes unnecessary to give the special causes, or the arguments bearing upon them.

A. Walker, for the plaintiff, argued in support of the demurrer, and cited, 4 Johns. R. 486 ; 19 Viner, 443 ; Cro. Car. 416 ; St. 1821, c. 93 ; *Mer. Bank* v. *Cook*, 4 Pick. 405 ; *Adams* v. *Wiscasset Bank*, 1 Greenl. 361 ; 19 Johns. R. 501 ; *Freeman* v. *Cram*, 13 Maine R. 255.

J. A. Poor, argued for the plaintiff, and contended, that a deputy sheriff could not legally serve a writ, where he was the plaintiff in interest, although the suit might be brought in the name of another; and cited *Commercial Bank* v. *Wilkins*, 9 Greenl. 28; *Smith* v. *Saxton*, 6 Pick. 483; *Clark* v. *Lyman*, 10 Pick. 45; *Brewer* v. *New Gloucester*, 14 Mass. R. 216; *Sutton* v. *Cole*, 8 Mass. R. 96; 5 Verm. R. 93; 19 Johns. R. 308; *Sutton* v. *Cole*, 3 Pick. 232.

The opinion of the Court was drawn up by

TENNEY J. — The pleadings show that Daniel P. McQuestin made service of the writ in this suit as a deputy sheriff, and that he was at the same time the owner of the note declared on. Is the service legal? The statutes of 1821, c. 93, § 1, provide, "that every coroner within the county for which he is appointed, shall serve all writs and precepts, where the sheriff or either of his deputies shall be a party to the same." McQuestin was not a party to the writ; he is not named in it. "They who make any deed and they to whom it is made are called parties to the deed." 5 Jacob's Law Dictionary, p. 104. A party to a writ is either plaintiff or defendant, named therein.

If the term *party* embraces all those who may be interested as owners, neither the sheriff nor any of his deputies could make service of the writ in this case. It has been settled however, that service made upon the President, Directors and Company of a Bank by an officer, who at the time was a stockholder therein, was sufficient; and that the writ could not have been served by a coroner, because the deputy sheriff was not a party to the suit, although interested. *Adams* v. *Wiscasset Bank*, 1 Greenl. 361. In *Merchants' Bank* v. *Cook*, 4 Pick. 405, the Court say, "The word party then is unquestionably a technical word, and has a precise meaning in legal parlance. By it, is understood, he or they by or against whom a suit is brought whether in law or in equity; the party, plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons; they are parties in the writ, and parties on the record, and all others, who may be

affected by the writ indirectly or consequentially are persons interested, but not parties." The amount of interest, whether the whole or only a part of the subject matter of the suit, cannot be the foundation of a distinction; neither is the principle varied by the interest being on the side of one party rather than the other. *Thayer* v. *Ray and Trustees*, 17 Pick. 166; *Simonds* v. *Parker*, 1 Met. 514. By the Revised Statutes a person interested, as well as a party to the suit, is precluded from serving the writ. Rev. St. c. 104, § 60. But this cannot apply to the case at bar. The foregoing views, render it unnecessary to consider whether the plea is in form correct, for however accurate, it cannot avail the defendant.

Plea bad.

Henry Warren *versus* Isaac Wheeler.

If the obligor makes an express promise of performance to an assignee of the bond, the assignee may maintain assumpsit in his own name upon such promise.

The assignment of a bond is a good consideration for an express promise by the obligor to an assignee to perform or to pay.

If the obligor contracts to convey land, on the performance of certain conditions within a stipulated time, if the obligee shall elect to become the purchaser upon the conditions named, it is his duty to give notice of his election within the time, if he would require a conveyance.

Where by the contract performance is to be made by the parties respectively at the same time, that party who would claim performance of the other, must show a readiness and offer to perform on his part. But when the contract itself determines which party shall first prepare and offer to perform, neither the law, nor the tribunals, break in upon or disregard such agreement.

In estimating the value of a tract of land at a particular time, evidence of the value of other land, whether "in the neighborhood or more remote," and the value of particular portions of the land in question, as well as the sum the witnesses thought the whole tract might have brought, "based upon the price at which lands in the same town were selling in the market at the time," may be received as circumstantial evidence of the value.

In assessing damages for the breach of a contract to convey land, the jury may find the value of the land in money on the day of the breach of the contract, and in coming to a result, they are not confined to the value of the land for agricultural or other useful purposes, or the probable value of the land for building lots, but they may "take into consideration the marketable value at the time," and form their opinion "from taking a view of all the objects for which the land was desirable," and add interest on the value from the time the contract should have been performed.

This was an action of *assumpsit*, brought upon a written agreement made upon the back of a bond given by the defendant to one Kimball.

On June 11, 1835, the defendant gave his bond, under his hand and seal, to Jedediah Kimball, in the penal sum of six thousand dollars, having this condition. "The condition of the above obligation is such, that whereas the said Wheeler contracted with the said Kimball to sell and convey to the said Kimball, or his assigns, a tract of land in Bangor, being all that part of the lot that was purchased by said Wheeler of John M. Prince, which lies northwesterly of the part of said

lot sold by said Wheeler to Remick, being three acres more or less, at the rate of one thousand dollars per acre, to be paid one third in cash upon delivery of the deed, and the remainder half in one year, and half in two years, with interest annually. The purchaser to give good notes for the second and third payments, with satisfactory security.

"Now if the said Kimball, or his assigns, shall elect to become purchasers of said tract upon the above named conditions within sixty days from this date, and the said Wheeler shall thereupon execute and deliver or cause to be delivered to the said Kimball, or his assigns, upon request therefor, a good and sufficient deed of the above described premises, then this obligation shall be void and of no effect, otherwise it shall remain in full force."

On June 11, 1835, Kimball, for the consideration of $15, assigned one half the bond to Warren, the plaintiff; and on July 9, 1835, he also, for the consideration of $750, assigned the other half of the bond to the plaintiff. Both these papers were under seal.

On August 27, 1835, the defendant, Wheeler, made a writing on the back of the bond, under his hand, but not sealed, of which a copy follows.

"I hereby acknowledge notice to have been given on the within in due time and demand of deed, and also have received one thousand dollars, the first payment, according to the tenor of this bond. And I have agreed to deliver to Henry Warren (assignee) or his assignees a good warrantee deed within twenty days from date. And then said Warren or assignee shall deliver to me the notes mentioned within. And if said Warren shall have had said land surveyed in the mean time, and it shall fall short of three acres, then I am to discount in proportion. August 27th, 1835.

"Isaac Wheeler."

The action was founded on this agreement.

At the trial, before TENNEY J. the plaintiff offered to prove by Jedediah Kimball, that the plaintiff gave him fifteen dollars for the first assignment on the bond, and seven hundred and

fifty dollars for the second. This evidence was objected to by the defendant but it was admitted. He further testified, that he demanded of the defendant, for the plaintiff, a deed of the land mentioned in the bond, at the defendant's house in Garland, the last of June, 1835. The defendant said he could not attend to it then, but would before the bond run out. The middle or last of July he called upon the defendant again, and told him he wished him to come and run out the land, and give a deed; that the defendant set a time when he would meet the witness in Bangor, and attend to it; that the witness came to Bangor, at the time appointed; that the defendant came a day or two after, and said he could not see to running out the land at that time. This, and what appears in the writing declared on, was all the evidence relied upon by the plaintiff to show a performance of his agreement on his part as contained in the bond or writing declared on. The plaintiff then offered the record of a mortgage executed by the defendant to one Prince of the land described in the bond, which was objected to by the defendant, but admitted. The mortgage was dated March 5, 1833, and was discharged on the margin of the record, Dec. 23, 1835. Upon the foregoing evidence the defendant moved for a nonsuit, but the motion was overruled by the Judge presiding at the trial, on the agreement of the plaintiff to become nonsuit, if he is not entitled to maintain his action. Witnesses were introduced by the plaintiff to prove the value of the land, and to prove what land lying in the neighborhood of the land described in the bond sold for, in the fall of 1835; and also land in Bangor more remote. This evidence was objected to, but was received.

The plaintiff also offered evidence to show for what sum lots on the land in question might have sold for in Sep. 1835, in the opinion of the witnesses, and this evidence, though objected to, was received; and also what the witnesses thought the whole lot might have brought per acre, based upon the price at which lands in Bangor were selling in the market in the fall of 1835, was admitted in evidence, though objected to.

Several witnesses for the defendant were introduced, who testified as to the value of lands in Bangor, and as to the actual value of the land in the bond mentioned, in 1835, and its diminished value in Oct. 1838, when this action was brought.

Hereupon the Judge instructed the jury, that the plaintiff could maintain the action in his own name; that the covenants and agreements in the writing declared on were independant; and that no tender of notes was necessary to be made by the plaintiff, further than what appeared by the writing declared on, and the evidence touching that point; that it was the duty of the defendant to tender a deed within the twenty days mentioned in the memorandum, declared on, upon the back of the bond; that in assessing the damages, they would find the value of the land on the fifteenth day of September, 1835, in money; and in coming to a result, they would not be confined to the value of the land for agricultural, or pastoral, or other useful purposes, or on account of the probability that the land would be in demand for building lots, but they might take into consideration the marketable value also at that time; and the result would be from taking a view of all the objects for which the land was desirable; and that their verdict on this question would be for what they considered the value of the land, estimated by the foregoing principles, on the fifteenth day of Sept. 1835, deducting therefrom the sum of $2000, which had not been paid, and interest on the balance so found from the said 15th Sept. 1835. The jury returned a verdict for the plaintiff for $2419,81, being the amount of $1765, and interest thereon.

If the presiding Judge was incorrect in ruling that this action could be maintained, upon the evidence adduced, the verdict was to be set aside and a nonsuit entered. If the action could be sustained, and any of the objections overruled are held valid, or if the rules given for assessing damages are incorrect, the verdict was to be set aside and a new trial granted; otherwise judgment was to be rendered upon the verdict.

A. W. Paine, for the defendant, contended:

1. That the action was improperly brought. Instead of

assumpsit in the name of Warren, it should have been debt on the bond in the name of Kimball, the obligee. The bond is the basis of the action, the writing being but the mere acknowledgment of certain facts. But if this writing can be construed into a contract, there was no consideration for it. A new consideration is necessary to support it as a contract. 1 Chitty on Pl. 10, 11. If this be a contract, it alters the whole tenor of the bond, and it is as necessary to show a consideration, as if there had been no bond.

2. Before the action could be maintained, the plaintiff should have given the defendant notice of his desire to purchase, that an opportunity might have been had to provide the deed. There was no promise by the plaintiff to take the land and pay the remaining consideration, and the defendant could not know that such was his desire, without notice. The fair inference was the contrary. *Hudson* v. *Swift*, 20 Johns. R. 24; *Fuller* v. *Hubbard*, 6 Cowen, 13.

3. The covenants in the bond were dependent, as were also the stipulations in the agreement. The plaintiff therefore should have made and tendered the notes, before he could call upon the defendant to perform. There were indeed no covenants or promises on the part of the obligee or promisee. They cannot be said to be independent stipulations, where they were all on one side. The defendant had no power to compel performance on the part of the plaintiff, when he had fully performed on his part. There is no ground for contending, that the plaintiff can call on the defendant to perform without showing a readiness to perform on his part. 4 Conn. R. 3; *Tompkins* v. *Elliot*, 5 Wend. 496; *Howe* v. *Huntington*, 3 Shepl. 350; *Dana* v. *King*, 2 Pick. 155; 1 Chitty on Pl. 314. By the very terms of the agreement, the notes were to be delivered at the same time of the delivery of the deed. As the plaintiff did not show, that the notes were ready, the action cannot be maintained for this cause alone. *Parker* v. *Parmelee*, 20 Johns. R. 130; *Brown* v. *Gammon*, 2 Shepl. 276; *Hunt* v. *Livermore*, 5 Pick. 395; *Howland* v. *Coffin*, 11 Pick. 151; *Kane* v. *Hood*, 13 Pick. 281; 1

Peters, 464; *Couch* v. *Ingersoll*, 2 Pick. 303; *Drummond* v. *Churchill*, 5 Shepl. 325. The plaintiff here had his election to take the deed or not; and if we had tendered it, and he had refused to take it, we should have been without remedy.

4. The mortgage to Prince can make no difference. The contract was merely to give *a good and sufficient deed.* This does not require that the title should be perfect. *Gazley* v. *Price*, 16 Johns R. 267; *Tenney* v. *Ashley*, 15 Pick. 546; *Aiken* v. *Sanford*, 5 Mass. R. 494.

5. The verdict should be set aside on account of the erroneous admission of testimony, in several particulars. It was wrong to admit testimony to prove the amount paid by Warren to Kimball for the transfer of the bond; or to prove the value of lands situated at a great distance from that in controversy, and different in quality; or to prove the value of land in the densely settled parts of the city, at a distance from the land described in the bond; or to prove at what price certain specific portions of the land could be sold.

6. The rule laid down by the Judge, relative to the measure of damages, was erroneous. The actual value of the land at the time, and not a speculation price, was the true measure. What speculators would give at that particular time had no tendency to show its true value. The instruction induced the jury to fix upon the price paid by Warren to Kimball, as the amount of damages, instead of the true value of the land, at the time the alleged contract is said to have been broken.

Warren, pro se, was informed by the Chief Justice, that he might reserve his argument until called upon for it.

The opinion of the Court was drawn up by

Shepley J. — The first objection is to the form of the action. In the case of *Fenner* v. *Mears*, 2 Bl. R. 1269, the defendant made a bond to one Cox, and indorsed upon it an agreement to pay to any assignee of Cox; the plaintiff, being such assignee, maintained assumpsit on that agreement. That case has been approved in many subsequent cases. It is then said, the promise to the plaintiff is not binding for want of

consideration and of mutuality. In the case of *Innes* v. *Wallace*, 8 T. R. 595, the Court say, "they were clearly of opinion, that the assignment of the bond to the plaintiff was a good consideration for the assumpsit of the defendant." And it was so decided in *Crocker* v. *Whitney*, 10 Mass. R. 319; and *Parkhurst* v. *Dickerson*, 21 Pick. 310. The case of *Forth* v. *Stanton*, with the notes appended, 1 Saund. 210, is not opposed to this doctrine. The decision in that case is, that there must be a new consideration to support a promise by an executrix to pay *de bonis propriis*.

The second objection is, that the plaintiff should have given the defendant "notice of his desire to purchase, that he might have an opportunity to provide the deed." No doubt such was the duty required by the bond; but the defendant, in his written agreement indorsed upon it, says, "I hereby acknowledge notice to have been given on the within in due time, and demand of a deed." There was no occasion for a further notice or demand; for the defendant had acknowledged, that these preliminary steps had been taken, and that the cash payment had been made; and had thereupon agreed to deliver a deed within twenty days.

The third objection is, that the covenants in the bond, and the stipulations in the agreement indorsed upon it, were dependent; and that the plaintiff should therefore have made and tendered the notes before he could call upon the defendant to perform. There can be no doubt, that it was the intention of the parties as expressed both in the condition of the bond, and in the agreement indorsed upon it, that the deed should be delivered and payment made by money and notes at the same time. And neither party would be obliged to perform unless the other did. In such case the general rule is, that the party, who would claim performance from the other, must show a readiness and offer to perform on his own part. But this rule does not prevail, when the contract itself determines, which party shall first prepare and offer to perform. When the parties have agreed upon this matter, neither the law, nor the tribunals, break in upon or disregard such agree-

ments. They are admitted to be effectual. Have the parties in this case agreed, which should first prepare and offer to perform? The defendant in the agreement indorsed upon the bond, as before stated, acknowledges notice of the acceptance of the terms of purchase, a demand for a deed, and the receipt of the cash payment of a thousand dollars, and then says, "I hereby agree to deliver to Henry Warren, assignee, or his assigns, a good warrantee deed within twenty days from date. And then said Warren, or assignee, shall deliver to me the notes mentioned within." The intention and effect of this language cannot be misunderstood. The defendant acknowledges, that the previous acts required of the other party had been so far completed, that it became his duty to prepare and present a deed, and then receive the notes on its delivery; and this he promises to do within a certain time. And this he has never done or offered to do. And it is as clearly a breach of his contract, as if he had promised in writing to pay the debt of another within a certain number of days, and then receive an assignment of the debt to himself, and had wholly neglected it.

Other objections have reference to the admission of testimony relating to the value of the land, and to the instructions respecting the measure of damages. It might not be a very unreasonable inference, that the value of three acres of land would not vary greatly from that "lying in the neighborhood," or from that in the same place "more remote," unless it should be proved to be of a different quality, or to be situated in the densely settled part of a village or city. And it does not appear, that this was so situated, or that testimony was received of the value of lands at any great distance from it. It would be circumstantial evidence only of the value of the three acres; and as such it might be received.

The instructions to the jury respecting the measure of damages, as well as upon the other points in the case, appear to have been correct.

Judgment on the verdict.

LORENZO S. CRAGIN *& al. versus* JAMES H. CARLETON *& al.*

Where the defendants were sued on a note given by a partnership name, and judgment was rendered against them by default, a copy of that judgment is competent evidence, as a concession that a partnership existed between them, in a suit against them as partners by a different plaintiff.

The effect of judgments is never to be explained by parol; and surely not by the declarations of the parties to them, in opposition to what is obviously imported by them.

ASSUMPSIT on a note, dated February 20, 1838, in favor of the plaintiffs against James H. Carleton, Robert R. Haskins and Romulus Haskins, alleged to have then been copartners, doing business in the name of J. H. Carleton & Co. Carleton and Romulus Haskins were defaulted; and the only question was, whether Robert R. Haskins was liable as a partner.

The note, which was admitted to have been signed by Carleton in the partnership name, was read to the jury. To prove that Robert R. Haskins was a partner, after the introduction of other evidence, the plaintiffs produced and offered in evidence a copy of a judgment against all the defendants, recovered by default, at the return term of the writ, in the Court of Common Pleas for the county of Cumberland, March Term, 1838, in favor of the Oriental Bank, on a note given April 14, 1836, and signed by J. H. Carleton & Co. To the admission of this judgment in evidence the defendant objected. TENNEY J., presiding at the trial, permitted it to be read to the jury, as evidence of the admission by the defendant, R. R. Haskins, that he was a member of that firm. The counsel for the defendant then proposed to prove, that after the commencement of that suit, and before the default, the defendant consulted counsel in reference to a defence thereto, stating to the counsel that he was never a member of the firm of J. H. Carleton & Co. and that he had never in any way authorized the use of his name by that firm; that upon inquiry by his counsel, whether he considered the firm of Carleton & Co. solvent, he stated that he thought it was; and that upon the suggestion by his counsel, that the amount of the demand sued was small, and that the expense of litigating it at such distance would be

considerable, whether it would be best to resist it, he concluded, and so instructed his counsel, to let the action be defaulted. The plaintiffs objected to the admission of this evidence, and it was excluded by the Judge.

The defendant then consented to be defaulted, with leave to move to have the default taken off, if, in the opinion of the Court, the judgment was not admissible in evidence, or if the evidence offered by the defendant, and rejected, was admissible.

A. Walker, for the defendant, contended that the Judge erred, both in admitting the record of judgment, and in excluding the evidence offered; and cited, *Lane* v. *Burgess*, 3 Greenl. 165; *New England Bank* v. *Lewis*, 8 Pick. 113; 6 T. R. 275; 2 W. Bl. 827; 9 Conn. R. 309; *Kimball* v. *Morrell*, 4 Greenl. 368; 1 Phil. Ev. 84; 2 Stark. Ev. 48; 3 Johns. R. 427; 10 Johns. R. 365; 11 Johns. R. 161; 9 Johns. R. 141; *Storer* v. *Gowen*, 18 Maine R. 174; 7 Ves. 508; 5 Ves. 700.

J. A. Poor, for the plaintiff, contended that the ruling of the Judge was correct in both particulars; and cited, *Ellis* v. *Jameson*, 17 Maine R. 235; *Fogg* v. *Greene*, 16 Maine R. 282; *Casco Bank* v. *Hills*, ib. 155.

The opinion of the Court, SHEPLEY J. taking no part in the decision, having been employed at the time of the argument in trying jury causes in the County of Piscataquis, was drawn up by

WHITMAN C. J. — The only questions raised by the defendants are, whether a judgment entered against them, as copartners upon default, in a suit between them and persons other than the plaintiffs, was admissible in this case to prove their copartnership; and, if it was, whether the reasons given by one of the defendants, who denies that he was a partner, disclosed by him to his counsel for suffering a default to be entered in that suit, were admissible together with the advice of his counsel thereon, by way of showing that the default should not be taken to be a concession that a partnership existed be-

tween them. As to the first question, we cannot regard it otherwise than as settled by the case of *Ellis* v. *Jameson*, 17 Maine R. 235, that such judgment is admissible. And, as to the other, we are not aware of any precedent in support of such a proposition; but, on the contrary, the rules of evidence seem to be diametrically opposed to it. The effect of judgments is never to be explained by parol; and surely not by the declarations of the parties to them, in opposition to what is obviously imported by them.

Judgment on the default.

EDWARD R. SOUTHARD *versus* NATHANIEL WILSON.

In an action against the indorser of a note, the maker, for whose accommodation it had been indorsed, without a release from the defendant, is an incompetent witness for him.

If a party introduces a release, for the purpose of discharging the interest of a witness, he must, ordinarily, prove its execution.

Where an interested deponent states in his deposition, that the party calling him, and in whose favor the interest is, has given him a release, but no release is produced, either at the time of the taking of the deposition, or at the time it is offered in evidence at the trial, the deposition is inadmissible.

ASSUMPSIT on a note of hand, made by Abner Bailey to the defendant, and by him indorsed for the accommodation of the maker, dated Feb. 20, 1836, for the sum of $415. To prove payment of the note the defendant offered the deposition of Bailey, the maker of the note. To the admission of this deposition the plaintiff objected on account of the interest of the witness. The objection was overruled by SHEPLEY J. presiding at the trial, and the deposition was read to the jury. The verdict was for the defendant, and the plaintiff filed exceptions.

The following are all the parts of the deposition, pertinent to the present inquiry.

"By defendant. Interrogatory 10. Has or has not said Wilson given you a receipt and discharge in full from all

liability on account of said note? Answer of deponent. He has, prior to my former deposition, and has now given me another, and the following is a true copy of the same. "Received of Abner Bailey one dollar in full for any and all claim I may or can have upon him in consequence of any liability of mine by indorsing a note for his benefit for the sum of $415, dated Feb. 20, 1836, and in full of any and all claims I might have upon him growing out of the suit of E. R. Southard vs. me on said note. Given under my hand and seal, at Orono, this sixth day of August, 1840. Nathaniel Wilson. [Seal.]" By attorney for the plaintiff. Interrogatory 6. Had you, prior to March, 1839, received any release or discharge from N. Wilson from liability on the note in suit? Answer by deponent. I did receive a written release from Mr. Wilson prior to giving my former deposition, and he has now given me another, signed and sealed by him, a copy of which I have annexed to this."

It did not appear from the exceptions, that any release was produced at the trial, or that any notice had been given to produce it.

Washburn argued for the plaintiff, and contended that the deposition was improperly admitted. The deponent, being the maker of the note, was incompetent as a witness, without a release. *Pierce* v. *Butler*, 14 Mass. R. 303.

The deponent was incompetent to prove, by his own testimony, that he had been discharged from his interest by a release. The release must be produced and proved, and the Court is to decide, whether the release is sufficient to discharge the interest. 4 Serg. & R. 298; *Hobart* v. *Bartlett*, 17 Maine R. 429; 1 Campb. 37.

The objection was taken at the time of taking the deposition, and if it had not been, it could have been taken at the trial. *Talbot* v. *Clark*, 8 Pick. 51.

The cross-interrogatory was merely to fix the time, not to inquire about his interest. But no cross-examination could have rendered the deponent competent. *Gage* v. *Wilson*, 17 Maine R. 378; 1 Dallas, 275; 1 Coxe, 46.

A. G. Jewett and *Wilson* argued for the defendant, and cited, *King* v. *Upton*, 4 Greenl. 387; *Hobart* v. *Bartlett*, 17 Maine R. 429; *Abbott* v. *Mitchell*, 6 Shepl. 354.

The opinion of the Court was drawn up by

WHITMAN C. J. — The witness, Bailey, the maker of the note declared upon, for whose accommodation the defendant had indorsed it, without a release from the defendant, was an incompetent witness for him. *Pierce* v. *Butler*, 14 Mass. R. 303; Greenl. Ev. § 401; *Hubbly* v. *Brown*, 16 Johns. R. 70. The question then, is, was Bailey duly released, and was there competent proof of it. No release was offered, with proof of its execution, as is ordinarily requisite. *Cocking* v. *Jarrard*, 1 Camp. 37; *Hobart* v. *Bartlett*, 17 Maine R. 429.

But it is contended, that as the plaintiff, when Bailey's deposition was taken, inquired of him whether the defendant had given him a receipt or discharge in full, it was tantamount to an interrogation as to whether he was interested in the event of the suit or not; and being so, that it comes within the decision in *King* v. *Upton*, 4 Greenl. 387. The Court in that case held, that, as the witness, in his deposition, was interrogated on oath as to his interest in the event of the suit, and denied having any such interest, it was an election of the adverse party to ascertain the interest of the witness from his own testimony; and his denying that he had any such interest rendered him competent. The decision in that case was unprecedented, so far as respects any adjudged case in the Reports; but may, nevertheless, be considered as well supported by analogy and sound logic. But care must be taken not to press the decision beyond its legitimate bounds. It would seem that the interrogatory as to interest, should be direct, and not by way of inference. The Court are to decide whether the witness is qualified to testify or not. The evidence tending to show that he is or is not so, should be distinct. If the witness on the stand, sworn in chief, and having an apparent interest, were asked by the party objecting to his being a witness, if he had a release from the party producing him, and he

were to answer that he had, would he be allowed to testify without producing it, and without proof of its execution, unless by consent? If not, the same thing occurring in the taking of his deposition would have no greater effect. If he were to say merely that he had a release, without producing it, how could the Court adjudge without inspection that his interest in the event of the suit had been discharged? The Court, in determining upon this ground, that he had no interest, must adjudicate as to the efficacy of his release, and as to the fact of its due execution. The precedent cited, and relied upon, therefore, we think, is not parallel to the case in question; nor does the recovery in that case apply, with equal force, to the one here. It appears in this case that the witness, without the release, was interested that the defendant should prevail. This interest should have been shown to have been removed. The testimony of the witness, that it had been so removed, was, under the peculiar circumstances of this case, incompetent for the purpose. It was not in the power of the plaintiff to prevent the taking of the deposition. Seeing at the time that the witness had an apparent interest, he might well inquire of him, if he had a release. It was not the time to question the efficacy or validity of it. The plaintiff had a right to expect that it would be produced at the trial, in order to render the testimony of the witness admissible. Then only could it be adjudged sufficient. In the case, *Hobart* v. *Bartlett*, before cited, the witness, whose deposition was rejected, testified, upon an interrogatory put, but it does not appear by which party, as to whether he had been released, and whether he had any interest in the event of the suit. He answered that he had been released, and had no interest in the event of the suit. The Court however say, "when the interest is apparent, and it is proposed to discharge it by release, the Court must judge of its sufficiency. In this case no release is produced and the Court cannot decide upon it. The witness cannot be permitted to do it." And further, "to decide the witness to be competent would deprive the Court of the power of performing its appropriate duty, and devolve it upon the witness." We are

aware that there are some recent English decisions, at *nisi prius*, which may seem to conflict, somewhat, with the decision in the case last cited. Mr. Justice Coleridge, in *Quartermain* v. *Cox*, 8 C. & P. 97, ruled, that a witness testifying in Court, upon the *voir dire*, that he had a release, but had it not with him, might be admitted to testify without producing it; and a decision in *Carlisle* v. *Eady*, 1 C. & P. 234, is nearly to the same effect. But it seems to us that those decisions, at the same time that they are not authoritative with us, if really in conflict with the opinion in *Hobart* v. *Bartlett*, tend too much to the introduction of a laxity in practice, which may be mischievous in its operation. The rule as laid down in *Hobart* v. *Bartlett*, will much more effectually guard against imposition and unfair dealing. If a party must, in order to render a witness competent, who otherwise would appear clearly to be interested in the event of the suit, execute a release to him, it does not seem that it would be an unreasonable hardship upon him to require, that he should cause such witness to come prepared to exhibit his release.

Verdict set aside and a new trial granted.

JAMES CROSBY *versus* NATHANIEL HARLOW and Trustee.

NATHANIEL HARLOW *versus* THOMAS DREW and Trustee.

NATHANIEL HARLOW *versus* NATHAN B. WIGGIN and Trustee.

Where the mortgagor of real estate appointed an agent to act for him in receiving the rents from the tenants, and before the rents had accrued, the mortgagee notified the agent to pay the rents, when collected, to no one but himself, this was held to be a termination of the tenancy at will of the mortgagor, and rendered the agent accountable to the mortgagee for the subsequently accruing rents received by him; and liable to be charged therefor, as trustee of the mortgagee.

And if the mortgagee bring a suit against the mortgagor and summon such agent as his trustee on account of the money thus received for rent, the agent holding the money for the plaintiff and not for the defendant, will be discharged as trustee.

IN each of these cases Isaac S. Whitman was summoned as trustee, and made his several disclosures. From these it appeared, that a tract of land, called the Harlow Corner, on which were several small tenements, had been owned as tenants in common by Harlow, by Drew, by Wiggin and others. Drew and Wiggin had mortgaged their shares in the estate, respectively, to Harlow, and the condition of these mortgages had been broken. Whitman had been appointed by Harlow, by Drew, and by Wiggin their agent to collect and receive the rents. When the trustee processes were served upon Whitman, he had nothing in his hands on account of rents received for Harlow's original share, but had money received for rents on account of each of the other shares mortgaged to Harlow. Before the service, Whitman had seen published in a newspaper a notice by Harlow to foreclose both mortgages, and had seen a notice thereof in the registry of deeds; and before the rents had accrued, he had been notified by Harlow, not to pay the rents on their shares to Drew or to Wiggin, and to pay the same to him, as he claimed the same as mortgagee.

In the case of *Crosby* v. *Harlow*, and trustee,

G. F. Shepley, for the plaintiff, claimed that the trustee should be charged, because upon the disclosure, Harlow was

entitled to the rents received by the trustee on account of the Drew and Wiggin shares, and the trustee was debtor to him therefor. The mortgagee was entitled to the rents after notice to the agent not to pay over to the mortgagor. Even if the entry was not effectual to foreclose the mortgage, the mortgagee was entitled to the rents after notice. *Stone* v. *Patterson*, 19 Pick. 476; *Welch* v. *Adams*, 1 Metc. 494; *Reed* v. *Davis*, 4 Pick. 216.

Cutting, for the trustee, said that having been appointed agent by each of the parties, Whitman was not obliged to litigate the question, whether some other person had a better title to the land than his principal; nor to determine whether the alleged mortgage was in existence or not; or whether an entry had been made or not. But even if the agent is bound at his peril to decide all these questions correctly, Harlow was not entitled to this rent. As between mortgagee and mortgagor, the latter is entitled to the rents and profits, until the former has obtained the actual possession. A claim to the possession is not enough. *Wilder* v. *Houghton*, 1 Pick. 87.

The opinion of the Court was drawn up by

Whitman C. J. — In the two last cases it is clear from the disclosure of the trustee that he is not chargeable. The rents disclosed by him, as being in his hands, were, in those two cases, due and payable neither to the said Drew nor to said Wiggin, but to the plaintiff himself. He was the mortgagee of the premises; and being so, while the rents were accruing, he gave notice to Whitman, who was the agent of the mortgagor, to pay the rents, when collected, to no one but himself. This was a termination of the tenancy at will of the mortgagors, and rendered Whitman his agent and liable to him for the subsequently accruing rents. *Lane* v. *King*, 8 Wend. 584; *Wadilove* v. *Barnett*, 2 Bing. N. C. 538; *Pope* v. *Briggs*, 9 Barn. & Cres. 245. The trustee, therefore, in these two cases must be discharged; but in the first case he is chargeable.

BANK OF OLDTOWN *versus* JAMES HOULTON.

In an action brought by a banking corporation, in the corporate name, if the defendant calls one of the stockholders of the bank as a witness, he may legally refuse to testify in the case. — SHEPLEY J. dissenting.

The interest of the witness as a stockholder may be proved by his statements on the *voir dire*, without producing any other evidence thereof.

ASSUMPSIT by the plaintiffs, in their corporate name, upon a promissory note dated Oct. 4, 1838. The general issue was pleaded, and a brief statement was filed, alleging that the charter of the bank had been annulled.

At the trial before TENNEY J. the note was read, and the defendant introduced a resolve of the legislature of the State, passed March 20, 1839, providing for the repeal of the charter of the bank, and reserving to the bank the right of closing up their concerns.

The defendant thereupon moved that a nonsuit should be directed. The presiding Judge declined to order a nonsuit.

The defendant then called Jefferson Sinclair as a witness, and the report states, that "on the *voir dire*, he testified that a writing on the back of the note was his handwriting, and that he signed the same, and that he was a stockholder in the bank, which last fact was objected to by the defendant's counsel, there being better evidence thereof. The objection was overruled. The witness declined answering questions put to him by the defendant's counsel as he was a party. The defendant's counsel offered to prove by him, if the Court should direct him to testify, that this note was assigned by Jefferson Sinclair, as appears on the back, about the time but before the action was brought, for collateral purposes; that those purposes had been accomplished; that this action was prosecuted in the name of the bank for the benefit of the Suffolk Bank; that the object for which it was assigned to the Suffolk Bank having been accomplished, the note, by an arrangement between Sinclair, as the agent of the Oldtown Bank, and the Suffolk Bank, should be returned to Sinclair; and that Sinclair informed the defendant's counsel, that if the note was returned

to him, as it should be, he would dismiss the suit." The presiding Judge "declined to direct the witness to testify after his refusal, whereupon the defendant was defaulted." "If in the opinion of the whole Court the presiding Judge ought to have given the directions as above requested, or either of them, or if the fact that Sinclair was a stockholder was improperly shown by his own testimony, the default is to be stricken off."

Hobbs, for the defendant, submitted the case without argument.

M. L. Appleton, for the plaintiffs, cited 7 Cowen, 174; 1 Wend. 20; 7 Mass. R. 131; 1 Hill, 586; 14 Maine R. 142; 7 Greenl. 51.

The opinion of a majority of the Court, SHEPLEY J. dissenting and giving his reasons therefor, was drawn up by

WHITMAN C. J. — The rule of the common law, as to the obligation of witnesses to testify in cases in which their interest may be involved, may be considered as embraced in the statute of the 40th Geo. 3d, which enacts, that a witness cannot legally refuse to answer any question, relative to the matter in issue, merely on the ground that the answer may establish, or tend to establish, that he was a debtor or otherwise subject to a civil suit. The witness, Sinclair, in this case, was not in either of these predicaments. He was a party in interest in the very suit then pending. The corporation was in effect his trustee, and he was its *cestui que* trust.

A Banking Corporation is but a modified joint stock copartnership, having authority by law to carry on business by an artificial name, instead of the names of the individual corporators. Mr. Justice Putnam, in delivering the opinion of the Court in *Wright* v. *Dame & al.* 1 Metc. 237, remarks, that "the Court cannot but see, that the name of a corporation is but the name, which the individual members of the corporation have taken or accepted. The corporators themselves are really the persons interested." If individually named, it is clear, that the adverse party could not call upon either of them to testify. How does the case differ when they are allowed to sue

by an artificial name, comprising the same persons? Because the declarations or admissions of the individual members of such corporations cannot be given in evidence forms no test. The reason of that rule is that they have, by becoming a corporate body, come into a compact, that their concerns shall be under the control of the major vote of the members. Their acceptance of an act of incorporation, making such a regulation, forms the compact. To allow the declarations or admissions of any one of the associates, not being an agent for the purpose, to control the interest of the whole would contravene the fundamental principle upon which they were bound together. Formerly the inhabitants of our towns and parishes were inadmissible as witnesses in causes in which they were concerned; and they could not have been compelled to testify against their respective towns or parishes. *The King* v. *the Inhabitants of Woburn*, 10 East, 395. By statute they are now made competent as witnesses, and may be compelled to testify by either party. In *Hamblin* v. *Fitch*, Kirb. 174, it was held, that the admission of a party in interest could not be given in evidence against the party on record. This rule, however, is doubtless subject to some qualifications.

In *Appleton* v. *Bond*, 7 Mass. R. 131, C. J. Parsons, in delivering the opinion of the Court, laid down the law to be, that a party in interest, though not of record, could not be compelled to give evidence. In *Mauran* v. *Lamb*, 7 Cow. 174, the same doctrine is recognized as established law. In the *People* v. *Irving*, 1 Wend. 20, Mr. Justice Sutherland says, where persons called on to testify allege, under oath, that they are the parties in interest, and entitled to the subject matter in controversy, if they do not consent, they cannot be compelled to testify. In *Cook & al.* v. *Spaulding & al.*, 1 Hill, 586, a banking institution was the plaintiff in interest, though not so of record, and it was held that one of the corporators could not be compelled to testify as a witness for the defendant. Mr. Justice Bronson, in delivering the opinion of the Court in that case, says, "the distinction between calling a party in interest as a witness, whose answer may subject him to a civil

suit was maintained in the case of the *King* v. *The Inhabitants of Woburn.* It was there held, that the English Statute had not changed the rule, that the party in interest, though not in form a party to the record, was not obliged to answer."

It is believed to be well settled at law, that a *cestui que trust* can in no case be compelled to testify in a suit against his trustee in reference to the trust property. Professor Greenleaf, in his treatise on evidence, § 353, says, "the rule which excludes the party to the suit from being admitted as a witness, is also a rule of protection." Nor, says he, "can one who is substantially a party to the record be compelled to testify though he be not nominally a party."

Surely, it would seem, that the corporators of banks are substantially the parties in interest. Suppose one individual owns nearly the whole of the capital of the bank, and such instances have often occurred, if a suit be commenced in the corporate name, can he be compelled at law to testify against the interest of the institution?

It is true that in *Bull* v. *Loveland,* 10 Pick. 9, and in *Doolittle* v. *Dwight & al.* 2 Metc. 561, Mr. C. J. Shaw may seem to lay down the law somewhat at variance with the foregoing propositions. But those two cases may be regarded as not actually presenting the precise point raised in this case. Here the witness was substantially a plaintiff in interest. In the case of *Bull* v. *Loveland* a witness was called upon to produce a note, given by the defendant to the plaintiff, upon which the suit was commenced, and which the witness claimed to have a right to retain; and in which suit certain property had been attached, to which the witness and others made claim. The witness in that case was neither the plaintiff or defendant in interest. His interest was wholly collateral. The Court considered him as having a right to retain the note; and the suit was defeated. Mr. C. J. Shaw, nevertheless, controverts the opinion of the Court in the case of *Appleton* v. *Boyd;* and it may well be admitted that the opinion therein expressed, by C. J. Parsons, was too general, as seemingly embracing every kind of interest, which a witness might have in the event of a suit;

and therefore was not an authority in point in the case of *Bull* v. *Loveland.* But had the witness in that case caused the suit to be commenced for his own benefit in the name of Bull, claiming to be the owner of the note, and to have a right to the proceeds of a judgment, recovered upon it, it is not reasonable to suppose that the defendant could have compelled him to testify in the cause. His interest, then, would have been direct, and not contingent or eventual.

In *Doolittle* v. *Dwight & al.* Mr. C. J. Shaw says, "he (the witness) was compellable to testify, interest or no interest; nor could he there set up any claim of his own; or object to the plaintiff's suit or right to recover. He was no party to the suit, and had no power to offer plea, or make proof, or do any thing but testify." In that case the plaintiff was endeavoring to recover a sum of money on a promise made to the plaintiff, to the one half of which the witness, if the plaintiff recovered, might set up an equitable claim. The promise not being made to the witness; and the suit not being instituted by him, or by his procurement, and over which he had no control, he could not refuse to testify." The condition of Sinclair, in the case at bar, was different. The suit was commenced for him and others, in their corporate name to recover a sum due to them. If one of them might have been compelled to testify, by the same rule they all might; and a spectacle would be presented, in which all the actual parties plaintiff might be compelled to testify in their own cause; a case which has never occurred in the case of private monied corporations, and which it may be believed never can occur.

The manner in which the interest of the witness in this case was disclosed was not objectionable.

Judgment on the default.

Shepley J. — A party to the suit cannot be required to testify. Nor can the party or parties in interest. One who does not sustain either of these relations, although interested in the event of the suit, may be required to testify, if called by

the opposing party. These positions are established by cases too numerous to be cited.

Was the witness in this case a party to the suit? That was instituted by a private corporation created by statute with the name of the President, Directors and Company of the Bank of Oldtown; and in the corporate name. The acting president and directors do not become parties to a suit by the use of the corporate name. The body corporate is in such cases the party and the only party to the suit. No one of the corporators thereby becomes a party. One is not a party to a suit because he may be more or less interested in the event of it. The inhabitants included in *quasi* corporations have been regarded as parties to suits instituted in their names. And it was upon the ground, that he was a party to the suit, that the witness was excused from testifying in the case of the *King* v. *the inhabitants of Woburn*, 10 East, 395. And not upon the ground, that he was a party in interest. Lord Ellenborough was answering the objection, "that the inhabitant proposed to be called was not a party to the proceeding," when speaking of the inhabitants of the parish, as "the parties grieved," and as "immediately interested in the event of the proceeding," to prove, that the inhabitants of the parish were in reality parties to the proceedings, although the appeal was made by the church wardens and overseers of the poor. The case having been presented, as was remarked in the argument before that Court, in the name of the King, was sufficient to show, that in such statute proceedings the name on the record might not disclose the real parties to the suit. Accordingly it is said in the case of *Cook* v. *Spaulding*, 1 Hill, 586, "In the *King* v. *the inhabitants of Woburn*, the rateable inhabitants of the parish of St. Albans were in fact though not in form parties to the appeal." Whatever difficulties there may be in such cases in determining, who are the parties to the proceedings, there can be none in determining, who is the party plaintiff in a suit at law commenced by a private corporation in the corporate name.

If the witness was not a party to the suit, was he according to the legal phrase a party in interest? Not every one, who may be more or less interested in the event of the suit is in law considered as a party in interest. If it were so, a corporation or an individual might be careful to have all those, who could testify against it, so far interested as to deprive the other party of their testimony. The phrase party in interest has a more limited and definite signification. The party in interest is that person, who is really interested in the result, and who can control and discharge the suit. And when the subject matter of the suit is the property of two or more persons, who can control and discharge it, they are the parties in interest. In such cases, although they cannot be required to testify, their mouths are not absolutely closed against a discovery of the truth, for their declarations may be introduced as testimony for the opposing party. The declarations of corporators cannot be thus introduced to affect the rights of the corporation, and if they were regarded as parties in interest, there would be no mode, by which the truth could be extracted from them in relation to the corporate conduct and rights. But they cannot be legally so regarded; for they cannot control, or discharge the suit; or affect it in the least degree. The whole of the corporators could not do this without proceeding according to the laws of the corporation to make their will become the will of the corporation, to be exhibited there in some legal form. They may or may not be persons deeply interested in the event of the suit. But it is too well settled to be longer the subject of controversy, that if so interested against the party calling them, they cannot refuse to testify. In the case of *Cook* v. *Spaulding*, 1 Hill, 586, it was not a body corporate, but "a partnership or unincorporated banking association," assuming the name of the Niagara Suspension Bridge Bank, for whose benefit the suit was brought; and the decision was, that one of the members of the partnership, which was the party in interest, could not be required to testify. He might have discharged the suit, and his declarations might have been introduced as testimony for the opposing party. It is believed, that no case

can be found, in which one has been regarded as a party in interest, who does not stand in this relation to the suit.

NOTE BY THE REPORTER. — See *Lowney* v. *Perham*, 2 Appleton, 235.

HENRY B. FARNHAM *versus* SAMUEL MOOR *& als.*

In an action by an officer upon a replevin bond, where it appeared that the plaintiff in replevin was a wrongdoer, having no title to any part of the goods attached and replevied, and that judgment was rendered for a return of the goods, and that no return was made, *it was held*, that the plaintiff was entitled to recover the value of the goods replevied, and damages for their detention.

The plaintiff in the suit on the bond, who was the officer making the attachments, is accountable for the property to the attaching creditors and their debtors, and not to the plaintiff in replevin who was a mere wrongdoer without title; and a release by the debtors to the officer of all their claim to the goods attached will not enure to the benefit of the defendants in the suit upon the replevin bond, and entitle them to any surplus beyond the amount of property necessary to satisfy the judgments in the suits wherein the attachments were made.

Nor should any deduction be made, under such circumstances, if the attachments in some of the suits were made after the goods were replevied.

THIS was an action of debt on a replevin bond, and came before the Court on an agreed statement of facts. The facts appear in the opinion of the Court. As to the removal of the goods, the statement was thus: — "If legally admissible, the defendants offer to prove, and can prove, and it may be considered as proved, that said goods were removed from Bangor to Orono prior to the fourth of July, 1836." The release from the debtors to Farnham was in these words: — "Know all men by these presents, that we E. G. M., J. W. M. & S. R. in consideration of one dollar to us paid by Henry B. Farnham of Bangor, deputy sheriff, do hereby release said Farnham from all claim and demand on him for or on account of the goods and merchandize by him attached on several writs against us in 1836, and he is hereby discharged from all liabil-

ity to us for said goods by reason of all or any of said attachments." The date was Nov. 4, 1841.

J. Appleton, and *M. L. Appleton*, argued for the plaintiff: and

Rogers and *Washburn*, for the defendants, who cited, *Knapp* v. *Sprague*, 9 Mass. R. 258; *Denny* v. *Willard*, 11 Pick. 519; *Mattoon* v. *Pearce*, 12 Mass. R. 406.

The opinion of the Court was drawn up by

WHITMAN C. J. — Judgment in this case is to be rendered upon default for the plaintiff for as much as he is in equity and good conscience entitled to recover. The suit is upon a replevin bond. The defendant, Samuel Moor, was the plaintiff in the replevin suit; and the present plaintiff, who was the defendant in the replevin suit, was a deputy of the sheriff; and had, at the suits of sundry creditors of E. G. Moor & Co. attached the goods in question. The defendants contend, that the plaintiff should have judgment for no more, than may be sufficient to satisfy the judgments rendered or to be rendered in favor of four only of the creditors, for whom the plaintiff made attachments, on the 28th of June, 1836; excluding two made by the plaintiff, on the fourth of July, 1836; upon the ground, that the attachments, in these two cases, were made after the replevin suit had been instituted; and after the goods had been removed from Bangor to Orono; upon which they would have it inferred, that the returns, as to the attachments in these suits, are false and therefore created no lien upon the property attached.

It is to be borne in mind, that the defendant, Moor, must be deemed to have been a wrongdoer in replevying the goods from the plaintiff; and that the other defendants are responsible with him therefor. The jury in the replevin suit must have found, that the goods attached *in toto* were not the property of Moor. The plaintiff in this suit, thereupon, became entitled to a return of them; and to damages for their detention. Not having succeeded in his attempts to obtain a re-delivery of the goods, or the damages for their detention, he is

now entitled to recover their value and his damages of the defendants; unless the ground before stated, as to the two attachments, will avail them. The plaintiff, who made the attachments, is accountable for the property, upon general principles, not to the defendant Moor, who was a wrongdoer, and who had been proved to have had no title to it; but to the attaching creditors and their debtors. To succeed in their claim the defendants must exhibit some equitable ground, upon which to rest it. Have they done it? and what evidence have they adduced to sustain any thing of the kind? In the first place the officer's return, that he had attached the goods in the two suits referred to, is *prima facie* evidence of the fact; and, in the absence of countervailing evidence, must be taken to be true. Besides, for aught that appears, the goods may have been accessible to him after they were replevied; and he may have made an actual attachment of them; for Orono was within his precinct. He having returned them as attached, we are not at liberty to doubt it without evidence to the contrary.

But, suppose the return of the plaintiff to have been false, what right has the defendant, Moor, and his co-obligors, to question its verity? It may be surmised that he had purchased the goods of the debtors, colorably for the purpose of aiding them in an attempt to avoid their being subject to attachment. But would this better the condition of the defendants; and create an equity in their favor? Surely not. On what other ground then do they stand.

It is alleged that the debtors have filed a release in the case, whereby they have discharged the plaintiff from any claim on their part, and that this will enure to the benefit of the defendants. But in what way? The release, if it be effectual, is to the plaintiff. There is not one word in it indicative of an intention to benefit the defendant, Moor, or his co-defendants. For what purpose must we presume the release to have been intended? We must suppose it to have been designed for honest purposes surely. And what more honest purpose could there have been, than to pay the debts honestly due? The release purports to be to the plaintiff, and to him solely.

Should we not presume, that it must have been designed to enable him to perform the obligation, resting upon him as an attaching officer; and, at the same time, that the debtors might become thereby exonerated from demands, justly existing against them? At any rate, without any express indication in the release itself for the purpose, we are not at liberty to suppose, that any benefit was to result from it to the defendants.

The case of *Mattoon* v. *Pearce & al.* 12 Mass. R. 406, has been cited as tending to maintain the position relied upon by the defendants. But that case seems very distinguishable from this. In that case Mr. C. J. Parker, in delivering the opinion of the Court, notices, that the defendants relied upon the release, there set up, as containing a virtual release and *transfer*, of the debtor's rights to Pearce. And he says, "according to the rule therefore which we have adopted, the plaintiff, but for the compact made by the present defendants, with the owner of the goods, would be entitled to recover, for the uses prescribed by law, the full value of the goods replevied." And again, in conclusion, he says, "but in the case before us it is manifest, from the release filed in the case, in which the debtor has declared, that he has received full satisfaction for the goods; that he consents that whatever may be coming to him may be applied to the use of the present defendants, by deducting it from the damages now to be assessed." Now, in the release in the case at bar there is nothing tending to any such purpose. We therefore are brought to the conclusion, that the plaintiff must have judgment for the full value of the goods replevied, together with the damages for their detention.

GEORGE S. FRENCH *versus* GEORGE W. STANLEY.

As a general rule, if property be attached, and it turns out not to have been the property of the debtor, at the time of the attachment, the officer making it is exonerated from his liability to have it forthcoming on the execution.

Whether this should extend to a case in which the officer, of his own mere motion, had knowingly attached property not belonging to the debtor, may possibly be questioned. But however that may be, it is incumbent on the officer to show, that the property actually attached was the property of one other than the debtor.

If there be an actual attachment, and it is immediately abandoned, it becomes a nullity, and must be considered the same as if none had been made; and therefore a return, in such case, that one had been made, would be in substance a false return.

Where there is no other evidence of the value of the property attached, in an action against an officer for refusing to deliver the property to be taken on the execution, than what is contained in his return of the attachment, that must be deemed to have been its true value.

If the officer sets up in defence, that the property attached was not the property of the debtor, and the evidence fails to show that the property returned as attached did not belong to the debtor, although it might induce the jury to believe that no property was in fact attached, when the officer returned that there was; proof of the insolvency of the debtor will not reduce the amount of damages to be recovered.

If an instruction of a District Judge be not perfectly correct, but the finding of the jury, upon a view of the whole case, as then presented to them, was correct, the party against whom such finding was, cannot be considered, in the language of the statute authorizing exceptions, as a party aggrieved; and exceptions, in such case, would not be sustainable.

That a District Judge refuses to order a nonsuit, on a trial, on account of the insufficiency of the plaintiff's evidence to maintain his suit, affords no ground of exception, it being merely a matter of discretion.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Case against the defendant, then sheriff of the County of Kennebec, for the default of Francis Davis, Jr. one of his deputies.

The facts in the case are stated in the opinion of the Court. The officer's return on the writ follows. "Kennebec, ss. May 8, 1837. I attached one horse of the defendant of the value of one hundred and fifty dollars, also all the right, title, and

interest he has in all real estate in the County of Kennebec, and gave him a summons in hand." The ruling of the District Judge is also stated in the opinion of this Court. The verdict was for the plaintiff for the full amount of the judgment remaining unsatisfied, and the defendant filed exceptions.

S. W. Robinson argued for the defendant, contending that the plaintiff could not recover on the first count, or at most only nominal damages for not returning the execution. And in regard to that, it was incumbent on the plaintiff to show, that it had not been returned. *Varrill* v. *Heald*, 2 Greenl. 91.

On the second count, the plaintiff was bound to prove that the execution was in the hands of the officer within thirty days from the rendition of judgment. If received by him afterwards, though within the life of the execution, he could not be liable any further, than he would have been on the first count.

The evidence offered by the plaintiff to show that no actual attachment was made on the writ, ought not to have been admitted. That evidence was to prove a different default from the one charged, and would expressly contradict the declaration. *Doane* v. *Badger*, 12 Mass. R. 69. Such evidence could only have been admissible in an action for a false return, in which the plaintiff could recover no more than the damage actually sustained. *Weld* v. *Bartlett*, 10 Mass. R. 470; *Norton* v. *Valentine*, 15 Maine R. 36.

The Judge erred in his instructions as to the true measure of damages. The jury should have been instructed to assess the damages actually sustained by the plaintiff. *Varrill* v. *Heald*, 2 Greenl. 91; *Hodgdon* v. *Wilkins*, 7 Greenl. 113; *Nye* v. *Smith*, 11 Mass. R. 188; *Phillips* v. *Bridge*, ib. 242; *Rice* v. *Hosmer*, 12 Mass. R. 127; *Shackford* v. *Goodwin*, 13 Mass. R. 187; *Burrill* v. *Lithgow*, 2 Mass. R. 526; *Colby* v. *Sampson*, 5 Mass. R. 310; *Dearborn* v. *Dearborn*, 15 Mass. R. 316. The admission made by the gentleman, who conducted the trial, who is not the counsel now employed, especially as it was retracted before the trial closed, would not justify the instruction. *Hodgdon* v. *Wilkins*, 7 Greenl. 113.

In any view of it, it should not be extended further than to recover nominal damages.

Moody argued for the plaintiff, and admitted, that the plaintiff could not recover on the first count, for want of proof that the execution was not returned. The exceptions do not show, whether there was or was not proof on the subject. The only questions presented are upon the rulings and instructions of the Judge.

The refusal to order a nonsuit was clearly right. It was a question of fact for the jury, and was properly submitted to their decision.

The testimony objected to was rightly admitted. It did not go to prove a different default from that charged, nor did it contradict the declaration. It was introduced merely to rebut the testimony offered by the defendant.

The Judge's ruling was right on the question of damages, and of the effect of the evidence of the debtor's insolvency. The error was in admitting the evidence, of which the defendant cannot complain. To admit the evidence was to allow the sheriff to contradict his return, and to instruct the jury, if they found certain facts, to disregard it, could not be wrong. *Purrington* v. *Loring*, 7 Mass. R. 392; *Weld* v. *Bartlett*, 10 Mass. R. 470; *Simmons* v. *Bradford*, 15 Mass. R. 82; *Stinson* v. *Snow*, 1 Fairf. 262; *Clark* v. *Lyman*, 10 Pick. 47; *Boynton* v. *Willard*, ib. 169.

If the defendant's principle is right, the actual damage was the value of the horse attached, and the officer values it in his return at one hundred and fifty dollars, all the jury found.

There was no evidence that the officer attached any particular horse. He wholly failed to show that the horse attached belonged to another, and so the jury found.

No reliance is placed on the admission of the gentleman's associate, but that the law is clearly as he admitted it to be.

The opinion of the Court was drawn up by

Whitman C. J. — This case comes before us upon exceptions taken to the instructions and rulings of the Judge in the

District Court. The action is against the defendant, as late sheriff of Kennebec, for the misfeasance of his deputy, Davis. The plaintiff's declaration contains two counts. As to the misfeasance alleged in the first no evidence appears to have been offered. In the second the deputy is alleged, on an original writ of attachment, in favor of the plaintiff, and against one Barker, to have attached a horse of the value of $150,00, as the property of the debtor; and not to have kept it so that it could be taken on execution, thereafter issued on a judgment duly recovered by the plaintiff in the same suit, although it was seasonably placed in the hands of the same deputy for the purpose.

The evidence of the attachment consisted of the return thereof, made by the deputy on the writ of attachment. That return it was not competent to the defendant to contradict. It must therefore be taken and deemed to be true. The defendant, however, attempted to prove, that the horse, so attached, was a certain mare, called the Stimson mare, and that she was not the property of the debtor. By a series of decisions in our Courts it has been settled, that, if property be attached, and it turns out not to have been the property of the debtor, at the time of the attachment, the officer making it shall be exonerated from his liability to have it forthcoming on execution. Whether this would or should extend to a case in which the officer, of his own mere motion, had knowingly attached property not belonging to the debtor, as the evidence in the defence, in this case tended to show was done by the deputy, may possibly be questionable. However that may be, it was incumbent on the defendant to show, that the Stimson mare was the horse actually attached by his deputy, as well as that she was the property of some one other than Barker. The evidence upon this point was derived from the deputy himself, who had probably been released by the defendant, although the case does not show it. But his testimony does not show that he actually attached the mare. He only says, that he got into the wagon, in which the mare was harnessed, and told Barker that he attached her as his property, and he thinks

Barker and he rode down the street together in the wagon at the same time. No other act of possession, on his part, took place. He left the mare as he found her in Barker's possession with a promise, as he says, on the part of Barker, to get a receiptor for her. This cannot be regarded as proving an attachment of the mare. It does not appear, that she had been under his control for a moment; and if it could be considered that he had an instantaneous possession, it was as instantaneously abandoned. If there had been an actual attachment, and it was immediately abandoned, it became a nullity, and must be considered the same as if none had been made; and therefore a return, in such case, that one had been made, would be in substance a false return. Hence the proof, that the mare was the horse attached, is not made out, and fails to support that part of the defence.

The case then stands upon the evidence of the deputy's return upon the writ, as to the horse thereon attached, which must be taken to be other than the one attempted to be proved to have been attached, there appearing to have been no attachment of that horse; and as there was no other evidence of the value of the horse, which must be supposed to have been actually attached, than what is contained in the return itself, that must be deemed to have been its true value. The direction, therefore, of the Judge to the jury, was correct as to the right of the plaintiff to recover, in this action, the amount due on his execution, if any thing, it being short of the ascertained value of the horse attached.

The instructions of the Judge are excepted to on another ground. He charged the jury that, if they were satisfied, from all the evidence, that Davis made no attachment on the writ, and his return thereon was merely nominal, the defendant was precluded from showing Barker's utter insolvency in defence, in order to make it appear, that the damage to the plaintiff was merely nominal. This instruction may not have been perfectly correct; especially as there is no count in the plaintiff's writ for a false return on the writ against Barker. If, however, the finding of the jury, upon a view of the

whole case, as then presented to them, was correct, the defendant cannot be considered, in the language of the statute authorizing the filing of exceptions, as a party aggrieved; and exceptions in such case would not be sustainable. *Hathaway* v. *Crosby & al.* 17 Maine R. 448; *Camden Rail Road* v. *Belknap*, 21 Wend. 354. Now, if there be in the case no other ground of exception than this, we cannot doubt, upon a careful examination of the evidence, but that the verdict of the jury was correctly found, and that, thereupon, none other could legally have been returned.

A Judge in giving his reasons for an opinion may often err; but if in substance a right direction is given to the cause no exceptions thereto should be sustained. Had the Judge said to the jury, that, as the evidence failed as to the Stimson mare's being the horse attached, although they might apprehend no horse was in fact attached, yet, as Davis returned, that there was, and his return is conclusive of the fact, they would find for the plaintiff, the amount due on his execution, that being short of the value of the horse as stated in the return; and in such case the insolvency of Barker was out of the question; no complaint could have been justly made against it. How does the charge delivered differ in effect from that? The jury found in the one case, as they would have done in the other. Should these exceptions be sustained, the effect will be, that a new trial must be granted. Now when we see, in the case itself, that substantial justice has been done by the verdict, and that it could not have been legally rendered otherwise than it was, it seems to be preposterous that a new trial should be granted. *Brazier & al.* v. *Clap*, 5 Mass. R. 1; *Jones & al.* v. *Fales*, ib. 101; *Farrar & al.* v. *Merrill*, 1 Greenl. 17; *Kelley* v. *Merrill*, 14 Maine R. 228; *Jewett* v. *Lincoln*, ib. 116; *Buddington* v. *Shearer & al.* 22 Pick. 427; *Thorndike* v. *Boston*, 1 Metc. 242; *Weeks* v. *Clutterbuck*, 2 Bing. 483.

There is still another ground of exception relied upon. It is, that the Judge should have nonsuited the plaintiff, because it was not proved in the first instance, directly, that the exe-

cution reached Davis within thirty days, after the rendition of the judgment against Barker. The evidence to this point first introduced, and relied upon by the plaintiff, was, that the attorney of the plaintiff, a few days after the judgment, enclosed the execution to Davis, and put it into the mail, directed to him at Augusta, his place of residence and business, in season to have reached him, according to the course of the mail, before the expiration of the thirty days. From these facts the plaintiff insisted that the jury would be authorized to presume, that it must have reached him in due season. The Judge declined to order the plaintiff to be called. This afforded no ground for an exception to be taken. It was purely a matter of discretion with the Judge, whether to take or decline to take that course. In Massachusetts, and in England, it has been held, that a nonsuit cannot be ordered in the course of a trial to the jury, but upon the express or tacit consent of the plaintiff. *Watkins* v. *Tower*, 2 D. & E. 280; *Mitchell* v. *New Eng. Ins. Co.* 6 Pick. 117. In this State it has been held otherwise, in *Perley* v. *Little*, 3 Greenl. 97, and in subsequent cases.

The deposition of Davis, introduced by the defendant, shows that the execution was in Davis' hands; and, if it had not reached him within the thirty days, the defendant could not have failed to have drawn that fact from him. The whole evidence to this point was properly left to the jury; and it cannot be questioned, but that the evidence should have been, and was, to their entire satisfaction upon the point.

Exceptions overruled and

Judgment on the verdict.

JOHN SPENCER *versus* JOSEPH EUSTIS.

Desertion of the vessel during the continuance of the contract, *animo non revertendi*, and without sufficient cause, connected with a continued abandonment, works a forfeiture of seamen's wages by the maritime law.

But when a statute desertion is interposed as a forfeiture of wages, there must be a performance of the duty required by the act of Congress, by making the proper entry on the logbook.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Assumpsit for wages as a seaman. The plaintiff introduced proof, that he performed duty on board the schooner Palestine, of which the defendant was master, from Feb. 6, 1837, for the term of two months and a quarter, in the capacity of cook and steward. The defendant produced the shipping papers, from which it appeared, that the plantiff had shipped on Feb. 6, 1837, as cook and steward, "bound from the port of Frankfort, Maine, on freighting business for the term of four months." He proved that the plaintiff left the Palestine about the middle of April, 1837, without the leave of the master or mate, and never afterwards returned. The plaintiff then offered Atkins one of the seamen, to prove, "that the defendant had represented to him that the voyage was different from that described in the shipping papers." To the admission of this evidence the counsel for the defendant objected, but the Judge overruled the objection, and the testimony was admitted. The counsel for the defendant requested the Judge to instruct the jury, that by the marine law, if the plaintiff deserted the vessel before the expiration of the term for which he had engaged, he forfeited his wages. The Judge declined to give this instruction, and instructed the jury, that since the act of Congress of 1790, c. 29, proof of an entry on the logbook according to said act was necessary to create a forfeiture of wages.

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

Abbott, for the defendant, said that the evidence objected

to was inadmissible. It by no means follows, that what was said to one seaman, was said to every one.

The Judge should have charged the jury as requested. Desertion from the ship, without returning again, is a forfeiture of wages. This is the settled principle of the marine law. The statute of the United States of 1790, c. 56, does not touch the present case, where the seaman deserted before his time expired, and did not return to the vessel. Abbott on Shipping, Story's Ed. 463, 468, and notes; *Cloutman* v. *Tunison*, 1 Sumn. 373; 1 Pet. Adm. R. 212; Ware, 309, 447; *Webb* v. *Duckingfield*, 13 Johns. R. 390. The result would be the same at common law. *Stark* v. *Parker*, 2 Pick. 267. The Judge therefore erred in omitting to give the instruction requested, and in giving the one actually given.

Robinson, for the plaintiff, understood the word *him*, in the exceptions, as applicable to the defendant and not to the witness; and said, that the evidence was admissible, as showing a fraudulent misrepresentation by the defendant. All contracts with seamen are to be construed favorably to the seamen. 1 Story's Eq. 325, 326; *Brown* v. *Lull*, 2 Sumn. 449.

Here was no entry of any desertion on the logbook, and no protest made. The entry on the logbook is necessary to prove desertion. This is made the only evidence of it by the act of Congress of 1790. And so are the decisions on the subject. 1 Pet. Adm. Dec. 139; Gilpin's R. 144, 207, 225; Abbott on Shipping, 468, and note, and cases cited.

The opinion of the Court was by

Shepley J. — Desertion of the vessel during the continuance of the contract, *animo non revertendi*, and without sufficient cause, connected with a continued abandonment, works a forfeiture of seamen's wages by the maritime law. But when a statute desertion is interposed as a forfeiture of wages, there must be a performance of the duty required by the act of Congress by making the proper entry in the logbook. *Limland* v. *Stephens*, 3 Esp. R. 269. *Cloutman* v. *Tunison*, 1 Sum.

373. *The Rovena*, Ware, 309. *Magee* v. *The Moss*, Gilp. 219.

In this case the seaman shipped for the term of four months and deserted, when the term had but little more than half expired; and did not return, or offer to do so. And for this he offers no excuse. This brings him within the first class of cases; and his wages earned before the desertion are by the maritime law forfeited.

Exceptions sustained, and new trial granted.

ISAAC WILLIAMS *& al. versus* JOSEPH KINSMAN.

Where the tenant in a writ of entry claimed to have been in possession of the premises for more than six years before the commencement of the action; and to be entitled to have the value of his improvements allowed to him under the St. 1821, c. 47, § 1, called the *betterment act;* and where it appeared, that he had claimed to be the owner of the land, and as such had given a bond to another, stipulating to convey the same to him on the performance of certain conditions, who entered and made improvements, but failed to perform the conditions of the bond, and gave up the possession and surrendered the bond to the tenant, and sold out the improvements to him; *it was held*, that the tenant was entitled to those improvements in the same manner as if they had been made personally by him.

And where the tenant, thus claiming to be the owner of the land, gave a bond to one, to convey the land to him on the performance of certain conditions, and he entered in submission to the title of the tenant, and made improvements, but forfeited all title to them and to the land by non-performance of the conditions of the bond; *it was held*, that the tenant was entitled to have those improvements allowed to him, as virtually made by himself.

THIS was a writ of entry, and was tried upon the general issue. The tenant filed a claim for betterments, and the demandant filed a request, that the value of the land might be estimated, as it would have been, had no improvements been made. This suit was commenced April 28, 1838.

The demandants proved title to the premises demanded under a title originating in 1815, and the tenant produced a conveyance of the same land from the same grantor in 1824.

The tenant then introduced one Perley, as a witness, who testified, that in March, 1828, Kinsman gave him a bond for the conveyance of the premises on certain conditions, and that under that bond he entered and commenced making the improvements, for which the tenant claims the value. He testified that this bond, on their settlement, was given up by him to Kinsman. The case states, that the demandants objected to any statement by the witness of the contents of this bond, and that the objection was overruled by TENNEY J. presiding at the trial. It does not appear, however, that the contents of the bond were stated. The witness did testify, that on taking the bond he entered into the premises described therein, called the McKecknie lot, and being the same demanded, and lived thereon about three years, when he surrendered the same and the improvements to the tenant, who paid him for them; that this was in November, 1830; that he continued to reside there until the March following when he left; and that no deed or writing was made to convey his improvements to the tenant. Testimony was then produced by the defendant, that Penney and Norcross occupied the premises until 1834, when McKecknie had a bond from the tenant for the conveyance of the land to him on the performance of certain conditions, which have been broken by him, and entered upon the premises, and has since continued to reside upon the land. McKecknie made a part of the improvements now claimed as betterments by the tenant. "There was testimony tending to show, that the tenant had a general interest in the McKecknie place while Penney and Norcross were thereon, and that he had hay which was cut on the Kinsman tract."

The presiding Judge instructed the jury, that Kinsman, the tenant, having purchased the betterments made by Perley under the circumstances detailed by him, might recover the same in this suit, if he immediately took the possession from Perley, and occupied the premises, and could connect the possession of Perley with that of McKecknie; and to do this, that they must find, that the tenant had actual possession by Penney and Norcross; that they might consider the improvements made by

McKecknie as actually made by the tenant; that if they should find Kinsman to have been in possession during the time the premises were occupied by Penney and Norcross, they would allow him for the betterments made by McKecknie under the bond; and that such betterments were in law made by the tenant.

The jury found, that the tenant was entitled to betterments, and the demandant filed exceptions to the ruling and instructions of the Judge.

Exceptions were also filed by the tenant, but they were abandoned at the argument.

A. W. Paine argued for the demandant, citing, 1 Stark. Ev. 349; St. 1821, c. 47, § 1; *Mason* v. *Richards*, 15 Pick. 141; *Lombard* v. *Ruggles*, 9 Greenl. 62.

J. Appleton, argued for the tenant, citing, *Lombard* v. *Ruggles*, 9 Greenl. 62; Stearns, 89, 175; *Knox* v. *Hook*, 12 Mass. R. 329.

The opinion of the Court was drawn up by

Tenney J. — The demandants were disseised more than six years, before the commencement of this suit, and buildings and improvements have been made on the premises since such disseisin, by those claiming adversely to the owner. The question before us is, whether the possession has been in the tenant, and continued by him, and those occupying under him, in such a manner, that he is entitled to hold those improvements by virtue of the statute of 1821, c. 47, § 1. In March, 1828, he claimed to own the land by giving to Perley a bond, to convey the same to him; under which Perley went on, and made improvements, retaining the possession till Nov. 1830, at which time he sold all his rights, and upon the sale transmitted them to the tenant. This certainly gave the purchaser advantages, equal to those which he would have acquired, if he had himself made the improvements, claiming to be the owner of the land. From that time Penney and Norcross as his servants occupied the land till the bond was given to McKecknie, to convey on the fulfilment of certain conditions, which have not been per-

formed. Under this bond McKecknie occupied the land, and made further improvements, which legally belonged to the tenant as between him and McKecknie. The demandant treats the tenant as claiming a freehold estate; this is admitted by the tenant in his pleadings. McKecknie has always occupied in submission to the tenant, and has no legal interest in the premises. In whom then is the possession, and to whom belong the improvements? The value of the land has been increased under the agreement made between the tenant and McKecknie, and we are unable to see how the terms of that agreement, can effect the rights of the parties now in controversy, for it is one to which the demandants are strangers, and it is immaterial to them, whether the contract be, that the improvements should be made by a servant of the tenant, or under a bond to convey the land, on certain conditions, the non-performance of which have worked a forfeiture on his part. The possession of McKecknie was virtually that of the tenant, and we see no error in the instructions.

Exceptions are taken to the ruling of the Judge, that permission was given by the tenant, to prove by parol the contents of the bond given by him to Perley, it having been given up to the obligor, and there being no other proof of its loss. It is unnecessary to consider, whether this ruling was proper or not, as it appears by the case, that the tenant did not avail himself of that permission, and the contents of the bond were not disclosed under that ruling.

Judgment on the verdict.

ROBERT CURTIS *versus* NATHANIEL TREAT.

Where the premises have been occupied without the knowledge or consent of the owner, the state of landlord and tenant does not exist between him and the occupant; and an action for use and occupaton cannot be sustained.

It is, however, competent for the parties to waive the tort; and if the tort be waived by them, the owner may have his remedy in assumpsit.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit for the use of a sawmill, in Orono, during the summer of the year 1838.

The writ contained a count on an account annexed, and one for money had and received, and by leave of Court, the plaintiff also added a count for use and occupation. The writ was dated, August 23, 1839.

The plaintiff proved by one Joy, that on the first of June, 1838, he hired the sawmill of the defendant, and continued sawing in it till 11th or 12th of July following; that he paid him the rent by sawing for him, within that time, a quantity of lumber and letting him have a note against one Johnson for $255. On cross-examination, he further testified, that Treat said, that in letting the mill to him he was acting as agent for one Bolles, who had been the owner of the mill.

The defendant at first rested his defence on a claim of title to the mill by virtue of a tax sale and deed of the same from the collector of Orono for the year 1835, and proceeded to introduce the proper evidence to sustain his title. A defect being found to exist in the proceedings of the collector, he abandoned this defence, and introduced a witness who testified that he was in the defendant's store in Orono in the spring of 1839, when the plaintiff came in for the purpose, as he said, of looking up the rent of his mill for 1838; that the plaintiff said he had written to a Mr. Whitman of Bangor to rent the mill, but Mr. Whitman had told him the mill was not rented; that the defendant told the plaintiff he had rented the mill to Joy; that the plaintiff then asked him what he had rented the mill for, and the defendant replied that he had rented it as

testified by Joy; that the plaintiff said he was glad he had let the mill, and had been afraid the mill had not been let; that he asked to see the note and that, it being exhibited, he took it, and wanted to sell it to Treat, said Treat could collect it better than he could, but Treat declined buying it; that he said it ought to have been indorsed. The witness, who was the defendant's clerk, said the payee was in the neighborhood, and he could easily procure his indorsement, and Curtis then requested him to do so. The parties had some further conversation on the subject. The plaintiff said he was going to Upper Stillwater, and could not stop to settle then, but could attend to it in the afternoon. While the parties were talking, the witness left the store to procure and did procure the indorsement of said note, and when he returned the parties had left, and he placed the note on the defendant's file, where it has ever since remained. The plaintiff never called afterwards to witness' knowledge, to attend to it.

The defendant contended, that in letting the mill, he acted as agent for Bolles, who had been and whom he supposed was still the owner of the mill; that afterwards, the plaintiff had ratified and confirmed his acts, and that this made him his agent; that he had offered, and the plaintiff had accepted all that was due him for said rent, and all the defendant had received; that he was at that time, and ever had been ready to account to the plaintiff on demand. No other evidence was offered in support of these positions, than as above stated. The defendant further contended, that he was not liable in this action, no demand having been proved to have been made on him to account.

And hereupon the Judge instructed the jury, that if they should find that the plaintiff ratified and adopted the acts of the defendant in letting the mill to Joy, claiming the benefit of them, he thereby made the defendant his agent, and such ratification would be equivalent to a prior authority; that the defendant was not held in this suit for the note, until the plaintiff had demanded it, and the defendant had refused to deliver it; nor if the jury believed that the plaintiff had by the transac-

tion in the defendant's store, accepted the note, nor if they believed it was then agreed, that the whole of this matter should be subsequently settled at the defendant's store, and the plaintiff had never called there to settle it; but if there had been a demand of the note and refusal of it by the defendant he was liable for its value, unless there was a waiver of this proceeding by a subsequent agreement to settle it at the defendant's store, and a neglect by the plaintiff to attend to it there; and that the action could not be sustained for the balance of the rent unless a demand had been made for settlement prior to the bringing of the action, unless the jury believed it was agreed by the parties that the whole of this matter had been subsequently settled at the defendant's store, and the plaintiff had never called there and settled it.

The jury returned a verdict for the defendant, and the plaintiff filed exceptions to the ruling of the Judge.

A. W. Paine argued for the plaintiff; and cited *Clark* v. *Moody*, 17 Mass. R. 145; *Langley* v. *Sturtevant*, 7 Pick. 214; *Coffin* v. *Coffin*, 7 Greenl. 298; *Arms* v. *Ashley*, 4 Pick. 71; *Miller* v. *Miller*, 7 Pick. 133.

Washburn argued for the defendant; and cited *Selden* v. *Beale*, 3 Greenl. 178; *Clark* v. *Moody*, 17 Mass. R. 145; *Torrey* v. *Bryant*, 16 Pick. 528; *Hemenway* v. *Hemenway*, 5 Pick. 389; *Copeland* v. *Wadleigh*, 7 Greenl. 141.

The opinion of the Court, SHEPLEY J. not sitting in the case, having been employed at the time of the argument in holding the jury term in the County of Piscataquis, was drawn up by

WHITMAN C. J. — The object of this suit appears to be to recover for the use of a sawmill, during the year 1838. The defendant appears to have occupied it, by an under tenant, for that year, supposing it, as he, at sometimes pretended, to belong to one Bolles. The occupation, therefore, was without the consent previously obtained, and in fact without the knowledge of the plaintiff. The state of landlord and tenant, in

such case would not exist between the parties. The plaintiff might have brought trespass for the mesne profits against the defendant; but an action for use and occupation, under such circumstances, could not have been sustained.

There would however, seem, subsequently, to have been, on the part of the defendant, according to the testimony of a witness introduced by him, a recognition of the plaintiff's right, and that the rent belonged to him. If this should be deemed tantamount to an original implied occupation, as lessee to the plaintiff, this action for use and occupation may be sustained. It was competent to the parties to agree to waive the tort, and to change the liability of the defendant into an assumpsit. What took place between the parties, as represented by the above witness, seems to us to have been to that effect. *Ball* v. *Gibbs*, 8 Ter. R. 327. In such case it is for the defendant to show payment, or accord and satisfaction, if he would exonerate himself from liability in this action; neither of which has he done.

The Judge, who tried the cause, in his instruction to the jury, to which the plaintiff excepted, seemed to consider what took place in the presence of the above witness, as a recognition of the defendant as an agent in letting the mill; but to us it seems that such a construction of what then passed, did not amount to any thing of the kind. It has rather the semblance of a loose conversation between the parties, about the use which had been made of the mill; the plaintiff expressing his satisfaction at the prospect of deriving income from it, and the defendant freely conceding, that he was entitled to it, and stating what payment he had received on account of it, and was willing to surrender.

The idea of an agency for the plaintiff is forcibly refuted by the defence, which the defendant, at first, attempted to maintain. The defendant could not be owner himself, and, at the same time, agent for the plaintiff. This would be utterly absurd. After setting up such a claim, and finding himself unable to sustain it, the pretence, afterwards set up, that he was the

implied agent of the plaintiff in letting the mill, must have come with a very ill grace from him.

But suppose the plaintiff had instituted an action of account against the defendant, declaring against him as his agent and receiver, how could his agency have been made out? and what would have been the effect of the proof here adduced? Could it have been deemed sufficient to establish any such fact? The defendant had conceded nothing of the kind; but alleged that he had acted as agent for Bolles. The presumption, however, notwithstanding what may have been pretended, would seem more naturally to be, that he in fact acted for himself, and not as agent to any one else; since it appears, that he had possessed himself of a title under a sale for taxes, which he attempted to establish in his defence. We think, therefore, that his defence fails him upon the latter, as well as upon the former ground.

Exceptions sustained
and a new trial granted.

JESSE FOGG & *al. versus* HENRY HILL & *al.*

By an offer to be defaulted the cause of action must be regarded as confessed; and such offer under the statute, is equivalent in its effect, in that particular, to bringing money into Court upon the common rule, which has ever been considered as leaving nothing in controversy but the *quantum* of the debt or damage, which the plaintiff is entitled to recover.

To enable the jury to ascertain the amount of rent to be recovered for the use and occupation of a store for a certain time, it is competent for the plaintiff to show what the premises had rented for in years immediately preceding the period in question; and also what other similar tenements rented for in the same neighborhood, at and about the same time.

Leases of the same store in former years to which one of several defendants was a party, are admissible in evidence for the same purpose.

And also with the same view, it is competent for the plaintiff to give in evidence, for the consideration of the jury, that he requested the defendant to leave the store, and that if he continued in the occupation thereof, a certain rent would be expected.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Assumpsit on an account, annexed to the writ, charging one quarter's rent of a store in Bangor, from April 1, 1839, to July 1, of the same year, $112,50, with a count for use and occupation of the same.

At the term at which the action was entered, the defendants offered in writing to be defaulted for the sum of $101,69, and the same was entered upon the record.

It was admitted, that the store was owned by one Hatch; and the plaintiffs introduced in evidence a written lease of this and several other stores from Hatch to them for the term of one year, commencing April 1, 1839. The plaintiffs proved that the defendants occupied the premises during the time for which rent was claimed, and that a few days after the expiration of the quarter, the plaintiffs presented to the defendants the same bill, annexed to the writ, and requested payment thereof; and that the defendants said, that if the plaintiffs would strike off the $12,50, it should be paid. The plaintiffs also proved, that after the expiration of the quarter ending July 1, 1839, on August 22, they left a written notice with the defendants, requesting them to leave the store, and notifying them, that if they continued longer, they would be charged at the rate of $450 per annum therefor; and that they still continued to occupy the store during the remainder of the year. The counsel for the defendants objected to the introduction of the proof of this notice, but the Judge admitted it. The counsel for the defendants contended, that the relation of landlords and tenants did not exist between the plaintiffs and the defendants, that the latter were answerable to Hatch for the rent, and to him alone, and that the plaintiffs had not made out their case, and should be nonsuited. This the Judge declined to do, and directed the parties to proceed in the trial. The parties introduced the testimony of several witnesses, some of whom occupied stores in the immediate neighbourhood, and stated the prices given by them at the time for rent, and the comparative value of the rent of this store, and theirs. The plaintiffs introduced in evidence one lease from Hatch to one of the plaintiffs and one of the defendants, jointly, of this

store from the spring of 1836 to April, 1837, and another from April, 1837, to April, 1838.

The defendants objected to the putting of interrogatories by the plaintiffs to the witnesses for the purpose of ascertaining the value of this rent by comparison with others in the vicinity, and the prices paid for them; and also objected to the introduction of the prior leases of the same store. These objections were overruled.

The Judge instructed the jury, that the relation of landlord and tenant existed between these parties, and that the plaintiffs would be entitled to recover, if the jury were satisfied, that the defendants had occcupied the premises as charged; that when the lessee at a specified rent holds over, the presumption is, that he occupies upon the same terms as during the original lease; that many of the facts and dates from which the value of the rent should be determined had been given them in evidence, which in connexion with the opinions of the witnesses, which were but opinions of experienced men, were all proper for their consideration, and would form the basis of their verdict.

The jury found for the plaintiffs, and estimated the rent at $112,50 per quarter. The defendants filed exceptions.

J. Appleton argued for the defendants, citing, 3 Serg. & R. 500; *Codman* v. *Jenkins*, 14 Mass. R. 93; *Wyman* v. *Hook*, 2 Greenl. 337; *Boston* v. *Binney*, 11 Pick. 1; Woodfall's Land. & Ten. 349; 6 N. H. R. 298; 2 Selw. N. P. 548; 1 Chipman, 208; 4 T. R. 716; Peake's Ev. 95; 2 B. & Cr. 264; 8 Serg. & R. 243; 3 Johns. R. 354.

A. G. Jewett, argued for the plaintiffs.

The opinion of the Court, SHEPLEY J. holding a jury term at the time of the argument, and not sitting in the case, was drawn up by

WHITMAN C. J. — By the offer to be defaulted the cause of action must be regarded as confessed. Such offer, under the statute, is equivalent, in its effect, in this particular, to bringing money into Court upon the common rule, which has ever

been considered as leaving nothing in controversy but the *quantum* of the debt or damage, which the plaintiff is entitled to recover. The evidence therefore tending to prove a tenancy as lessee, under the plaintiff, was, after such offer, superfluous; and the arguments of counsel thereupon are in the same predicament.

As the case stands the evidence, as to the value of the tenancy to the defendants, as lessees under the plaintiffs, as to which there was no special agreement, is the only subject for consideration. The plaintiffs were permitted to show what these premises had rented for in years immediately preceding the period in question; and also what other similar tenements rented for in the same neighborhood, at and about the same time. To this there could be no reasonable objection. Nothing is more common in ascertaining the value of one thing, than to compare it with others of known value, and of a similar description. Money itself is but a thing of known and fixed value; and we are continually comparing all other things with it by way of fixing their value. If two dwellinghouses are nearly contiguous, and one of them has a fixed and known value, and the other has not, but its value is to be ascertained, resort may be had to a comparison of the one with the other for the purpose. Our constant course of reasoning is from things known to things unknown; and our deductions depend upon it. Our conclusions from circumstantial evidence are of this nature; and the evidence here relied upon to prove the value of a tenancy is of this class.

The leases of the store in question in former years, to which one of the defendants was a party, were properly admissible. These show what he had admitted the value of the tenancy to be in years immediately previous. If rents had fallen it would have been competent for the defendants to have shown it, by way of lessening the effect in a greater or less degree, arising from such admission.

As to the message sent by Noy, and by him communicated to the defendants, we see no objection to its being proved, together with the reply, if any, that was made to it. It is every

day's practice to give in evidence messages and replies between parties. This was nothing more than information to the defendants, that if they still continued to hold the tenement a certain rent would he expected for the quarter. The defendants might have replied, that it was not worth so much. In such case the evidence might have been of very little, or indeed, of no value to the plaintiffs. If they made no reply it might be inferred that they assented to the correctness of the claim; and in that view of it some weight might be properly attached to it. As to the instruction of the Judge to the jury, we see no reason to question its correctness.

Exceptions overruled.

BANGOR AND PISCATAQUIS RAIL ROAD COMPANY *versus* ELBRIDGE HARRIS.

The act incorporating the Bangor and Piscataquis Rail Road Company, among other things, authorized them to "procure, purchase and hold in fee simple, improve and use for all purposes of business, to be transacted on or by means of said Rail Road, lands or other real estate, and to manage and dispose thereof, as they may see fit;" and provided, "that the capital stock of said Company may consist of three hundred thousand dollars, and shall be divided into shares of one hundred dollars each, *to be holden and considered as personal estate.*" *It was held*, that the real estate owned and used by the company, either as a rail road or as a depot, was not subject to taxation, otherwise than as personal estate, unless the legislature should specifically prescribe differently.

THIS case was submitted for the opinion of the Court, without argument, upon the statement of facts found at the commencement of the opinion.

Cutting, for the plaintiffs.

Cony, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the statement of facts agreed upon by the parties, it appears, that this is a writ of entry, wherein the plaintiffs are seeking to obtain possession of two lots of

land of which, it is conceded, they are the rightful owners unless the defendant has obtained a title paramount to theirs by a sale for taxes, assessed thereon by the inhabitants of Orono. It is admitted that the modes of proceeding by the assessors and collector were correct; and the only question in controversy is, whether the inhabitants of Orono had a right to levy a tax upon the lots. These lots, it is also agreed, were the depots of the plaintiffs' rail road, at the villages of Oldtown and Upper Stillwater in said town.

By the act incorporating the plaintiffs (c. 307, § 8,) they were authorized to "procure, purchase, and hold in fee simple, improve and use, for all purposes of business, to be transacted on or by means of said Rail Road" among other things, "lands or other real estate, and to manage and dispose thereof, as they may see fit." § 11 of the same act provides, "that the capital stock of said company may consist of three hundred thousand dollars, and shall be divided into shares of one hundred dollars each, *to be holden and considered as personal estate.*"

The property in the Rail Road, being thus converted, by statute, into personal estate, was no longer subject to taxation, otherwise than as personal estate unless the legislature should think fit, by the tax act or otherwise, specifically to prescribe. And we are not aware that in 1840, when the tax in question was imposed, any such provision was in existence. The inhabitants of Orono, might as well tax the whole of the land within their town, taken for the Rail Road, as to tax the two depots in question; and any other town through which it passes might, with equal propriety, do the same. The interest in this Rail Road, being personal estate, was no otherwise taxable than as such. Each shareholder was taxable for the amount of his interest in it, in the town where he resided, and not elsewhere; and to allow the inhabitants of the towns, through which it might pass, to tax it, would be subjecting it to a double taxation which could be tolerated neither by the policy, nor justice of the law, and the legislature never could have designed any such thing.

The defendant must be defaulted, and judgment be thereupon entered, that the plaintiffs recover seisin and possession of the demanded premises.

CHARLES MURCH *versus* PEOL TOMER.

That the defendant was an Indian of the Penobscot tribe, furnishes no defence to an action upon a promissory note made by him.

The slightest imposition, however, in obtaining the note, would prevent a recovery upon it.

THE parties agreed, that the action was upon a note of hand signed by the defendant, and that he was at the time of signing it, and still is, an Indian of the Penobscot tribe. If the action could be maintained against the defendant, he being an Indian as aforesaid, he was to be defaulted; and if not, the plaintiff was to become nonsuit.

At the June Term, 1842, the case was continued *nisi* under an agreement, that it should be argued in writing. No arguments have come into the hands of the Reporter.

J. Appleton and *Randall*, for the plaintiff.

Cony & Sewall, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — Tomer, it appears, is an Indian of the Penobscot tribe. The action against him is upon a note of hand; and it is contended that, by reason of his being such Indian, he is not liable upon it. But for certain enactments of the legislature, it would not, probably, have been doubted, that the defendant might have made a valid contract. He might not have been deemed a citizen, or as having any of the privileges incident to citizenship. His condition, however, in reference to his contracts, might not be distinguishable from that of a foreigner, who might be sojourning among us.

The aborigines of this country were its ancient proprietors. But, emigrants from Europe having obtained a foothold here,

and having increased in numbers, till their power had greatly transcended that of the natives, they at length assumed entire control over them; till it has become settled law, that even the territory and soil of the small districts, to which they are now reduced, in their occupation, is not absolutely theirs in fee. They are prohibited from alienating; and even the use and improvement of it is not left to their entire control. Our citizens, throughout the United States, have been prohibited, except under certain regulations, in some of them, from purchasing lands of the Indians. These regulations have been wise and politic, without doubt; but they show the altered and humbled condition of the ancient possessors of the country.

In this State, by an act, ch. 175, § 1, passed in 1821, it was provided, that the Governor, by and with the consent of the Council, might appoint one or more, not exceeding three persons, to be agents for the Penobscot tribe of Indians. By § 4, of the same act, it was provided, that such agent or agents should have the care and management of their property for their use and benefit; and further, that all contracts and bargains, of every kind, relative to the sale or disposal of trees, timber or grass, growing or being on said Indians' land, and all leases and other contracts, relative to the improvement of lands, which any person may obtain from said Indians, shall be void and of no effect unless approved by such agent or agents. And by § 5 it was provided that such agent or agents, in his or their own names, might maintain any proper action for any sum due any Indian or Indians or their respective tribes; or for any injury done to them or their property, for the benefit of such Indian or Indians or their tribes. Other regulations have since been made, from time to time, relative to the location, allotment and occupation of their lands. And all the provisions in the different acts were re-enacted in the Revised Statutes, excepting the one, that provides that agents shall have the care and management of the property of the Indians for their use and benefit. This provision, from the place of its former insertion, and the subject matter with which it was connected, may be believed to have been intended only in reference to the real

estate of the Indians. It would seem that it never could have been contemplated to give such agents any supervision over, or the management of the little modicum of personal property, usually to be found in the possession of an Indian. In practice, it is believed, that no agent ever considered himself clothed with any such power. And, in reference to the care and management of the real estate, every necessary provision had been specifically made. It seems, therefore obvious, that, for these reasons, that provision was omitted.

In some one or more of the States it has been enacted, that no contract with an Indian should be valid, and, in Massachusetts, some of the tribes have been put under guardianship. In this State nothing of the kind has taken place, except to the limited extent before named. The condition of the tribes, remaining in the elder States of the Union, is peculiar. They are, however, human beings, born and residing within our borders. This would, ordinarily, constitute them citizens; and they cannot in all respects, if in any, be considered as aliens. Our constitution seems to contemplate, that, under certain circumstances, they may become voters at our elections. It only excludes such from voting, as are not taxed; thereby implying, if taxed, that they may be voters. Our constitution, moreover, says that "all men are born equally free and independent; and have certain natural, inherent and unalienable rights; among which is, that of acquiring, possessing, and protecting property." Why, then, should the condition of an Indian differ from that of other individuals born and reared upon our own soil? Is it insisted that the Penobscot tribe are a nation by themselves and independent? Our constitution recognizes no such thing, and our legislation altogether forbids it. If one of them should commit a crime, or do any personal injury to one of our citizens, should we hesitate to send an officer into the midst of his tribe to apprehend him? Clearly not. It would be surely otherwise, if they were a nation by themselves. We have in express terms extended our legislation over them; and over their territory; and have even presumed to appoint agents to manage the affairs of the Indians in reference to it. Their

condition then is truly anomalous. Although endowed with the attributes belonging to our species, and in fact, a portion of the human race, and born within our borders, and by the terms of our constitution having seemingly an inalienable right to the acquisition and control of property; yet, as a people, and as it were nationally and collectively, they are treated, and perhaps necessarily so to a certain extent at least, as having none of those attributes. Imbecility on their part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man. To the extent to which our laws go in abridging them of their supposed natural right, ordinarily incident to the ownership of property, we must consider them individually and collectively as under our tutelage. As the regulations before stated are in derogation of personal rights, however, we must not extend them beyond what is obviously prescribed.

Their rights to make personal contracts are not, by our statutes, impaired. An Indian of the Penobscot tribe might hire himself out to labor; and his right to sue for and recover an agreed compensation, in his own name is not taken from him. His agreement, if fairly made, would be recognized as valid. If such agreement were to labor for a certain term for a specified price, and after having served a part of the time, if he should causelessly depart and refuse to finish the term, would he have a right, any more than any one else, to recover any thing for what service he had performed? If not it must be because he had power to make a binding contract. And suppose he should be desirous to purchase some article of personal estate, and it should be delivered to him upon his agreeing to pay for it a certain fixed price, by his labor for a specified term of time; and he should fail of performance, would his employer have no right of action against him? Surely he ought to have, and we cannot doubt but he would have redress at law.

In the case of *Thaxter, adm'r.* v. *Grinnell & al.* 2 Met. 13, the plaintiff, having been appointed guardian to the Chappe-

quiddic Indians, and one of them having engaged on board of a whale ship, and having deceased during the voyage, and the plaintiff having taken out letters of administration on his estate, attempted to recover pay for his services, upon the ground, that the contract with the Indian, he being under guardianship, was void. The Court held, as the defendants were not apprised, that the Indian was one of the Chappequiddic tribe, and had been paid the full amount due to him, that the plaintiff could not recover; and that the contract was valid. This case shows very clearly that, aside from any express statutory prohibition, an Indian might make a valid contract.

Our statute has authorized the agent or agents to sue for a debt due to an Indian; but it has not, in terms, or by implication, taken away the right of the Indian to sue without the interference of the agents. And the statute has made no provision for any interference of an agent, when a contract is sought to be enforced against an Indian; nor has it, in any way, certainly not in express terms, and we cannot understand that it has by implication, undertaken to shield him from his obligation to perform his promise, whether express or implied, to pay for goods or articles by him received. In this respect he seems to stand in the predicament of any other individual. The note declared on, we must presume, was fairly obtained. If not it would have been made apparent. The slightest imposition in obtaining it would prevent a recovery upon it.

GUSTAVUS G. CUSHMAN *versus* GEORGE WAITE *& al.*

The conditions of the bond, given under the provisions of the St. 1835, c. 195, § 8, to liberate a debtor arrested on an execution from imprisonment, should require performance within six months *from the time of the arrest or imprisonment.*

If the bond given by a debtor to procure his release from arrest on an execution, recites the day of arrest, and bears date on the same day, the debtor and his sureties are bound by the date of the bond and recital of the day of arrest. Parol evidence is therefore inadmissible to show that the bond was in fact executed on a subsequent day.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Debt on a poor debtor's bond in the penal sum of $66,72, being double the amount of the debt and costs without interest, dated April 15, 1837. In the condition of the bond, it was recited, "that whereas the said George Waite hath been and now is arrested by John Tobin, a deputy sheriff in the said county of Penobscot, by virtue of an execution issued against him on a judgment," &c. After describing the time when judgment was rendered, and the amount thereof, the condition stated that, "if the said Waite shall in six months from the time of executing this bond cite the said Cushman, the creditor," &c. The execution, referred to in the bond, had the following return thereon. "Penobscot, ss. April 15, 1837. By virtue of the within execution I have arrested the within named Waite, and he gave an approved bond, which bond I return annexed to this execution. John Tobin, deputy sheriff." The approval of the justices was also dated April 15, 1837. At the trial, the plaintiff called John Tobin, the subscribing witness to the bond. In the language of the exceptions, "On his cross-examination the defendants offered to prove, that there was a mistake in the date of the bond; that it was executed on or after the 22d day of May, 1837; and that there was a performance of its condition within six months from the said 22d day of May. To the admission of this evidence the plaintiff objected, and the Court excluded it. To which ruling of the Court the defendants except.

Rowe, for the defendants, contended that as the condition of the bond was to be performed within six months *from the time of executing this bond*, the defendants should have been permitted to cross-examine the subscribing witness to the bond, to prove the time of its execution. 2 Saund. Pl. & Ev. 97; 3 Stark. Ev. 1047; 4 B. & Cr. 272; 6 D. & Ry. 329.

An officer's return is not conclusive as to collateral matter. It was no part of his duty to return the date of the bond, if he had attempted it. An officer's statement of facts on a precept, is not conclusive nor even competent evidence, as a return, excepting where he is in the performance of official duty. *Boynton* v. *Willard*, 10 Pick. 166; *Bott* v. *Burnell*, 11 Mass. R. 163; *Weld* v. *Bartlett*, 10 Mass. R. 470; 4 Burr. 2129; 1 Phil. Ev. 312.

This bond was not taken for double the amount of debt, costs, and interest on the debt, as the statute requires. It is but a common law bond, and the plaintiff could recover but the damages actually sustained. The evidence excluded was admissible to show that the damages should be but nominal. St. 1835, c. 195, § 8; *Clapp* v. *Cofran*, 7 Mass. R. 101; *Freeman* v. *Davis*, ib. 200; *Winthrop* v. *Dockendorff*, 3 Greenl. 161.

G. G. Cushman, pro se, contended that the return of the officer was made in the proper discharge of his duty, and was conclusive in this case as to the time of the execution of the bond.

He also insisted that the defendants were estopped by their own acts from denying the execution of the bond on the fifteenth of April. If they chose to date their bond back to the time of the arrest, they are bound by the date. Otherwise it would operate as a fraud upon the plaintiff. The bond recites, that the arrest was made on that day, and that the bond was given to procure the release of the debtor, and the defendants are estopped to deny the truth of the recitals. *Milliken* v. *Coombs*, 1 Greenl. 346; *Cady* v. *Eggleston*, 11 Mass. R.

282; *Cordis* v. *Sager*, 2 Shepl. 477; *Dryden* v. *Jepherson*, 18 Pick. 386; *Fullerton* v. *Harris*, 8 Greenl. 198.

But the evidence was properly excluded on another ground. It was wholly immaterial. Performance was to be made within six months from the date, and not within six months from the time they put their names to the paper.

The opinion of the Court was drawn up by

SHEPLEY J. — The bond on which this suit is brought, bears date on the 15th of April, 1837; and the approval required by the statute is of the same date. It recites that "George Waite hath been and now is arrested," on the execution of the plaintiff against him. And it provides, "if the said Waite shall in six months from the time of executing this bond cite the said Cushman, the creditor," and submit himself to examination and take the oath as required by law, the obligation shall be void. The officer has returned on the execution, that he arrested Waite on execution on the same 15th of April, and that he gave an approved bond, which he returned with the execution.

The defendants offered to prove by the subscribing witness, that there was a mistake in the date of the bond, that it was executed on or after the 22d of May, 1837; and that there was a performance of its condition within six months from the said 22d of May. The proof that it was executed on the 22d of May, would not have shown, that the arrest was not made on that day. The recital of that fact in the bond only, and not the return of the officer would have been affected by it. The return of the officer would have still continued to be evidence of that fact, and there would be nothing to contradict it.

The statute, 1835, c. 195, § 8, provides, that, when the debtor is arrested or imprisoned on execution, he may give a bond conditioned, that in six months he will cite the creditor. That is in six months from such arrest or imprisonment. The bond was given as a compliance with the requirements of the statute, and it recites the arrest to be on the day, on which the return of the officer declares it to have been made. And this

is a material fact, as from it both by the terms of the statute and the condition of the bond performance is to be made within six months.

In *Cady* v. *Eggleston*, 11 Mass. R. 282, where the plaintiff in replevin gave a bond of like date, reciting, that he had sued out a writ of replevin, and did not sign it until the return day of the writ, it was decided that he was "estopped to say, that it was made on a day different from its date, and must be considered as having given force and effect to it on the day of the service of the writ of replevin." So here by reciting the day of arrest and dating it on that day the defendants must be considered as having given force and effect to it on that day.

In *Milliken* v. *Coombs*, 1 Greenl. 343, the date of the arbitration bond, signed by an attorney, was March 1, 1815. The only effectual power was dated on February 1, 1815, and was executed in fact on or about the 16th of March, 1815, after the date of the bond. The Court concluded, that it was antedated, "that it might appear as a subsisting power at the time of the execution of the bond; and that the principals might thereby be concluded from questioning the authority of their attorney.

In this point of view, the date becomes material, and must have been so considered by the parties. The defendants are therefore estopped by their deed to aver or prove, that it was in fact executed at a subsequent period." In *Styles* v. *Wardle*, 4 B. & C. 908, the date of a lease for 97 years, was on the 24th of December, 1822. And the lessor covenanted in it, that within twenty-four calendar months after the date he would procure one R. B. to take a lease of the premises for twenty-one years at a certain rent; and failing to do so would within one calendar month after the end of the twenty-four pay a certain sum of money. The defendant pleaded, that the lease was in fact executed on the eighth of April, 1823, and that twenty-five calendar months had not elapsed. There was a demurrer and joinder. Bayley J. said, "I consider, that a party executing a deed agrees, that the day therein mentioned shall be the date for the purposes of computation."

And the court rendered a judgment for the plaintiff.

According to these cases, the testimony excluded could not have varied the rights of the parties, and it might therefore properly be excluded.

The explanation of the difference in dates, between those stated in the bond and in the return of the officer on the execution, and that offered to be proved as the execution of the bond, may probably be found in an arrangement made between the officer and the debtor for their mutual accommodation. The officer might call upon the debtor and inform him, that he must pay, or be arrested and imprisoned, unless he gave a bond. The debtor might inform the officer, that he could not pay, and was desirous of being at liberty to apply to his friends and obtain a bond. The officer might assent to it on condition that he should consider himself as arrested on that day, and procure a bond bearing that date, to be executed and brought to him. To this the debtor might assent, and procure the bond accordingly as soon as he conveniently could, and present it to the officer; and all the papers would bear date as had been arranged. If this should be considered the proper solution, the result would be justly the same, as that to which the decided cases have come. For it would be apparent, that it was the intention of all parties, that the computation should be made from the date named in the bond, and not from the date of the execution of it. And having agreed, that the computation should be so made, they would be bound by it.

Exceptions overruled.

JAMES S. ROWE *versus* JOSEPH WHITTIER.

Where a person is liable to pay a debt, and promises to pay the same amount to a creditor of him to whom the debt was due, such promise is not within the statute of frauds, and need not be in writing; but if the promisor had not before been liable to pay such sum, his promise would not have been obligatory, under that statute, without a memorandum thereof in writing.

Where an action had been commenced by R. a counsellor and attorney at law, in favor of P. against W., and during the pendency of the suit, the creditor and debtor agreed to settle the demand in a certain manner, "provided W. would pay the expenses;" and on application of P. and W. to the attorney, he handed them his bill, charging to P. in one item the taxable costs, and in another, "commissions on amount secured by attachment;" and "W. took the bill, and looked at it, and told R. that he would pay it before he went out of town;" and thereupon the demand was settled in the manner proposed, without including any costs *or expenses;* afterwards P. informed R. of the settlement, "when W. told R, that he would call and settle it before he went out of town, and R. said that would be satisfactory;" and afterwards W. paid R. the amount of the taxable costs: — *It was held,* that an action by R. against W. for the balance of the bill, being the amount of the item of charge for commissions, could not be maintained.

EXCEPTIONS from the Eastern District Court.

Statement of facts. This was an action of assumpsit upon an account annexed to the writ, and also upon a count on a special contract to pay the expenses the Pattens had incurred in their suit against Whittier. The account is as follows, to wit: —

"Mr. Joseph Whittier to James S. Rowe, Dr.

1840, June.	To taxable bill of costs in the case *Willis Patten & al.* v. *him,*	15,03
	"Commissions on amount secured by attachment,	10,00
		$25,03
	"Cr. July. By cash and Remick's order,	15,03
		$10"

To sustain his action the plaintiff introduced Willis Patten as a witness, who was released, and testified that sometime in the spring of 1840, he had a suit on a note against Joseph Whittier for $2000, and he came down to settle it, and he

said he would give him certain paper for the demand, to which the witness assented, provided he would pay the expenses. He then asked him what it would be, and the witness replied he did not know, but would see Mr. Rowe. He did see Mr. Rowe, and told him he wanted to know how much the bill would be. Rowe said he would make it out and hand it to him, which he did, and when he came in Whittier was in the counting room. Rowe handed in the bill, which is the same the witness holds in his hand, and is as follows:

	" Willis Patten *& al.* to James S. Rowe,	Dr.
1840.	To bill of cost in suit against Joseph Whittier,	15,03
	" Commissions on amount secured by attachment,	10,00
		$25,03"

Whittier took it and looked at it, and told Mr. Rowe, that he would pay it before he went out of town. The witness and his partner afterwards settled the demand as was proposed, and neither party was entered on the docket. The witness told Rowe the arrangement they had made. When Whittier told Rowe, that he would call and settle it before he went out of town, and Rowe said that would be satisfactory. On cross-examination, witness said the whole amount of their debt was paid by their own paper, the amount of which he cannot recollect. They employed Mr. Rowe to bring the action. There was no promise in writing to pay the bill. Rowe said he should look to Whittier for pay. It was proved by the receipt of the plaintiff, which was put into the case by the defendant, that the taxable costs, being $15,03, were paid before the commencement of the action. The bar rules of Penobscot County may be referred to. Upon these facts the District Court rendered judgment for the plaintiff for the balance of the account; and the defendant filed exceptions.

Abbott, for the defendant, contended that the defendant was not liable, if the agreement was not within the statute of frauds, because commissions were not chargeable to any one, except where money was collected. And if the item for com-

missions is chargeable against Patten, it is not a charge against the defendant. His promise was to pay only the costs, but had it extended to the commissions, it would not have been binding upon him; for a promise made in ignorance of his legal rights is not binding. *Warder* v. *Tucker*, 7 Mass. R. 449; *Garland* v. *Salem Bank*, 9 Mass. R. 408.

The promise is not valid, because it is within the statute of frauds. The Pattens remained liable, and in such case, the collateral promise of a third person must be in writing, or it is not binding. *Perley* v. *Spring*, 12 Mass. R. 297; *Tileston* v. *Nettleton*, 6 Pick. 509; 1 Saund. 212; 2 T. R. 80; 2 Ld. Raym. 1085; 2 Wilson, 94; Com. on Con. 182, 191; 4 Johns. R. 422; 12 Johns. R. 291; 7 T. R. 201.

There was no consideration for the promise, and it was therefore void. The defendant was under no obligation to pay the charge for commissions. *Thacher* v. *Dinsmore*, 5 Mass. R. 301; 7 T. R. 350. The promise was no injury to the plaintiff, for he had no claim on the Pattens for this charge. Com. on Con. 27; *Cabot* v. *Haskins*, 3 Pick. 92.

The promise, however, did not extend to the payment of commissions. A promise to pay the expenses of a suit is but a promise to pay the legal costs of the suit.

Rowe, for the plaintiff.

The plaintiff's claim on the Messrs. Patten for commissions was a legal one, for it was in accordance with a long established barrule; and without such rule, it would have been legal. For no one but his client, can object to an attorney's charges for his services; and if he allows them, they constitute a legal claim. W. Patten allowed this charge for commissions, and handed the plaintiff's bill to defendant as a statement of the expenses to be paid. The defendant received it as such, and without objecting to any charge, promised to pay the bill.

The obligation of that promise, in part, he has admitted by paying the charge of taxable costs. There is no ground for the distinction between taxable costs and commissions. Neither constituted a debt of the defendant to the Pattens. Claim for taxable costs follows the judgment. At the time of the

defendant's promise, there was no judgment. Had the action not been dismissed, judgment might have been for the defendant. Until judgment the plaintiff's claim for costs is no more a debt of defendant's, than defendant's claim for costs is a debt of the plaintiffs. Before his promise the defendant was under no legal obligation to pay any part of the bill, and was under as strong moral obligation to pay one part as another, for the whole "expenses" had been incurred by the Messrs. Patten, in consequence of his neglect to pay his debt to them.

There was a good consideration in part, as is admitted, and, the promise being entire, that is sufficient to support the whole. 15 Pick. 159.

2. This case does not come within the statute of frauds. The defendant's promise was an original undertaking, founded on a new consideration, moving between the parties.

The consideration was twofold. 1st. A benefit to the defendant in thereby effecting a settlement which he could not have brought about without such promise. For the Messrs. Patten would agree to the compromise, only on the condition, that the defendant should pay, or discharge them from their liability for the "expenses" of that suit. 2d. A loss to the plaintiff in releasing his claim upon the Messrs. Patten for those expenses. For the arrangement between the Messrs. Patten and the defendant was, that their action should not be dismissed until they were discharged from their liability for the expenses; of which the plaintiff was informed, and consequently, by accepting the defendant's promise, as satisfactory, and having the Pattens' suit dismissed, he discharged them.

Either consideration alone would be sufficient to uphold the promise. *Dearborn* v. *Parks*, 5 Greenl. 83; *Leonard* v. *Vredenburgh*, 8 Johns. R. 31; *Farley* v. *Cleaveland*, 4 Cowen, 432; 1 Johns. R. 135; 1 Wilson, 305; Com. on Con. 196.

The discharge of the Pattens' liability to the plaintiff was not necessary to give validity to this promise. "In all these cases, founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original

debtor, the subsisting liability of the original debtor is no objection to the recovery." *Farley* v. *Cleaveland*, 4 Cowen, 439.

3. The defendant's promise was good though not in writing. *Brown* v. *Atwood*, 7 Greenl. 356.

4. The contract was entire; to pay a certain sum, a sum stated and ratified by part performance.

There is nothing in the case to sustain the position taken by the defendant, that the promise was made in ignorance of his legal rights. His arrangement with the Pattens was to pay the "expenses," (not the taxable costs,) and the amount of the plaintiff's bill was to be the amount of those expenses. That bill was asked for, rendered and received, without objection, as conclusive evidence of the expenses. The defendant's promise was made voluntarily, after examination of the bill, when he was not bound to pay a cent of it, to effect a compromise. And if proved, such ignorance is no excuse in law.

The opinion of the Court was by

WHITMAN C. J. — The suit of the plaintiff is on an account annexed to his writ. It is for the taxable bill of costs in an action commenced by him, in favor of *Willis Patten & al.* against the defendant; and for "commissions on amount secured by attachment" in the same cause. The defendant settled the demand of *Patten & al.* before judgment; and at the same time, having the plaintiff's bill presented to him as here exhibited, verbally promised the plaintiff to pay the amount of it to him; and has paid him the amount of the taxable costs; but now refuses to pay the amount charged for commissions; alleging that item to be a charge for which he was not, in any event, liable; and, if due from any one, it was from the plaintiffs in that suit; and that his promise to pay it was made in ignorance of his legal rights; and without consideration, and therefore void.

These positions, on the part of the defendant, seem to us to be well grounded in the law. This item for commissions could not have been recovered by *Patten & al.* of the defendant;

and therefore was not his debt. If it had been, his promise would have been available to the plaintiff; and good without a memorandum in writing. *Dearborn* v. *Parks*, 5 Greenl. 81. But, not being so, there was no consideration for the promise. If the claim was a legal one against Patten & al. it does not appear that they were discharged from it, in consideration of the promise made by the defendant; and if it had so appeared, the defendant, not being otherwise liable, his promise would not have been obligatory, under the statute of frauds, without a memorandum in writing. *Leonard* v. *Vredenburgh*, 8 Johns. R. 29. *Farley* v. *Cleaveland*, 4 Cowen, 432.

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

SAMUEL MORRISON *versus* JOHN MCDONALD *& al.*

It seems evident, that the framers of the Constitution of Maine, when providing for the continuance in office of "*judicial officers*," had in view those who to a general intent and purpose were such, and not those who were incidentally and casually entrusted with some attribute of judicial character.

The Recorder of the Municipal Court of the city of Bangor was not, in the sense contemplated by the constitution, a judicial officer; and therefore might be removed from office by the Governor and Council.

The Municipal Court of the city of Bangor is a court of record.

The power to commit for contempts of Court is incidental to all courts of record.

When a person has been duly removed from the office of Recorder, and another has been appointed in his stead, the person so removed commits a contempt of Court by persisting, after full and authentic information that he had been so removed, to exercise the duties of the office; especially after having been ordered by the Judge to desist therefrom.

In such case the Judge has jurisdiction of the subject matter of a commitment.

An action will not lie against a Judge of a court of record for any act done by him in his judicial character, in a matter within his jurisdiction, although in the discharge of the duties of his office there may have been an erroneous judgment, or an illegal commitment.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

This was an action of trespass, alleging that the plaintiff had been illegally arrested and imprisoned by the defendants, McDonald and Prescott. McDonald justified as Judge of the Municipal Court of the city of Bangor, and Prescott as Recorder of the same court, acting by order of the Judge.

The plaintiff, at the trial in the District Court, produced his commission as Recorder of the city of Bangor, dated March 12, 1838. He then proved, that he was arrested while attempting to discharge the duties of that office, after having been notified of his removal, and committed to prison on a warrant of which a copy follows. "State of Maine. Penobscot, ss. Whereas at a Municipal Court for the city of Bangor, in the county of Penobscot, holden at said Bangor, on the twenty-first day of January, A. D. 1839.

"Reuben S. Prescott appeared with a commission from the Governor, and having been duly qualified as recorder of said Court, and also with a notice from the Secretary of State directed to Samuel Morrison, notifying him that Reuben S. Prescott of Bangor had by the Governor, with the advice and consent of Council, been duly appointed recorder in his stead, and had been commissioned accordingly, which said notice was read by said Prescott in the hearing of said Morrison, and delivered to him in hand by said Prescott. Whereupon the Court directs said Prescott to take charge of the papers and records of said Court, and said Prescott attempting to take charge of the same is resisted by said Morrison, and the said Samuel Morrison refused to deliver up said records and papers to said Prescott, he the said Samuel Morrison claiming to be Recorder of said Court, and not recognizing the authority of the Governor and Council to remove him in the manner they have exercised said authority; therefore the Court order and direct, that the said Morrison be committed to the common jail in Bangor in said county, for contempt of Court by indecent behaviour in thus withholding the records and resisting the Recorder of said Court, and thus insulting said Court and obstructing it in the due and lawful exercise of its duties, against the peace of said State.

"Wherefore in the name of the said State, you are commanded to convey the said Samuel Morrison to the common jail in said Bangor, and there deliver him to the keeper thereof with this precept; and the said keeper is alike commanded to receive the said Morrison into his custody in said jail, and him there keep for want of sureties, or until he be otherwise discharged by due course of law. Witness, John McDonald, our said Judge, at Bangor aforesaid, this twenty-first day of January, A. D. 1839. R. S. PRESCOTT, Recorder."

It was admitted that Mr. McDonald was Judge of the Municipal Court.

The defendants produced a commission from the Governor, with the advice and consent of the Council, to Prescott, as Recorder of the city of Bangor, dated March 12, 1834, and another from the same to the same, as Recorder, dated Jan. 17, 1839, and proved a qualification on each. They also proved the refusal of Morrison to give up the records, and his resistance in court to Prescott in attempting to discharge the duties of the office. Each of these commissions, both of Prescott and Morrison, was for the term of four years, unless sooner removed by the Governor and Council.

The presiding Judge ruled, that the action could not be maintained, on the plaintiff's own evidence, and a nonsuit was entered. The plaintiff filed exceptions.

J. Appleton, for the plaintiff, said that this suit was a contest between two individuals to see which was entitled to the office of City Recorder; and insisted that the plaintiff could not be legally removed from the office by the Governor and Council, because he was a judicial officer. By the city charter the Recorder is authorized to act in the place of the Judge in his absence or death in all criminal offences, and has power to try, judge and punish; and is therefore a judicial officer. Const. of Maine, Art. 6, § 4; 1 Salk. 200; 3 Yeate's R. 300.

The Municipal Judge had no jurisdiction of the case. The remedy was by a *quo warranto*. *The People* v. *Richardson*, 4 Cowen, 101; *The People* v. *Tibbits*, ib. 380; *Comm.* v. *Fowler*, 10 Mass. R. 290; 2 M. & Selw. 75.

There was no adjudication in the premises. The imprisonment might have been perpetual. The Judge exceeded his jurisdiction, the imprisonment was illegal, and the defendants are responsible to the plaintiff for the injury. 7 English Com. L. R. 293; 5 Petersd. Ab. 391; Hardres, 480; 2 Wils. 383; 2 Strange, 993; 4 T. R. 424; Cowper, 646. The authority must appear on the face of the warrant. 7 Cowen, 249; 2 Johns. Cas. 49; 10 Conn. R. 521; 9 Eng. Com. L. R. 490; 5 M. & Selw. 314; 21 Eng. Com. L. R. 21. A commitment for an unreasonable time is entirely void. 16 Eng. Com. L. R. 342; 1 Burr. 196; 3 Cranch, 331; 1 Conn. R. 46.

Hathaway, for McDonald, supposed it was clear, that Prescott was Recorder, but whether so or not, the action cannot be supported against the Judge. A judicial officer is not responsible for a mere error in judgment, in the discharge of his official duties. The law is well settled on this subject. If such actions can be maintained, judicial officers must occupy very conspicuous places as defendants. *Yates' case*, 4 Johns. R. 317; *Yates* v. *Lansing*, 5 Johns. R. 282; same case, 9 Johns. R. 395; 1 Day's Cas. in Error, 315.

The Judge had jurisdiction of the subject matter, and of the person, and it so appears on the face of the paper. This is sufficient. 1 Mod. 184; 2 Mod. 218. The Judge must decide who was the recording officer of his Court, and it was his duty to proceed in the discharge of the business before him. The Judge was compelled by the conduct of the plaintiff to take the course he did, and is protected by law in so doing.

A. G. Jewett, for Prescott, said that if the Judge was protected by law, Prescott, who merely acted under his orders, was protected also. It can be no protection to the Judge, if the persons employed by him, and acting under his orders, are liable. He was the actual Recorder, recognized by the Court. In addition to the cases already brought to the attention of the Court, he cited Judge Peck's case, before the Senate of the

United States, on impeachment for the imprisonment of Lawless; and *Yates* v. *The People*, 6 Johns. R. 237.

Prescott, however, was the legal Recorder. It is not a judicial office. The city charter provides for but one Judge. The Recorder is the mere clerk of the Court, and the plaintiff was appointed and commissioned as such for the term of four years, and subject to removal by the appointing power, and could not be a Judge under such commission. The charter, it is true, provides that the Recorder may discharge some part of the duties of the Judge in his absence. This does not change the character of the office, and make the clerk the Judge. If there be any doubt upon the subject, it is whether the clerk of the Court could legally perform those minor duties of the Judge in his absence.

But if the principle contended for in behalf of the plaintiff were correct, that the clerk, or recorder of the municipal Court of the city is a judicial officer, it would not aid the plaintiff. If he relies upon his commission, he can hold only for four years, *and during the pleasure of the Governor and Council.* If he relies, that the office is a judicial one, and that the commission, as it is, gives him the right to hold until he is seventy, independent of the appointing power, both conditions are alike inoperative. Prescott, then, having been commissioned as the first recorder, in 1834, would still be in office, and Morrison would never have been legally the Recorder.

The opinion of the Court was drawn up by

WHITMAN C. J. — This case comes before us upon exceptions taken to the order of the Judge, nonsuiting the plaintiff at the trial, for defect of evidence introduced by him in support of his action, which was trespass for false imprisonment. The plaintiff, until immediately before the trespass complained of, had been Recorder of the Municipal Court at Bangor, of which the defendant, McDonald, was Judge; and of which the defendant, Prescott, claimed to have been duly appointed as the plaintiff's successor, exhibiting, at the same time, due notice to the plaintiff that he had been thus removed and superseded.

The plaintiff, nevertheless, insisted, that he had not, and could not by law have been so superseded. The Judge, McDonald, thinking otherwise, directed him to retire from the office, and to desist from exercising its duties; and upon his refusal caused a mittimus to be issued, on which the plaintiff was committed to prison as and for a contempt of Court.

The first question made by the counsel for the plaintiff is, whether the office of Recorder is a judicial office or not; he contending that it is such, and therefore not within the provision of the Constitution, Art. 9, § 6, which is, that "the tenure of all offices, which are not, or shall not otherwise be provided for, shall be during the pleasure of the Governor and Council."

The ground assumed is, that the Recorder, in the absence of the Judge, being clothed with the same powers as the Judge himself is when present, is a judicial officer, and therefore within the description of the Constitution, as it then was, Art. 6, § 4; which provided, that "all judicial officers, except justices of the peace, shall hold their offices during good behaviour; but not beyond the age of seventy years." The tenure of the office of Recorder as to duration, is not prescribed in the act constituting the office. The appointment in this case was for the term of four years, unless sooner removed by the Governor and Council. This appointment, therefore, was not as a judicial officer, and if a Recorder be such, the appointment was not according to the Constitution, and therefore might not be valid.

But we cannot bring our minds to the conclusion that a Recorder is, in the sense contemplated in the Constitution, a judicial officer. It seems evident, that the framers of that instrument had in view those, who to a general intent and purpose were such, and not those who were incidentally and casually entrusted with the exercise of some attribute of a judicial character.

The instances are numerous in which individuals are expected, in connexion with the chief business, characterizing the duties of their appointments, which in the main is in no

wise judicial, to exercise, as incident thereto, casually, some judicial power. Take, for instance, the Senate of the State. That body has judicial powers, in cases of impeachment, but it never occurred to any one that its members were to be deemed judicial officers. The great body of their powers is wholly foreign to any thing of a judicial cast; and they never could have been viewed as judicial officers. Auditors and masters in chancery, in connexion with their ministerial duties, perform sundry acts of a judicial nature. So do the assessors of taxes of our municipal corporations; and commissioners on insolvent estates; and commissioners to adjust controversies for the damage occasioned by flowing lands, under the act concerning mills, &c; and to make partition of real estate. And, in this connexion, the case of County Commissioners may well be referred to, although it may be believed, that no one would have been surprised, if the legislature had admitted them to be within the purview of the constitutional provision; especially since it has deemed it proper to authorize an appeal, in all cases, in which there can be any litigation before them, between parties, to this Court; when, whatever may be done in the matter of such appeals must be admitted to be of a judicial nature.

If County Commissioners are not to be denominated judicial officers, surely the Recorders of Municipal Courts cannot be.

The next branch of inquiry, presented by the plaintiff, under the exceptions, is as to the authority of the Municipal Court to proceed in the manner it did, to cause him to be imprisoned for a contempt of Court. The Municipal Court of Bangor is a court of record. The power to commit for contempt is incident to all such courts. The plaintiff, who must be regarded as having been duly removed from the office of Recorder, must be admitted to have committed a contempt, by persisting, after full and authentic information, that he had been so removed, in exercising the duties of the office; especially after being ordered by the Judge, to desist therefrom. The Judge clearly had jurisdiction of the subject matter of a commitment in the case. But it is contended, that he did not

proceed regularly in the exercise of such power. It may be that he did not. All the evidence of his proceedings, which the case presents, is contained in the mittimus, by which the plaintiff was committed to prison. Whether there was any record, upon which that instrument was grounded, does not appear. If the plaintiff had not been nonsuited upon his opening, the defendants might have introduced their record of the conviction and sentence. It seems from the mittimus, that the plaintiff, not finding sureties, was ordered to be detained in prison till discharged by due course of law. What sureties he had or could have been ordered to find, or for what purpose, does not appear. And finally there does not seem to be much reason to doubt that there was irregularity in the proceeding of the Court in the affair. But, after all, is the Judge, and his Recorder, who must stand or fall with him, amenable to the plaintiff in this action, on account thereof?

The cases tending to show that they are not, are numerous. *Giverwelt* v. *Burwell & al.*, 1 Salk. 396, and cases there cited; case of *J. V. N. Yates*, 4 Johns. 317; *Yates* v. *Lansing*, 5 Johns. 282. In *Hammond* v. *Howell*, 1 Mod. 184, the Court say, in very emphatic terms, that no action will lie against a Judge for a wrongful commitment, any more than for an erroneous judgment.

In the cases of *Yates*, and *Yates* and *Lansing*, before cited, in the Supreme Court, and Court of Errors, in New York, the learning upon this subject was entirely exhausted. And although the Court of Errors of that State was of opinion, that Lansing, as Chancellor of the State, had no authority to commit Yates, for the cause, and in the manner he did; yet they held, that the latter could not sustain an action against him therefor.

Exceptions overruled and nonsuit confirmed.

HENRY RICE *versus* DANIEL WILKINS.

If an attorney, who has reeeived merely general orders to secure a demand, delivers the writ, with written orders thereon to attach sufficient property, to an officer for service, and at the same time gives verbal directions to the officer to attach certain property, and to take therefor the receipt of a person named, such officer cannot be holden to produce the property attached, to be taken on the cxecution, if he has acted in accordance with the directions thus given.

And such directions are not disobeyed, should the officer in the receipt of the person named require him to deliver the property attached "on demand *after judgment.*"

If orders be given by the creditor to an attorney "to obtain immediate security" for a demand, the whole manner of doing it, is left to the discretion of the attorney, and the creditor is bound by his acts.

A deputy sheriff, who has given bond for the faithful discharge of his duties, but who has been released by the sheriff from all claim by reason of any default alleged in the suit, is a competent witness for the sheriff in an action against him for the default of the deputy.

THIS action was brought against the defendant as late sheriff of the County of Penobscot for the default of Henry B. Farnham, his deputy, in not keeping and delivering on demand certain property by him attached and returned on two writs, in favor of the plaintiff against Samuel A. Gilman, one dated March 12, 1836, and the other, Sept. 5, 1836.

The plaintiff introduced the writs. On the back of the first were written these words, "Mr. Officer. Secure by attaching personal property, goods, &c. by order of the creditor. S. & A.;" and on the other, "Mr. Officer. Attach sufficient personal property. S. & A." The writs were indorsed, "George Starrett, Moses L. Appleton," and were in the handwriting of Mr. Appleton. Farnham returned an attachment, under date of March 12, 1836, of "goods, wares and merchandize to the value of twelve hundred dollars," without naming any article; and on the second, an attachment of various articles of merchandize named, but not separately valued, "being all to the amount of twelve hundred dollars." The plaintiff also proved that judgments were recovered in said suits, executions issued thereon, and the property duly demanded of Farnham by the

proper officer, having the executions, within thirty days after judgment, and a refusal to deliver the same.

The defendant then introduced, as a witness, Farnham, the deputy who made the attachments, who was objected to on the ground of interest; and he then produced a release from the defendant to himself, discharging him from all claim by reason of any default alleged in this action. The plaintiff still objected to his competency, but the objection was overruled by TENNEY J. presiding at the trial. Farnham testified, that he thought, about March 12, 1836, George Starrett, Esq. then one of the firm of Starrett & Appleton, attorneys at law, but since deceased, gave him a writ for service, *Henry Rice* v. *Samuel A. Gilman*, which Starrett, having read his instructions, said he wanted secured; that he did not wish to break up the young man in business; that if S. A. Gilman would give his father's paper on sixty days, that the witness might take it, and if not, attach his goods in the store, and take his father as receipter; that the father was a man of property, and worth fifty or sixty thousand dollars. Farnham further stated, that he went over with the writ; that the debtor's father refused to give the sixty days paper, and he attached the goods, and took the debtor's father as receipter; that he then came back to Starrett & Appleton's office, and Starrett said it must be good, for he considered Mr. Gilman worth fifty or sixty thousand dollars. Farnham further testified, that in Sept. 1836, Mr. Starrett, gave him another writ in favor of the same against the same, with the same directions as the first; that he told Starrett that the goods had been attached by others on other suits; that Starrett said to him he might notwithstanding attach them, and get the old gentleman's receipt; that he then went into the store, sent for the old gentleman, who gave his receipt therefor; that he then returned to Starrett's office; that he received his directions in both cases from Starrett; that he thought Mr. Appleton was not present in the office; and that subsequently he gave the receipts to Mr. Appleton, who commenced suits thereon. The plaintiff objected to the admission of this testimony, the grounds of objection not be-

ing stated, but it was admitted by the presiding Judge. In the last mentioned receipt, the promise was to deliver the property "on demand after judgment."

The plaintiff then proved that the first note was sent by him to S. J. Foster, in a letter, dated March 8, 1836, and that Foster handed the note and letter to Messrs. Starrett & Appleton. The part of the letter relating to the note follows, "Enclosed you have Samuel A. Gilman's note for $743,25, for which I wish you to obtain immediate security. I have another note against him payable in six months for the same amount, but make sure of securing this, if it can be done." There was other testimony in the case, in some degree conflicting with that of Farnham.

The Judge instructed the jury, that the evidence introduced by the plaintiff, (and which was stated generally,) if believed, entitled the plaintiff to their verdict, unless the defendant, taking upon himself the burthen, gave them reasonable satisfaction, that Farnham followed the instructions given him by the plaintiff's counsel; that on a fair construction of the letter of March, 1836, the attorneys of the plaintiff were authorized to direct the officer who had the writs to attach property, and take receipts of a responsible person as one kind of security; that if Farnham followed the directions of the attorneys, or either of them, in attaching the property and taking the receipts of Allen Gilman, and the doings of Farnham were afterwards approved by the attorneys or either of them, or if Farnham took the receipts in pursuance of the verbal directions of the attorneys or either of them, given after the directions on the writs and before the service of the writs, it was a defence to the action, even if they did not find, that the doings of Farnham were afterwards approved by the attorneys, or either of them; and that in coming to a result on this question, they were at liberty to take into consideration the evidence touching the conduct of Farnham and the attorneys of the plaintiff, or either of them, in relation to the receipts after the same had been taken by Farnham, and after they had been delivered to the plaintiff's attorney. The verdict was for the defend-

ant. If Farnham was not a competent witness, or if any of the rulings and directions of the Judge were erroneous, the verdict was to be set aside.

Cutting and *M. L. Appleton* argued for the plaintiff.

They contended that the release did not render Farnham a competent witness for the defendant. It did not discharge the claim of the sheriff on the bond of the deputy for this default. If his sureties pay, they will have a claim against the witness. His interest therefore remains after the release. *Dickey* v. *Sleeper*, 13 Mass. R. 244; 8 Coke, 99, (b.); Com. Dig. Bail, G; 4 Hen. & Munf. 293; 1 Bailey, 501, 535; 1 Ld. Raym. 690; 3 Mod. 415, 551.

The parol evidence was inadmissible to control the written instructions on the back of the writ. The testimony is, that the verbal directions were given at the same time, the writ was handed to the officer with the written instructions. If no written instructions had been given, the officer would not have been liable for any omission to attach property. He cannot be charged for neglecting to obey verbal instructions to attach property. St. 1829, c. 445; Rev. Stat. c. 151, § 4; *Betts* v. *Norris*, 3 Shepl. 468.

The testimony of Farnham was inadmissible, because it goes to contradict his own return. *Gardner* v. *Hosmer*, 6 Mass. R. 325.

The instruction of the Judge to the jury, that Starrett was authorized by the plaintiff's letter, to take the course said by Farnham to have been taken, was erroneous. The instructions were communicated to the officer before the service of the writ. Therefore, whether an attorney acting under a general authority has this power or not, the officer knew that Mr. Starrett had none. The letter is plain and explicit, and gives no such power.

An attorney without express permission has no power to authorize, so as to bind his client, an officer to take the receipt of any one individual whatever for property attached by him. An attorney cannot compromise the rights of his client in this

respect. He may make himself responsible to the officer, but he cannot waive or destroy the rights of the creditor. It is no part of the duty of an attorney, in the collection of a debt, to absolve the officer from the obligation imposed upon him by law. *Lewis* v. *Gamage*, 1 Pick. 346; *Langdon* v. *Potter*, 13 Mass. R. 319; 1 Porter, 212; 5 Randolph, 639; *Parker* v. *Downing*, 13 Mass. R. 465; 14 Sergt. & R. 307; *York Bank* v. *Appleton*, 5 Shepl. 55; *Springer* v. *Whipple*, ib. 351.

The instructions of the attorney, as stated by Farnham, himself, were not followed in relation to the second writ. They did not authorize him to take a receipt for property to be delivered only after judgment. This was an important departure from instructions, because it effectually prevented the plaintiff from obtaining security of the receipter on the receipt until after judgment was obtained against the debtor.

The defence set up in this case is against the policy of the law. The sheriff and his deputies are officers of the law, and their duties are prescribed by it. Parties should not be permitted to impose upon the officer burthens which the law does not require; nor should the officer be allowed to bargain for a less onerous office than the law imposes. Nor should the officer be exposed to the temptation of coming into Court, and by his own testimony throwing the consequences of his own neglect of duty upon the attorney.

J. Appleton, for the defendant, was stopped by the Court.

It was said, that the main questions in this case had been argued in the county of Washington in 1841, and that an opinion, favorable to the defendant, had been prepared, and was to be delivered in that case (*Jenney* v. *Delesdernier*, 2 Appl. 183,) on the ensuing week.

The opinion of the Court was drawn up by

Tenney J. — The orders in writing upon the writs required the officer, to whom they were directed, to attach sufficient personal property. The directions, given by one of the plaintiff's attorneys, authorized him, on failure to obtain a certain

note as security, to take the receipt of Allen Gilman, the father of the debtor, for the goods, which he was directed to attach. It is unnecessary here to inquire, whether an officer is excused for omitting to observe written orders upon writs, when he follows those afterwards given, which are verbal and inconsistent with the former; for those which were written in this case were in nowise varied by the others; and both were fully complied with.

Was the direction of one of the attorneys, to take the receipts of Allen Gilman for the goods attached, sufficient to protect the officer for so doing, and exonerate him from liability for not retaining the property? In the case of *Jenney* v. *Delesdernier*, 20 Maine R. 183, it has been decided by this Court, that an attorney has power to approve a receipt taken by an officer, for goods attached; *a fortiori*, is the officer justified in taking a receipt in pursuance of and obedience to the instructions, given by the attorney, at the time, when the writ was delivered to him; the orders to attach and to take a receipt were here simultaneous, and the officer has as much right to protection by a compliance with the latter, as he was bound to act in obedience to the former.

Did the Judge err in the construction put upon the plaintiff's letter to S. J. Foster of the 8th of March, 1836? This letter was a direction to secure the demand enclosed, both of which were at the same time given to the plaintiff's attorneys. It required no specific kind of security, and therefore the whole was left to the discretion of the attorneys in that respect; and the case referred to, authorized the course taken by them, and the plaintiff was bound thereby.

It is insisted, that as the receipt taken in the last case is an engagement, to deliver the property described therein, "on demand after judgment," and it not appearing to have been exhibited, or its terms made known, to the attorneys or either of them, and not being approved, the instruction of the Judge was erroneous, inasmuch as the officer had no direction to take the receipt in the terms used. The object of the attachment was, that there might be property secured, to satisfy the judg-

ment sought to be obtained. No doubt of Allen Gilman's ability to meet his engagement in the receipt was manifested by the attorney, who authorized taking the receipt, after an attachment, which, from the evidence reported, must have been expected to be only nominal. No use could have been made of the property returned upon the writ, for the purpose of satisfying the debt without consent of parties, till after judgment. As the direction to the officer contained no time, when the receipter should be holden to re-deliver the property, we think the officer was warranted in presuming that the attorney had no wish, that it should be restored to his possession till needed to satisfy the judgment and execution. The terms of the receipt we think were in compliance with the directions given.

Was the officer, who made the attachments, a competent witness after he was released by the defendant? It is contended that he was not released from his bond, and that his sureties are still holden to the defendant, and they have a remedy upon the officer for the amount, which they may pay to the defendant. When the witness is discharged from all damages and costs arising out of this suit, we are unable to perceive how he can be holden therefor on the bond which is embraced in the terms used. How can any cause of action be prosecuted against the sureties on the bond, when that cause is cancelled by a release as effectually as it would be by payment?

If the defendant had given time to the principal on the bond for the payment of such sum as might be recovered against him, without the consent of his sureties, they would be discharged. They must be equally so, when he has released the principal entirely and absolutely, and thereby taken from them the remedy against him, if they could otherwise be holden. It has long since been settled in this State and Massachusetts, that an officer, for whose default an action is brought against the sheriff, is a competent witness for the defendant in the action after being released by him. *Jewett* v. *Adams*, 8 Greenl. 30.

Judgment on the verdict.

FRANKLIN ROLLINS *versus* JEREMIAH BARTLETT *& al.*

In an action upon a promissory note, an office copy of a deed made by the plaintiff to the witness, produced by the plaintiff for the purpose of establishing, with more certainty than the witness was able to do it, the precise time when the note in question was indorsed to the plaintiff, is inadmissible in evidence.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Assumpsit by the indorsee against the makers of a promissory note, dated Nov. 2, 1836, payable in two years from date.

Bartlett was defaulted, and the other two defendants placed their defence upon the ground of want of consideration, and that the plaintiff took the note from one Twitchell with a knowledge of the circumstances under which it was made. And to support this defence the defendants introduced several witnesses, to rebut which, evidence was introduced by the plaintiff.

Benjamin Rich, the payee of the note, was called by the plaintiff, and testified that he negotiated and indorsed the note, within a few days or weeks after it was made, to one Twitchell, in consideration of the conveyance of a farm by him to the witness, and that the notes were transferred to Twitchell at the time the deed was delivered. The plaintiff then introduced an office copy of the deed in order to show the date and time of delivery thereof, and also the time of its being recorded.

To the introduction of this copy the defendants objected, but it was admitted; and for that cause the defendants excepted.

Hobbs, for the defendants, said the question here was, whether an office copy of a deed of land was admissible to prove when the note in suit was indorsed. The mere statement of the case was enough to show, that the copy should not have been admitted.

The plaintiff considered the copy material evidence at the

trial, and without it, he dared not risk his case. He cannot now come into Court and say, that it was immaterial.

A. W. Paine, for the plaintiff, said that the office copy was admissible, even to prove the contents of the deed. *Tucker* v. *Welch*, 17 Mass. R. 160; *Eaton* v. *Campbell*, 7 Pick. 10; *Scanlan* v. *Wright*, 13 Pick. 523; *Burghardt* v. *Turner*, 12 Pick. 534; 1 Stark. Ev. 368, note; *Dick* v. *Balch*, 8 Peters, 30.

Where the writing between the parties is merely collateral to the question at issue, the original need not be produced. Greenl. on Ev. § 89; 11 Wend. 667.

But the evidence was wholly immaterial, the fact having already been proved sufficiently.

The opinion of the Court was drawn up by

Whitman C. J. — The defendant in the Court below, excepted to the admission of a copy from the Registry, of a deed made by the plaintiff to the witness, produced by the plaintiff, for the purpose of establishing, with more certainty, than the witness was able to do it, the precise time when the notes in question were negotiated to the plaintiff. The original of the deed must be presumed to have been in the possession of the witness. The defendant was no party to it, nor was there any question of title to land depending in connexion with it. It was, besides, evidence of the plaintiff's own manufacture, without the privity of the defendant. Neither the original nor the copy was properly admissible in evidence against him. The original might have been used by the witness to refresh his recollection, if it had been present; and this was the only use that could have been made of it, legitimately, against the defendant.

But the plaintiff now contends that, if the copy was improperly admitted, it was immaterial. But he did not so consider it at the trial, otherwise he would not have offered it. The fact which it tended to prove, and for the purpose of proving which, it was offered, he now contends, was sufficiently established without it. But this was a question for the jury.

The evidence to be relied upon was oral, depending upon the credibility of the witness; and the Court cannot undertake to know, that the jury would, but for this evidence arising from an inspection of the copy of the deed, have considered the fact as established.

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

JEREMIAH HATHAWAY *& al. versus* EDWARD H. BURR.

In an action for money had and received wherein the plaintiff claims to recover the price of a quantity of his bark, alleged to have been taken and sold by the defendant, it is only necessary for the plaintiff to prove, that the defendant had taken and sold his bark, and *received payment therefor*, without showing that such payment was in money.

Where the proof is, "that the defendant said he had sold the bark," it is not for the Court to decide whether payment had or had not been made therefor, upon the mere consideration of the legal meaning and effect of the word, *sold;* but the question should be submitted to the decision of the jury, who would also regard the attending circumstances and other facts in the case.

And if in taking and selling the bark the defendant acted as the agent of others, it will not be presumed, without proof, that the money had been paid over to the principals, unless from the nature of the business, or the usual course of transacting it, it would be expected that payment would be made to the principal, and not to the agent.

ON the following exceptions from the Eastern District Court, ALLEN J. presiding.

This was an action of assumpsit in which plaintiff claimed pay for sixteen cords of bark, according to an account annexed to the writ. There was also in the writ a count for money had and received. Plaintiffs prove that they hauled a quantity of bark to the landing in Brewer, and that defendant seized it. And it was agreed that defendant did seize it, acting under the orders of Joseph Otis, agent for the Proprietors of No. 8, in Hancock County, as whose property it was taken by the defendant.

It was also proved by plaintiffs that defendant said he had sold the bark.

Whereupon defendant's counsel requested the Judge to instruct the jury: —

1st. That unless the money or pay for the bark had been actually received by defendant, he was not liable in this action.

2d. That proof that defendant said he had sold the bark, is not sufficient evidence to prove, that he had received the money or pay for the same.

3d. That proof of sale of the bark by defendant as agent of Otis or the proprietors, (plaintiffs knowing at the time that he acted as servant or agent,) is not competent to charge the defendant in this action.

The Judge declined to give the last requested instruction; and instructed the jury, that to maintain this action, it was necessary for the plaintiffs to prove that defendant had sold the bark, and received the money or pay for the same. That if the evidence from the admission of defendant, proved that he had sold the bark prior to the commencement of this suit, the jury would be authorized to find, not only the sale, but that he had received the money or money's worth for the same.

There was no evidence that defendant had received any thing for the bark, or at what price it was sold, or to whom, or that defendant had received any security for the pay, or whether the payment was to be received by him or his principal. The only evidence as to these points, and also as to the fact of the sale, was, that defendant said he "had sold the bark."

Under the instructions of the Court, a verdict was returned against the defendant. And to the rulings and instructions of the Judge, as aforesaid, defendant excepts.

Hathaway argued for the plaintiff, and contended that the District Judge erred both in refusing to give the instructions requested, and in stating the law to the jury as he did in the instructions given.

The plaintiffs should have proved their property in the bark. The mere fact that the plaintiffs hauled it, was no evidence, that

it was their property. The defendant took the bark as the property of the owners, and the law will not imply a promise against him against his own protestations. *Jewett* v. *Somerset*, 1 Greenl. 125.

But had the property been proved to have been in the plaintiffs, as the taking was tortious, assumpsit will not lie, unless it be proved, that the money had been received. Here was no evidence that any thing had been received. The first request should have been complied with. *Jones* v. *Hoar*, 5 Pick. 285; 1 Metc. & Per. Dig. 282.

The instruction secondly requested should have been given. The mere statement by the defendant that he had sold the bark, is not evidence that he had received pay for it, and much less that he had received payment in money. It would apply equally to a sale for credit, as to payment down, and to a payment in specific articles as to a payment in cash. There is a wide distinction between a sale, and the reception of the proceeds of the sale in money. 1 Taunt. 112; *Gilmore* v. *Wilbur*, 12 Pick. 124; *Webster* v. *Drinkwater*, 5 Greenl. 323.

The third request should have been granted. The bark was claimed by the proprietors of No. 8; and if any presumption of payment to any one can arise, it is, that payment was made to the owners, and not to the agent.

If the plaintiffs can recover, it is only for the amount of money received by the defendant. It is the duty of the plaintiffs to show it, or they cannot support their action. 2 T. R. 144.

Blake, for the plaintiffs, contended that the possession of the bark by the plaintiffs, was sufficient evidence of their ownership, until it was proved to belong to some other person.

In common parlance, by having sold an article is meant, that the person has sold it, and received payment therefor in money, or in money's worth. The jury therefore were fully authorized to make the inference they did.

When we show a sale, we are entitled to the usual price of the article, unless the other party shows the sum at which it was actually sold.

The defendant took the property of the plaintiffs wrongfully, and he cannot avoid his responsibility by proving that he was acting as the agent of another. But he cannot even bring up that question, for he has not yet shown, that he has paid the money over to the principal.

The opinion of the Court was drawn up by

SHEPLEY J. — It was contended in argument, that there was no sufficient proof of property in the plaintiffs; but it does not appear, that any such question was made and decided by the presiding Judge. And the only questions presented by the bill of exceptions are those arising out of the instructions, and the refusals to instruct as requested. In this Court the property of the plaintiffs must be considered as having been satisfactorily proved.

There was a substantial compliance with the first request, when the jury were instructed, "that to maintain this action, it was necessary for the plaintiffs to prove, that defendant had sold the bark and received the money or pay for the same." And this was correct; for if he had received payment in any manner, he must be regarded as considering it equivalent to a payment in money. *Beardsley* v. *Root*, 11 Johns. R. 464; *Miller* v. *Miller*, 7 Pick. 136.

The second requested instruction, "that proof, that defendant said he had sold the bark, is not sufficient evidence to prove, that he had received the money or pay for the same," was not given. To have complied with this request it would have been necessary for the Court to have decided upon the legal effect of the word sold, without regard to the circumstances or other facts appearing in the case. Proof of payment was necessary, but it might be inferred from the testimony without any positive evidence. The word sale or sold, as used in conversation and even by legal writers, may signify only, that a bargain or contract to sell has been made, or that there has been such a contract, and delivery of the goods, or that such a contract has been made and completed by the payment of the price. The meaning will usually be clearly ascertained

by the words used in connexion with it, or by the circumstances developed. Examples of the use of the word in the first sense may be found, where it is said, "if goods are sold upon condition to be performed at the time of delivery, and the goods are delivered, but the conditions are not performed, trover will lie to recover them back." And where it is said "the vendor has a lien for the price of goods sold." And of the use of it in the second sense, when "an action for goods sold," or "assumpsit for goods sold" are spoken of. And of the use in the third sense, where it is said "where goods were purchased in market overt and sold by the purchaser before the felon was convicted, it was decided, that the owner" could not maintain trover for them. And when it is said, "if the purchaser neglects to remove goods sold within a reasonable time, the seller may charge him with warehouse room."

These examples will be sufficient to show, that there can be little safety in attaching a legal meaning to the word, when separated from the connexion or circumstances in which it is used. It is necessary therefore to advert to the facts disclosed in the case to decide, whether the instructions on this point were correct. These were, that the defendant before the commencement of the suit had wrongfully seised the plaintiff's property, and had sold it, and at the trial had offered no evidence, that it had been sold on a credit, or that it had not been delivered and payment made. In the case of *Longchamp* v. *Kenney*, Douglas, 137, the defendant had obtained possession of a ticket from his servant, with whom it had been intrusted for sale; and being called upon to account to the owner, he said, "well, if I had it, what then? Go to the person, who received it of you, and let him pay you." The servant paid for the ticket and brought an action for money paid and money had and received. Lord Mansfield said, "if he sold the ticket and received the value of it, it was for the plaintiff's use, because the ticket was his. Now as he has not produced the ticket, it is a fair presumption, that he has sold it." This sentence affords an example of the use of the word sold in two different senses. In the first use, it does not include the payment, and

in the second use it was designed to do so. It would not be necessary to carry the presumption so far, as in that case, to justify the instruction given in this case, that "the jury would be authorized to find not only the sale, but that he had received the money or money's worth for the same."

In support of the third request it is contended, that if payment is to be considered as made, it is to be presumed to have been made to the owner, for whom the defendant was agent. Such a presumption can arise only, when from the nature of the business, or the usual course of transacting it, it is perceived, that payment would be expected to be made to the principal, and not to the agent. Ordinarily agents and factors for the sale of goods are expected to receive the payments. If the defendant had authority to sell, which must be presumed so far as he is concerned, there is nothing to indicate, that the money was to be paid to the principal. And there being no evidence, that he had paid it over to his principal, the action may be sustained against him. *Buller* v. *Harrison*, Cowp. 566.

It does not appear, that the jury were erroneously instructed respecting the measure of damages, or that the defendant was charged for a greater amount, than he was presumed to have received.

Exceptions overruled.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

APPEAL.

See RECOGNIZANCE.

ASSIGNMENT.

1. Two debtors, P. & B. C., assigned, for the benefit of all their creditors, "all and singular the stock in trade, household goods, furniture, implements, excepting goods exempted by law from attachment, debts, sum and sums of money, books of account, notes, and other things due and owing the said P. & B. C., and all their real and personal estate and interest therein, as will appear by the schedule under oath and hereunto annexed, which is intended to give only a general description of the property assigned, subject to such further enlargement or diminution in value as a particular and minute survey of the property will justify." A schedule was annexed, containing a general description of the same property. The signature of the assignors was thus: "P. & B. C."— and but one seal. There was a certificate by a magistrate, bearing date the next day, that "P. & B. C." personally appeared and made oath, that the assignment embraced all their property, save such as the law exempted from attachment. *It was held*, that the assignment was to be regarded as conveying all the property of the assignors, which is required by the St. 1836, c. 239, concerning assignments.
Pike v. *Bacon*, 280.
2. When an assignment of the debtor's whole property has been made in good faith, for the benefit of all the creditors, its validity will not be impaired, if the assignor withholds a portion of the property actually conveyed. *Ib.*
3. If the assignor was induced to make the assignment through fear of, and to prevent, an attachment by one of the creditors, it would not thereby become invalid as against such creditor, if honestly and fairly made, according to the requisitions of the statute, for the benefit of all the creditors, and with an intention to comply with the statute. *Ib.*
4. But if the assignment is made in form according to the statute requirements, and yet not for the purpose of making an equal distribution of all the property among all the creditors, but to delay and defeat the attaching or other creditors, or to secure to the assignor a benefit by a reservation of any part of the property for his own use, it would thereby become fraudulent and void. *Ib.*
5. And if the assignor makes use of deception to induce a creditor to delay making an attachment until an assignment can be made, this is not conclusive evidence of fraud, but merely evidence to the jury, for their consideration in determining that question. *Ib.*

See ACTION, 5. BILLS AND NOTES, 9. CONSIDERATION, 3. FRAUD, 2.

ASSUMPSIT.

See ACTION, 5. LANDLORD AND TENANT, 2

ATTACHMENT.

See OFFICER. REPLEVIN.

ATTORNEY AT LAW.

1. Where an action had been commenced by R. a counsellor and attorney at law, in favor of P. against W., and during the pendency of the suit, the creditor and debtor agreed to settle the demand in a certain manner, "provided W. would pay the expenses;" and on application of P. and W. to the attorney, he handed them his bill, charging to P. in one item the taxable costs, and in another, "commissions on amount secured by attachment;" and "W. took the bill, and looked at it, and told R. that he would pay it before he went out of town;" and thereupon the demand was settled in the manner proposed, without including any costs *or expenses;* afterwards P. informed R. of the settlement, "when W. told R, that he would call and settle it before he went out of town, and R. said that would be satisfactory;" and afterwards W. paid R. the amount of the taxable costs: — *It was held*, that an action by R. against W. for the balance of the bill, being the amount of the item of charge for commissions, could not be maintained.
Rowe v. *Whittier*, 545.

2. If orders be given by the creditor to an attorney "to obtain immediate security" for a demand, the whole manner of doing it, is left to the discretion of the attorney, and the creditor is bound by his acts.

Rice v. *Wilkins*, 558.

AWARD.

See ACTION, 1.

BANK.

1. Banks, incorporated under the laws of this State, may receive real estate as security for a loan, or in payment of debts due.

Thomaston Bank v. *Stimpson*, 195.

2. And if land be conveyed to a bank as collateral security for the payment of money, and the title becomes absolute in the bank by the neglect of the grantor to make payment at the stipulated time; and afterwards, at the request of the grantor, the bank conveys the land to a third person, on payment by the latter of the amount due; this is not a redemption of the property, so as to restore the title to the original grantor. *Ib.*

3. And if a purchaser, *bona fide*, of the grantee of the bank without the knowledge of usury in any transaction in relation thereto, brings his writ of entry, demanding the land, against one who was not a party or the legal representative of a party to the usury, it is not competent for the latter to set up as a defence, that there was usury in the transactions between the person requesting the conveyance and the grantee of the bank. *Ib.*

4. The liability of one who had been a stockholder in the bank, but who had sold out his interest three months before he was offered as a witness for the bank, is too remote, uncertain and contingent to render him incompetent. *Ib.*

See BILLS AND NOTES, 3, 6. EVIDENCE, 11, 20, 21.

BETTERMENT RIGHTS.

1. Where the tenant in a writ of entry claimed to have been in possession of the premises for more than six years before the commencement of the action; and to be entitled to have the value of his improvements allowed to him under the St. 1821, c. 47, § 1, called the *betterment act;* and where it appeared, that he had claimed to be the owner of the land, and as such had given a bond to another, stipulating to convey the same to him on the performance of certain conditions, who entered and made improvements, but failed to perform the conditions of the bond, and gave up the possession and surrendered the bond to the tenant, and sold out the improvements to him; *it was held*, that the tenant was entitled to those improvements in the same manner as if they had been made personally by him.

Williams v. *Kinsman*, 521.

2. And where the tenant, thus claiming to be the owner of the land, gave a bond to one, to convey the land to him on the performance of certain conditions, and he entered in submission to the title of the tenant, and made improvements, but forfeited all title to them and to the land by non-performance of the conditions of the bond; *it was held*, that the tenant was entitled to have those improvements allowed to him, as virtually made by himself. *Ib.*

BETTING.

1. M. delivered his horse to L. in August, 1840, and at the same time received the note of the latter for one hundred dollars, to be paid when M. V. B. should be elected President of the United States, if elected at the then next November election, and should live until that time. M. V. B. lived until that time, but was not elected; and in February following, M. demanded the horse and payment of the note of L. and brought his action of assumpsit on the note and for the value of the horse as sold and delivered. *It was held:* —

2. That if the contract, which was to be considered but a bet on the event of the then pending election of president of the United States, was lawful, then the plaintiff cannot recover, as he has lost his bet: —

3. That if it be unlawful, he cannot recover on the note; nor for the value of the horse, delivered under such unlawful contract, unless the statute against gaming will aid him:
4. And that this statute will not aid him, because if the winning has been of goods, &c. which have been delivered, then the statute remedy is by an action of trover, or a special action of the case, commenced within three months of the time when the goods were delivered.

Marean v. *Longley*, 26.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In an action on a promissory note payable *on demand* at a particular place, no averment or proof of a demand on the part of the plaintiff is necessary, to entitle him to maintain his suit. *McKenney* v. *Whipple*, 98.
2. In an action by an indorsee against an indorser of a note, declaring on the indorsement, with the money counts, and where it does not appear but that the plaintiff has a right of action on the note against both indorser and maker, he cannot rescind the contract, and on the money counts recover of the indorser the consideration paid him for the note, by proof that it was obtained of the maker by fraud and misrepresentation, without returning the note to the indorser. *Cushman* v. *Marshall*, 122.
3. If a bank, having discounted an indorsed bill, sends it to another bank for collection, and that bank to a third for the same purpose, by which a demand is made on the acceptor through a notary, who makes his protest and prepares a notice to the indorser, which is sent with the protest back to the second bank; the protest must be regarded as containing notice of the dishonor of the bill, and the keeping them on hand till the second day after the receipt thereof, without forwarding any notice of the contents to the indorser, is an unreasonable delay which discharges his liability as indorser. *Northern Bank* v. *Williams*, 217.
4. If a promissory note has been indorsed and transferred to an indorsee for value before it fell due, and is available in his hands, want of consideration cannot be set up as a defence against his indorsee, although the latter had been notified before the transfer to him, that the note was without consideration. *Dudley* v. *Littlefield*, 418.
5. When the payee of a promissory note writes the words, "*holden without demand or notice*," on the back of the note, and signs it, and another person writes his name directly below it; whether this is or is not to be considered a waiver of demand and notice on the part of the second indorser, an agreement by him to waive demand and notice may be proved by oral evidence, or may be inferred from circumstances. *Ticonic Bank* v. *Johnson*, 426.
6. Where a note is discounted at a bank for the benefit of the first indorser, and the money is passed to his credit as a deposit, and a portion of it remains in the bank until the note becomes payable; it would seem to be optional with the bank to retain this money in part payment of the note, or not. The omission to retain it, cannot destroy the right to recover of another indorser the full amount. *Ib.*
7. Where a note is indorsed after it falls due, a demand on the maker and notice to the indorser are necessary to charge the latter, although such demand and notice might have been unavailing, by reason of the insolvency of the maker at the time of the indorsement and afterwards. *Greely* v. *Hunt*, 455.
8. In an action by the payee of a draft against the drawer, where it appeared that the plaintiff was one of two assignees of the effects of the acceptor, *it was held*, that the burthen of proof was on the defendant, to show that the plaintiff, as assignee, had funds in his hands to go, either wholly or partially, to pay the draft. *Fiske* v. *Stevens*, 457.
9. Where an assignment of his effects was made by the acceptor of a draft for the benefit of his creditors, containing a release of the debtor from all his liabilities; and the payee of the draft, with the verbal approbation of the drawer, wrote upon the assignment in the list of creditors, a description of the draft, "for whom it might concern;" *it was held*, that this would not discharge the drawer from his liability. *Ib.*

See EVIDENCE, 17, 26. INDIAN. LIMITATIONS, 1, 2. PARTNERSHIP, 4, 5, 6.

BOND.

1. The St. 1836, c. 212, "concerning constable's and collector's bonds," embraces *cities*, as well as towns, parishes, and plantations.
Lord v. *Lancey*, 468.
2. After that statute took effect, a bond to F W. treasurer of the city of Bangor, or his successor in office, is erroneously made; but nevertheless may be a good bond at common law. *Ib.*
3. But as it is not a statute bond, an action thereon in the name of a successor of F. W. in the office of treasurer of the city, cannot be maintained. *Ib.*

See ACTION, 5. CONSIDERATION, 3. POOR DEBTORS. REPLEVIN.

BOUNDARY.

See CONVEYANCE, 5, 6, 9.

CANCELLING OF DEED.

The cancellation of an unrecorded deed by the consent of parties to it may operate to restore the estate to the grantee, if the rights of third persons have not intervened; but it cannot have that or any other effect against the rights of such third parties. *Nason* v. *Grant*, 160.

COLLECTOR OF TAXES.

See BOND. TAXES.

CONSIDERATION.

1. In an action upon a promissory note, given as the consideration of land conveyed by deed with the usual covenants of seisin, of warranty, and against incumbrances; and where it appeared on the trial, that at the time of the conveyance there was an attachment upon the land, and that afterwards judgment was rendered in the suit, and the execution levied upon the whole of the land conveyed; and where the grantee did not redeem, but suffered a title to be acquired under the levy; and where it was not shown, that the land was appraised at its full value, nor that the grantee had not received rents and profits: — *It was held*, that a total failure of consideration for the note was not shown. *Wentworth* v. *Goodwin*, 150.
2. A partial failure of title to the land would not, it seems, constitute a defence to the note, *pro tanto*. *Ib.*
3. The assignment of a bond is a good consideration for an express promise by the obligor to an assignee to perform or to pay. *Warren* v. *Wheeler*, 484.

See BILLS AND NOTES, 4. DOWER, 9. PARTNERSHIP, 5, 6.

CONSTITUTIONAL LAW.

See MUNICIPAL COURT OF BANGOR, 1, 2. POOR DEBTORS, 4.

CONSTRUCTION.

The act incorporating the Bangor and Piscataquis Rail Road Company, among other things, authorized them to "procure, purchase and hold in fee simple, improve and use for all purposes of business, to be transacted on or by means of said Rail Road, lands or other real estate, and to manage and dispose thereof, as they may see fit;" and provided, "that the capital stock of said Company may consist of three hundred thousand dollars, and shall be divided into shares of one hundred dollars each, *to be holden and considered as personal estate.*" *It was held*, that the real estate owned and used by the company, either as a rail road or as a depot, was not subject to taxation, otherwise than as personal estate, unless the legislature should specifically prescribe differently. *Bangor & Piscataquis Railroad Company* v. *Harris*, 533.

See CONVEYANCE.

CONTRACT.

1. If one would enforce a contract which operates as a penalty, although the damages may be liquidated, he should show that he has performed all the acts incumbent on him to perform to bring the case clearly within the contract. *Chesley* v. *Welch*, 50.

2. Whenever it may be agreed between several parties to do and perform reciprocal acts for each other, the performance of one part being the consideration for the performance on the other; and that the agreement shall be evidenced by writing, under the hands and seals of the parties, until so executed by all the parties it cannot be obligatory upon either of them.
Goodenow v. *Dunn*, 86.
3. Where a cause of action has accrued to a party who has signed such agreement, independent of the agreement, against a party who has not signed, and he has taken measures to enforce his claim, it is too late to alter the state of the case, and prevent a recovery, by thereafter affixing to the instrument the signature and seal of the party who has not previously signed, without the knowledge or consent of the party seeking his remedy. *Ib.*
4. Where the question on trial between the parties is, whether a promise by the defendant was an original or a collateral one, the jury may rightfully be instructed, that if the goods were furnished on the credit of the defendant, and not on the credit of the third person, the promise was original, and not collateral; and that a presentment of the bill of the goods to such third person for payment, did not impair the plaintiff's right against the defendant, who would thereby have been relieved, if the application had been successful. *Homans* v. *Lambard*, 308.
5. Where the plaintiff, being then the owner of a township of wild land, made a contract with a person to erect a mill and barn thereon, and before these were finished, three of the defendants went to explore the land with the view of purchasing it, and stated to the contractor, that "*if they should purchase, they wished him to carry out the contract he had made with the plaintiff, in the same way as if the plaintiff had continued to own the land;*" and the purchase was made by all the defendants, and afterwards two of them signed a paper, directed to the plaintiff, wherein it was stated, that "*agreeable to our understanding we believe it right you should account to*" the contractor for a certain specified amount, "*it being due him from you or us;*" and the plaintiff then paid that sum and brought this suit therefor; *it was held*, that the action could not be maintained.
Eustis v. *Hall*, 375.
6. If the obligor contracts to convey land, on the performance of certain conditions within a stipulated time, if the obligee shall elect to become the purchaser upon the conditions named, it is his duty to give notice of his election within the time, if he would require a conveyance.
Warren v. *Wheeler*, 484.
7. Where by the contract performance is to be made by the parties respectively at the same time, that party who would claim performance of the other, must show a readiness and offer to perform on his part. But when the contract itself determines which party shall first prepare and offer to perform, neither the law, nor the tribunals, break in upon or disregard such agreement. *Ib.*

See Betting. Damages. Evidence, 4.

CONVEYANCE.

1. In construing deeds, one rule is, that a grant shall be taken most forcibly against the grantor. *Field* v. *Huston*, 69.
2. Another rule is, that general words are not restrained by restrictive words added, where such words do not clearly indicate the intention and designate the grant. *Ib.*
3. If reference be made in a deed of conveyance to other deeds by any definite description, they are to be regarded as parts of the conveyance; but to have that effect, the intention of the parties that they should be, must clearly appear. *Ib.*
4. Where the grantor, at the time of the conveyance, had been in possession of and claimed to own several tracts of land adjoining each other, and containing in the whole about 280 acres, and by a deed conveyed a tract of land and described it as follows: "*A certain tract or parcel of land, situate in Falmouth, containing* 230 *acres more or less, all the lands which I own in said town, the butts and bounds may be found in the county records at Portland,*" and conveyances to him were found on record "of several different tracts of land adjoining each other, all containing 235 acres, and adjoining to these several tracts was another, the close in dispute, and which

was claimed and possessed by the grantor, but to which he did not appear to have had any title apparent by the record, or any other than a title acquired by possession:" it was held, that *the whole* of the land was conveyed. *Ib.*

5. The proprietor of a one hundred and twenty acre lot conveyed a portion thereof, describing it thus in his deed. "Twenty acres of land in lot 56 in the 120 acre lot, west side of Royal's river, in N. Y. bounded as follows, viz. beginning on the westerly side of said river, by the river, at the dividing line betwixt the land owned by H. R. and the grantor in the aforesaid lot, thence running westerly on the said dividing line so far that a line running southerly parallel with the westerly end line of said lot until it comes within six rods of the southerly side line of said lot, thence easterly, keeping the width of six rods, from said side line to Royal's river aforesaid, thence by said river to the bounds first mentioned, containing twenty acres of land." And *it was held*, that the grantee was entitled to have the lot conveyed to him marked upon the earth in such a manner, that the westerly line should be parallel to the westerly line of the whole lot, and that the lot should extend southerly to within six rods of the southerly line, and that the line might at that end be made to terminate as near the river, there being no length of line in the deed there, as should be necessary to make twenty acres as nearly as might be, preserving some length to that line.
Dunn v. *Hayes*, 76.

6. But if an actual location of the land according to the monuments in the deed had been made after its execution by the agreement of the parties, then owners of the land, it would be binding upon them and their grantees, and could not be varied by either owner alone afterward. *Ib.*

7. Although the estate is held in her right, a woman under coverture cannot be bound by her verbal assent or actual knowledge of a conveyance of her lands by her husband; and therefore her knowledge of or assent to such conveyance, is not necessary in order to render the deed operative against the husband. *Rangeley v. Spring*, 130.

8. A deed of land, absolute and unconditional in its terms, but made, as appears by minutes of the grantees in managing their own affairs, to secure the payment of a loan of money, is not by our statutes a mortgage; and when the time stipulated for the payment of the money has elapsed, and payment has not been made, the estate becomes absolute in the grantees; although a Court having general equity jurisdiction might regard such a conveyance as a mortgage. *Thomaston Bank* v. *Stimpson*, 195.

9. A lot of land was conveyed, and described as bounding on one end upon a pond; and it appeared that there was a narrow cove or arm of the pond extending from the pond across the lot; and that if the land conveyed was limited by this cove, that the lines would not correspond with those of the adjoining lots, and there would remain a portion of land not conveyed, between the cove and the pond. *It was held*, that the land granted extended across the cove to the main body of water called the pond.
Nelson v. *Butterfield*, 220.

See CANCELLING OF DEED. FEME COVERT. LEVY ON LANDS.

COSTS.

A petition for a review is not an action within the meaning of the Revised Statutes, c. 115, § 56; but the Court has power to award costs for the respondents, in such case, under the provisions of § 88 of the same chapter.
Hopkins v. *Benson*, 399.

See ATTORNEY AT LAW, 1. POOR DEBTORS, 18.

COUNTY COMMISSIONERS.

See WAY, 8, 9, 10.

COURT OF RECORD.

See MUNICIPAL COURT OF BANGOR.

DAMAGES.

In assessing damages for the breach of a contract to convey land, the jury may find the value of the land in money on the day of the breach of the con-

tract, and in coming to a result, they are not confined to the value of the land for agricultural or other useful purposes, or the probable value of the land for building lots, but they may "take into consideration the marketable value at the time," and form their opinion "from taking a view of all the objects for which the land was desirable," and add interest on the value from the time the contract should have been performed. *Warren* v. *Wheeler*, 484.

See MILLS. REPLEVIN. TRESPASS, 3.

DEED.

See CONVEYANCE.

DEMAND.

See BILLS AND NOTES, 1, 5, 7.

DEPOSITION.

See EVIDENCE, 5, 19. PRACTICE, 10.

DEVISE.

1. If land be devised to two persons in fee, with a condition annexed to the estate, that it should be improved by them in common, the land is subject to partition; for the partition of the fee would not destroy the right to have it improved in common. *Richardson* v. *Merrill*, 47.
2. By the devise of a "*ship yard, the privilege thereon to be improved equally between the heirs of my son S. C. aforesaid, deceased, and my son W. C.*" the mode of improvement is limited to the son and grandsons of the testator, and does not remain after they cease to be interested in the land. *Ib.*
3. By a devise to L. J. of "the whole of my estate of every name and nature, both real and personal, of which I may die possessed, after paying my just debts," the devisee takes an estate in fee in the lands of the testator. *Josselyn* v. *Hutchinson*, 339.

DISTRICT COURT.

See PRACTICE, 6.

DOMICIL.

See POOR.

DONATIO CAUSA MORTIS.

1. A *donatio causa mortis* is good, although a chose in action, accompanied by a mortgage as collateral security therefor; and notwithstanding it were in trust for the benefit of others besides the donee. *Borneman* v. *Sidlinger*, 185.
2. A married woman may be the recipient of such a donation, provided her husband was assenting thereto, even if he was the debtor. *Ib.*
3. And if the donation has once vested for the benefit of the donees, it is out of the power of the husband to alienate it, to their prejudice. *Ib.*
4. In an action on the mortgage by the adminstrator of the alleged donor, the husband of a donee, who had released to the defendant all interest in and claim to the note and mortgage, reserving all claim upon the administrator for any money paid to him, was held to be a competent witness for the defendant. *Ib.*

DOWER.

1. The practice of executing the deed by the wife, in order to bar her of her claim to dower, at a time many days subsequent to that on which the husband had executed it, is common and unobjectionable. *Frost* v. *Deering*, 156.
2. It is a well settled rule, that a deed, or other instrument, is well executed, if the name of the party be put to it by his direction and in his presence, by the hand of another person. And the wife may well so execute a deed releasing her right of dower. *Ib.*
3. And it is as competent for her to have her name so placed by her husband, by her direction, as by any other person. *Ib.*

4. The words in a deed, "In witness whereof I, the said C. L. and S. wife of the said C. L. in token that she relinquishes her right to dower in the premises, have hereunto set our hands and seals," are sufficient for the purpose. *Ib.*
5. Where the subscribing witnesses have been called, and have failed to prove the execution of the deed by her, wherein she relinquishes her claim, the admissions of the demandant in a writ of dower, made during her widowhood, of her having executed the deed, are admissible as the next best evidence of the fact. *Ib.*
6. In the St. 1821, c. 40, "concerning dower," the word *jointure* was used in its well known and established legal sense; and must be a freehold estate in lands or tenements, secured to the wife, to take effect on the decease of the husband, and to continue during her life at the least, unless she be herself the cause of its determination. *Vance* v. *Vance*, 364.
7. But by that statute no jointure can prevent the widow from having her dower, unless made before marriage, and with the consent of the intended wife. *Ib.*
8. A legal jointure cannot be composed partly of a freehold, and partly of an annuity not secured on real estate. *Ib.*
9. Marriage is a good consideration for ante-nuptial contracts, and they are binding upon the parties, when fairly made, although there be no trustee or third party named in them. *Ib.*
10. There can be no estoppel by executory covenants not to claim a right which is first to accrue afterwards. *Ib.*
11. It is only where there is a warranty of title, that covenants can operate to bar or rebut a future right not then in existence. *Ib.*
12. The covenants of the wife with her husband, before the marriage, that she will not claim dower in his estate, cannot operate by way of release, estoppel, or rebutter, to bar her of her dower. *Ib.*
13. If the widow, after the decease of her husband, refuse to receive the provision made for her as the consideration of her covenants, this, too, would prevent the covenants from depriving her of her dower. *Ib.*

ELECTIONS.

The offence of double voting, under St. 1821, c. 115, may be committed, although the presiding officer of the meeting may not keep a check list, as the law requires; and although he may throw out the ballots after the double voting has taken place, and commence the voting again.
State v. *Bailey*, 62.

See INDICTMENT, 3, 4.

ENTRY, RIGHT OF.

Prior to the late revision of the statutes, there was no provision that the right of entry of heirs should be extended to twenty years next after the time when an intervening estate would have terminated by its own limitation, notwithstanding any forfeiture thereof. *French* v. *Rollins*, 372.

See FEME COVERT. TENANT BY THE CURTESY.

EQUITY.

1. When a man can readily remove difficulties standing in the way of his prevailing in a suit in equity, and does not do it, such difficulties become insurmountable. *Gordon* v. *Lowell*, 251.
2. Although the statutes provide, that any person, who should knowingly aid or assist in any attempt by a debtor to conceal his property from his creditors, should be liable to any creditor defrauded in a penalty, and that he should also be subject to be punished criminally; yet a court of equity will not aid in the infliction of penalties, but will endeavor that strict justice shall govern in the transactions between individuals. *Ib.*
3. A court of equity will assist a judgment creditor to discover and reach the property of his debtor, who has no property that can be reached by an execution at law, and especially when it is attempted fraudulently to secrete it. *Ib.*

4. When a creditor has, through the instrumentality of a court of equity, sought out and discovered the property of his debtor, which he had before been unable to discover and seise upon execution at law, he becomes entitled to a preference over other creditors, to have his judgment first satisfied, even under the insolvent laws. *Ib.*
5. In equity, to control the answer, the evidence against it must be equivalent to that of the testimony of two credible witnesses, testifying to the contrary. *Gould* v. *Williamson*, 273.
6. This evidence, however, may in this, as in other cases, be by way of inference from circumstances, which are sometimes more convincing than direct testimony; and in the developement of fraud, furnish almost the only source to be relied upon. *Ib.*
7. When a person will, in his answer under oath, state that to be a fact, which he believes to be true, when he has at hand the means of ascertaining whether it be true or not, it is a circumstance strongly indicative of fraud, if it be not true. *Ib.*

See CONVEYANCE, 8.

ESTOPPEL.

1. Where a party has so conducted himself, as wittingly and willingly to lead another into the belief of a fact, whereby he would be injured if the fact were not as so apprehended, the person inducing the belief will be estopped from denying it to the injury of such other person. *Rangeley* v. *Spring*, 130.
2. If one procures a conveyance of land to be made, and is the go-between of the parties in accomplishing it, he will not be allowed to question the rights of third persons from thence innocently deriving title. *Ib.*

See DOWER, 10, 11, 12.

EVIDENCE.

1. A copy of the record of the warrant for calling the town meeting, is competent evidence, without producing the original warrant, or showing its loss. *State* v. *Bailey*, 62.
2. Where one voluntarily appears before the grand jury as a witness, but it does not appear of record that he was the complainant, he is not entitled to half the penalty given by the seventeenth section of that statute; and therefore is not for that cause an incompetent witness on the trial. *Ib.*
3. If a plan of premises conveyed be made in the absence of one of the parties interested, and there is no proof that its accuracy has been agreed to, and it has not been otherwise verified by oath, the plan is inadmissible in evidence. *Dunn* v. *Hayes*, 76.
4. Parol proof of an acknowledgment by a principal that an agent had authority under seal to enter into a sealed contract obligatory upon his principal, is not competent evidence of such authority. *Paine* v. *Tucker*, 138.
5. Neither the st. 1821, c. 85, nor the Rev. St. c. 133, authorizes the taking of a deposition during the sitting of the Court, to be used at that term, because the deponent wishes to go out of the State. *Stinson* v. *Walker*, 211.
6. A child of any age, capable of distinguishing between good and evil, may be examined on oath; and the credit due to his statements, is to be submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion. *State* v. *Whittier*, 341.
7. A preliminary examination of a child under fourteen years of age, prior to his testifying to the jury, is only necessary to satisfy the presiding Judge, that he may testify; and if the Judge is satisfied of the propriety of admitting the witness, it is sufficient for that purpose. *Ib.*
8. Where the indictment alleges, that the accused, "beat in the windows and broke the glass of a dwellinghouse, not having the consent of the owner thereof," it is not incumbent on the government, after proving the injury to the building, to introduce any direct evidence that there was no consent of the owner; but being a matter peculiarly within the knowledge of the accused, the burthen of proof is upon him to show that he had such consent. *Ib.*

25. A deputy sheriff, who has given bond for the faithful discharge of his duties, but who has been released by the sheriff from all claim by reason of any default alleged in the suit, is a competent witness for the sheriff in an action against him for the default of the deputy. *Rice* v. *Wilkins*, 558.
26. In an action upon a promissory note, an office copy of a deed made by the plaintiff to the witness, produced by the plaintiff for the purpose of establishing, with more certainty than the witness was able to do it, the precise time when the note in question was indorsed to the plaintiff, is inadmissible in evidence. *Rollins* v. *Bartlett*, 565.

See BANK, 4. BILLS AND NOTES, 8. DONATIO CAUSA MORTIS, 4. DOWER, 5. EQUITY, 5, 6, 7. FRAUD, 1. INDORSER OF WRIT. LARCENY, 1. MILITIA. MONEY HAD AND RECEIVED. POOR, 17. POOR DEBTORS, 25. PRACTICE, 10, 11, 13, 15. WAY, 1, 2, 3, 5, 6.

EXCEPTIONS.

1. A bill of exceptions from the District Court, under the provisions of the statute, cannot present legally to this Court, or call upon it to decide upon any other matter, than the opinion, direction or judgment of the District Court. Any errors or irregularities in the proceedings, or errors of the jury, are not and cannot be legally presented, except through some opinion, direction or judgment of the District Court upon them, and on a matter not submitted to its discretion. *State* v. *Somerville*, 20.
2. If an instruction of a District Judge be not perfectly correct, but the finding of the jury, upon a view of the whole case, as then presented to them, was correct, the party against whom such finding was, cannot be considered, in the language of the statute authorizing exceptions, as a party aggrieved; and exceptions, in such case, would not be sustainable. *French* v. *Stanley*, 512.
3. That a District Judge refuses to order a nonsuit, on a trial, on account of the insufficiency of the plaintiff's evidence to maintain his suit, affords no ground of exception, it being merely a matter of discretion. *Ib.*

EXTENT.

See LEVY ON LANDS.

FEME COVERT.

1. Where the wife became entitled to the premises, as heir at law, during her coverture, and her husband conveyed his life estate therein, and his grantee continued in possession for more than thirty years, the husband still living; she may, after the decease of her husband, make an entry and recover the land. *Mellus* v. *Snowdon*, 201.
2. Thus, where the demandant, on the death of her father, in 1800, became entitled to one fifth of the demanded premises, as an heir at law, she then being the wife of H. M. who soon afterwards conveyed "*his right to the estate, and gave a deed of it in which his wife did not join;*" and his grantee entered into possession, and he and those claiming under him, of whom the tenant is one, have since continued in possession; and in 1832 the husband of the demandant died, and in 1840 she made an entry, and brought this suit; *It was held*, that by the deed of the husband his grantee could hold his life estate; that the demandant could not lawfully enter or interrupt this possession during the life of her husband; that her rights were not barred by the statute of limitations; and that she was entitled to recover. *Ib.*
3. But if the demandant and her husband had been disseised during the coverture, they would have had a right to enter immediately upon the disseisor, and from that time the statute of limitations would have commenced running against the husband, and against the wife also. *Ib.*

See CONVEYANCE, 7. DONATIO CAUSA MORTIS. DOWER.

FLOWING LANDS.

See MILLS.

FRAUD.

1. Fraud is, almost always, a matter of inference from circumstances. Direct proof of it can seldom be expected. Concealment and disguise are often essential ingredients in it. It consists in intention, which if nefarious, will not be avowed; still it must be proved; and the question is, how shall it be proved. The answer is, by circumstantial evidence. A resort can be had to none other. The demeanor of the party implicated; the nature, tendency and effect of his acts, are to be carefully examined. A train of circumstances, sometimes more and sometimes less intimately connected with the particular act to be proved, may be presented, from which inferences may be drawn as to the object and design of the person charged with having committed the fraud. *Ingersoll* v. *Barker*, 474.
2. If one obtain goods by means of fraudulent representations, and then assign them for the benefit of his creditors, the assignee not being himself a creditor, and no creditor having accepted the assignment when the assignee was fully notified of the fraud, the property cannot then be regarded otherwise than as virtually in the hands of the assignor and perpetrator of the fraud; and no rights can be subsequently acquired by any of his creditors by assenting to the assignment, adverse to him from whom the goods were fraudulently obtained. *Ib.*

See ASSIGNMENT, 4, 5. BILLS AND NOTES, 2. EQUITY, 2, 3, 6, 7. INDIAN, 2. LEVY ON LANDS, 4.

GUARANTY.

See STATUTE OF FRAUDS.

HUSBAND AND WIFE.

See DOWER. FEME COVERT.

INDIAN.

1. That the defendant was an Indian of the Penobscot tribe, furnishes no defence to an action upon a promissory note made by him. *March* v. *Tomer*, 535.
2. The slightest imposition, however, in obtaining the note, would prevent a recovery upon it. *Ib.*

INDICTMENT.

1. To sustain, on demurrer, an indictment for erecting and continuing a public nuisance, obstructing "Portland harbor, situate and being between the city of Portland and the town of Cape Elizabeth, and also wholly situate and being in the county of Cumberland," it is necessary that it should allege, that the part of the harbor in which the obstruction was erected was within the bounds of the city of Portland, or of some other town; and the place where the erection was, must be described in a manner that shall be certain to a common intent, and be averred to be within the county. *State* v. *Sturdivant*, 9.
2. An allegation in an indictment, for erecting a nuisance, that the said S. at, &c. "unlawfully, wilfully and injuriously did erect, place, fix, put and set in the said harbor, and ancient and common highway there, *a certain part of a wharf, it being a part of a wharf owned by the said S. and known by the name of Weeks' wharf*," and has unlawfully, &c. continued the same, is a defective and insufficient description of the nuisance. *Ib.*
3. Where an indictment for double voting, under the statute of 1821, c. 115, regulating elections, alleges "that the inhabitants were convened according to the constitution and laws of the State in legal town meeting for the choice of town officers," it is not necessary also to allege, "that the inhabitants were summoned by warrant from the selectmen duly and legally served." *State* v. *Bailey*, 62.
4. Nor is it necessary to add, that the inhabitants were assembled in town meeting to give in their votes, ballots, or lists for the persons to be voted for. *Ib.*
5. It is not necessary to allege in the indictment *for this offence*, that the accused was an elector entitled to vote at the meeting. *Ib.*

LEVY ON LANDS.

1. When land is attached, and the attachment is preserved, and the execution, issued upon the judgment recovered in that suit, is legally levied on it; such levy operates as a statute conveyance of the land at the time of making the attachment, and places the creditor in the same position, as if the debtor had conveyed to him for value at the time of making his attachment. *Nason* v. *Grant*, 160.
2. When there proves to be an unrecorded mortgage of land attached, the proper course is to levy upon the fee, and not to sell the equity, if the creditor is entitled and intends to take the estate against the claim of the mortgagee. *Ib.*
3. The title acquired by the levy of an execution upon land, is not impaired, should it be shown, that the execution was issued upon a judgment recovered by one of two payees of a note, and it did not appear how he became entitled to recover the judgment in his name alone. *Crafts* v. *Ford*, 414.
4. Where a prior deed from the debtor to a third person, of the premises levied upon, is fraudulent as to the title of the execution creditor, even if such fraudulent grantee can object to any informality in the levy, it is good against him, where his objection is, that both the debtors chose an appraiser, when the land was the sole property of one of them. *Ib.*

LIMITATIONS.

1. At the foot of a promissory note, at the left of the signatures of the promisors, was a memorandum that interest had been paid to a certain day; and below this memorandum, were written these words, "Attest J. S. B.," all being in his handwriting, but the signatures of the promisors. This does not bring the case within the exception of the statute of limitations as a witnessed note. *Fryeburg Parsonage Fund* v. *Osgood*, 176.
2. A payment of interest, indorsed on a note, which payment was made within six years before the commencement of the suit, although for a year's interest which had become due more than six years before that time, is sufficient to take the case out of the operation of the statute of limitations. *Ib.*
3. In an action against an officer for neglect of duty in not attaching real estate upon a writ, as he was directed to do, and might have done, sufficient to fully satisfy the judgment afterwards rendered, whereby the creditor lost a part of his debt, *it was held*, that the statute of limitations commenced running from the time of the return of the officer upon the writ, or of its return into Court, and not from the time when it was ascertained by the judgment and levy upon the property attached, that it was not sufficient to satisfy the judgment. *Betts* v. *Norris*, 314.
4. To take a contract out of the operation of the statute of limitations, it is not necessary that the admission of indebtedness should be in any very precise or set terms. It is sufficient, if the evidence be such, that it can satisfactorily be deduced, that the party to be charged meant to be understood, that he owed the debt. *Dinsmore* v. *Dinsmore*, 433.
5. Nor is it necessary, that the precise amount due should have been named by the party to be charged in his acknowledgment. It is quite sufficient, if he admits an amount to be due nearly approximating to the amount claimed; and the precise amount may be proved *aliunde*. *Ib.*
6. A new promise, made by one of two joint and several promisors, will take the case out of the operation of the statute of limitations as to both. *Ib.*

See ENTRY, RIGHT OF. FEME COVERT.

MILITIA.

1. Where there is a battalion of artillery in one of the brigades of a division, commanded by a major, the brigadier general has no power to grant a warrant to a sergeant of one of the artillery companies. *Folsom* v. *Perkins*, 166.
2. To maintain an action to recover a fine of a private for neglecting to perform militia duty, the clerk must show that he had a legal warrant as sergeant at the time of his appointment as clerk. *Ib.*
3. The acquiescence of the commander of the battalion, by remaining silent on the subject for a year, will not make valid a sergeant's warrant, which had been illegally issued by another person. *Ib.*

4. If the clerk be not legally authorized *to commence* the suit, the commanding officer of the company is not authorized by the st. 1837, c. 276, to come in and prosecute the same. *Ib.*
5. For all the purposes connected with the performance of militia service, minority ceases at the age of eighteen; and therefore a person between the ages of eighteen and twenty-one is liable to the penalty incurred by unnecessarily neglecting to appear at a company training. *Porter* v. *Sherburne*, 258.
6. The enlistment of one over eighteen and within twenty-one years of age, into a volunteer company in the militia, without the consent of his parent, master, or guardian, is binding upon such infant. *Ib.*
7. If the soldier does not himself sign the book of enlistment, but gives another person the right to do it for him, by whom it is done, and he afterwards performs duty in the company; the enlistment will be regarded as binding upon him. *Ib.*
8. Where the record does not show that any question was made, in relation to notice to the commanding officer of the standing company, of the enlistment of the soldier into a volunteer company, before the justice, or was decided by him; and does not show that there might not have been other facts proved in the case and not inserted in the bill of exceptions; the objection cannot be taken in this Court for the first time. *Ib.*
9. A soldier is subjected to the forfeiture for neglecting to perform militia duty only, when the mode of notifying him pointed out by the statute is followed. *Bean* v. *Sherburne*, 260.
10. If a soldier becomes informed of the time and place of parade of the company by being ordered to notify others, this is not sufficient to render him liable to the payment of a fine for non-appearance. *Ib.*
11. Where the order is "to warn and give notice to all the non-commissioned officers and privates in the company, a list thereof being hereunto annexed," the latter words restrict the former general words, and limit them to the names borne upon the list. *Ib.*
12. The officer enrolling soldiers in a militia company is presumed to have done his duty; and if the soldier would deny that he was eighteen years of age, by the St. 1834, c. 121, § 23, the burthen of proof is on him to show that he was not eighteen. *Thorn* v. *Case*, 393.
13. If it appears by the record, that the enrollment of the soldier was made prior to his being warned to do the service, it is sufficient, although the precise day of the enrollment may be left uncertain. *Ib.*
14. If the time and place of the meeting of the company are stated in the notice, and it is handed in due time to the soldier by the person directed to warn him, the notice is good without any other date. *Ib.*
15. In an action to recover a fine, if the fact does not appear by the record, it is competent to prove by parol evidence that the defendant did not meet at the time and place appointed. *Ib.*
16. Where a record is required by the militia law to be made and kept as an official act, the record is sufficient evidence of the facts stated therein, without producing the original minutes from which it was made. *Ib.*

MILLS.

1. When land has been flowed by means of a dam erected for the use of a watermill; while the owner of the land suffers no damage, and can therefore maintain no suit or process, or in any way prevent such flowing, he cannot be presumed to have granted, or in any manner to have surrendered or relinquished any of his legal rights; and no prescriptive right to flow his lands without payment of damages can be acquired against him. *Nelson* v. *Butterfield*, 220.
2. But where damages have been occasioned by the flowing, and the owner of the land flowed has had the power to maintain a process to recover them, a prescriptive right to flow the land without payment of damages may be acquired. *Ib.*
3. If a dam be erected which retains the water of a pond and causes it to overflow the lands of others, but no mill is carried by the fall of water thus created; and such dam is only necessary to raise and preserve the water for the use of mills, lower down on the stream and carried by other

waterfalls, at certain times when the water usually flowing in the stream has become diminished; the only remedy is by proceedings pursuant to the statutes for the support and regulation of mills. *Ib.*

4. One who is neither the owner or occupant of a watermill for the use of which the water has been raised or continued, nor the owner or occupant of the milldam, is not liable to the owner of the land flowed, although he may be benefited by the flow of the water. *Ib.*
5. If a blacksmith's shop in which the bellows is worked by a waterfall, can be considered a mill, yet if there is only a right to use the water for that purpose at the will of the owners or occupants of the dam, and at such times and under such restrictions as they may please to prescribe, the owner of such shop is not liable to the payment of damages for the flowing of the water. It would not be a mill for whose use the water was either raised or continued. *Ib.*
6. In a complaint under the statute to recover damages to land, occasioned by its being flowed by a dam erected for the use of mills, the question whether the complainant has *suffered any damages*, is to be determined only when the *amount* of damages is under consideration. *Ib.*

MONEY HAD AND RECEIVED.

1. In an action for money had and received wherein the plaintiff claims to recover the price of a quantity of his bark, alleged to have been taken and sold by the defendant, it is only necessary for the plaintiff to prove, that the defendant had taken and sold his bark, and *received payment therefor*, without showing that such payment was in money. *Hathaway* v. *Burr*, 567.
2. Where the proof is, "that the defendant said he had sold the bark," it is not for the Court to decide whether payment had or had not been made therefor, upon the mere consideration of the legal meaning and effect of the word, *sold;* but the question should be submitted to the decision of the jury, who would also regard the attending circumstances and other facts in the case. *Ib.*
3. And if in taking and selling the bark the defendant acted as the agent of others, it will not be presumed, without proof, that the money had been paid over to the principals, unless from the nature of the business, or the usual course of transacting it, it would be expected that payment would be made to the principal, and not to the agent. *Ib.*

MORTGAGE.

1. Prior to the late statutes concerning registration thereof, mortgages of moveables were inoperative against attaching creditors, unless accompanied by a delivery of the property mortgaged, either actually or symbolically. *Goodenow* v. *Dunn*, 86.
2. Ships and goods at sea have, sometimes, been considered as exceptions to the general rule; in regard to which the delivery of the muniments of title are allowed to be sufficient till actual possession can be taken; which must be done when it becomes practicable, or the conveyance will be void against creditors. *Ib*
3. The mortgage of a ship, on the stocks, raised and building, to be built and completed afterwards, as security for advances made and to be made, without actual possession or delivery, is not available, by way of hypothecation, against attaching creditors. *Ib.*
4. The mortgagor of lands has no right to have a part of the mortgaged premises under any circumstances, estimated in payment of his debt, with a view to the redemption of the residue. *Spring* v. *Haines*, 126.
5. A foreclosure of a mortgage cannot take place as to one part of the mortgaged premises, and not as to the residue. If the mortgagor has a right to redeem any part, he has a right to redeem the whole. *Ib.*
6. And so long as the mortgagor is suffered to remain in possession of any part of the mortgaged premises, his right of redemption to the whole will continue. *Ib.*
7. Where a mortgage of lands was made to S. F. and wife, during their lives on condition that the mortgagor should "render and deliver unto the said S. F. and wife, and survivor of them, one third part of all the produce, which

may be raised on said farm, for and during the said term annually, or support and maintain the said S. F. and wife, whichever way they or either of them may elect, on said farm for said term ;" — *it was held*, that the mortgagor was entitled to the possession until the condition should be broken.
Lamb v. *Foss*, 240.

8. The mortgagor, therefore, in such case must be considered as the actual tenant of the freehold, although his right to the possession was liable to be defeated by a failure to perform the duties required of him by the condition.
Ib.

9. Where the mortgagor of real estate appointed an agent to act for him in receiving the rents from the tenants, and before the rents had accrued, the mortgagee notified the agent to pay the rents, when collected, to no one but himself, this was held to be a termination of the tenancy at will of the mortgagor, and rendered the agent accountable to the mortgagee for the subsequently accruing rents received by him ; and liable to be charged therefor, as trustee of the mortgagee. *Crosby & al.* v. *Harlow & als.* 499.

10. And if the mortgagee bring a suit against the mortgagor and summon such agent as his trustee on account of the money thus received for rent, the agent holding the money for the plaintiff and not for the defendant, will be discharged as trustee. *Ib.*

11. A mortgagee in possession cannot be charged for rent by the mortgagor, so long as the premises mortgaged remain unredeemed; unless there be a special agreement between the parties to the contrary.
Weeks v. *Thomas*, 465.

See Action, 2. Conveyance, 8. Levy on Lands, 2.

MUNICIPAL COURT OF BANGOR.

1. It seems evident, that the framers of the Constitution of Maine, when providing for the continuance in office of "*judicial officers*," had in view those who to a general intent and purpose were such, and not those who were incidentally and casually entrusted with some attribute of judicial character.
Morrison v. *McDonald*, 550.

2. The Recorder of the Municipal Court of the city of Bangor was not, in the sense contemplated by the constitution, a judicial officer; and therefore might be removed from office by the Governor and Council. *Ib.*

3. The Municipal Court of the city of Bangor is a court of record. *Ib.*

4. The power to commit for contempts of Court is incidental to all courts of record. *Ib.*

5. When a person has been duly removed from the office of Recorder, and another has been appointed in his stead, the person so removed commits a contempt of Court by persisting, after full and authentic information that he had been so removed, to exercise the duties of the office; especially after having been ordered by the Judge to desist therefrom. *Ib.*

6. In such case the Judge has jurisdiction of the subject matter of a commitment. *Ib.*

7. An action will not lie against a Judge of a court of record for any act done by him in his judicial character, in a matter within his jurisdiction, although in the discharge of the duties of his office there may have been an erroneous judgment, or an illegal commitment. *Ib.*

NEW TRIAL.

See Practice, 16. Verdict, 2.

NONSUIT.

See Exceptions, 3.

NUISANCE.

See Indictment, 1, 2, 6.

OFFER TO BE DEFAULTED.

By an offer to be defaulted the cause of action must be regarded as confessed; and such offer under the statute, is equivalent in its effect, in that particular,

to bringing money into Court upon the common rule, which has ever been considered as leaving nothing in controversy but the *quantum* of the debt or damage, which the plaintiff is entitled to recover. *Fogg* v. *Hill*, 529.

OFFICER.

1. As a general rule, if property be attached, and it turns out not to have been the property of the debtor, at the time of the attachment, the officer making it is exonerated from his liability to have it forthcoming on the execution. *French* v. *Stanley*, 512.
2. Whether this should extend to a case in which the officer, of his own mere motion, had knowingly attached property not belonging to the debtor, may possibly be questioned. But however that may be, it is incumbent on the officer to show, that the property actually attached was the property of one other than the debtor. *Ib.*
3. If there be an actual attachment, and it is immediately abandoned, it becomes a nullity, and must be considered the same as if none had been made; and therefore a return, in such case, that one had been made, would be in substance a false return. *Ib.*
4. Where there is no other evidence of the value of the property attached, in an action against an officer for refusing to deliver the property to be taken on the execution, than what is contained in his return of the attachment, that must be deemed to have been its true value. *Ib.*
5. If the officer sets up in defence, that the property attached was not the property of the debtor, and the evidence fails to show that the property returned as attached did not belong to the debtor, although it might induce the jury to believe that no property was in fact attached, when the officer returned that there was; proof of the insolvency of the debtor will not reduce the amount of damages to be recovered. *Ib.*
6. If an attorney, who has received merely general orders to secure a demand, delivers the writ, with written orders thereon to attach sufficient property, to an officer for service, and at the same time gives verbal directions to the officer to attach certain property, and to take therefor the receipt of a person named, such officer cannot be holden to produce the property attached, to be taken on the execution, if he has acted in accordance with the directions thus given. *Rice* v. *Wilkins*, 558.
7. And such directions are not disobeyed, should the officer, in the receipt of the person named, require him to deliver the property attached "on demand *after judgment*." *Ib.*

See LIMITATIONS, 3. INDORSER OF WRIT, 1. REPLEVIN.

PARTITION.

See DEVISE.

PARTNERSHIP.

1. Where a partnership was formed between J. P. B. and H. C. wherein it was stipulated that the partnership should be special; that H. C. should be the special partner, and should contribute a certain sum "as capital to the common stock for carrying on the business," which was to be conducted in the name of J. P. B. & Co.; and the sum was paid in and invested in goods, and the goods were sold and other goods purchased in their place with the proceeds of the sales; *it was held*, that whether the partnership was to be considered as a special one under the statute or as a general one, the goods became partnership property, the partnership becoming debtor to the partner advancing the capital to the amount advanced. *Bradbury* v. *Smith*, 117.
2. An action cannot be maintained by the members of a firm against an officer for attaching goods belonging to the firm on a writ against one of the members for his separate debt. *Ib.*
3. If an instrument be executed by one of a copartnership, in the name of the firm, and one seal only is affixed, and this by the consent of the other, or if there be a subsequent ratification, which may be proved by parol, it is sufficient to bind the firm. *Pike* v. *Bacon*, 280.

8. The occupant of an estate of which he has a freehold, for the term of three years successively, of the clear yearly income of ten dollars, does not thereby acquire a settlement under the Massachusetts settlement act, St. 1793, c. 34, if, during the time, he has received relief from the town as a pauper. *Freeport* v. *Sidney*, 305.

9. The yearly income, under that statute, is to be ascertained by deducting all expenses to which it might necessarily and legally be subjected; and must be valued as if the property had been subjected to taxation, when the forbearance to tax it had been on account of the poverty of the occupant. *Ib.*

10. By the statute of 1839, annexing a part of the town of Dearborn, with the inhabitants "having a legal settlement" on the territory set off, to the town of Belgrade, such were intended, as were entitled to support and relief from Dearborn, in case of their falling into distress, whether residing on the territory at the time of the annexation, or removed therefrom without having acquired a settlement in any other town. *Belgrade* v. *Dearborn*, 334.

11. And by the settlement act of 1821, c. 122, upon the division of towns, those having a legal settlement therein, and who were absent therefrom at the time of such division, have their settlement in such town as the part they dwelt upon shall have fallen into. *Ib.*

12. Where a person had originally acquired a settlement by living within the part of Dearborn which was not annexed to Belgrade, but had removed into the part which was annexed thereto, and lived several years, and there died, and his family continued to reside there until the annexation took place, being supported as paupers; *it was held*, that the family had their settlement in Belgrade. *Ib.*

13. Domicil depends on residence and intention; both are necessary to constitute it; and where it is once fixed, it is to continue until a determination to reside elsewhere has been carried into effect. *Wayne* v. *Green*, 357.

14. And in determining the intention of an individual, when he may move from one place to another, the character of his home, his mode of life, his habits, and his disposition, may appropriately be taken into consideration. *Ib.*

15. To acquire a settlement by residence in a particular town, the person must actually have resided there continuously for the space of five years, intending to make that his home and place of residence. Occasional absences, however, from there, for short periods, during the time, without any intention of taking up his abode elsewhere, or of abandoning his residence there, would not interrupt the running of the five years necessary to gain a settlement. But if during any part of the five years, he had determined to abandon his residence, and had actually carried his determination into effect, for ever so short a period, it would prevent his gaining a settlement. *Ib.*

16. Where a notice in writing respecting paupers is sent by the overseers of one town to those of another *by mail*, under the provisions of St. 1835, c. 149, (Rev. Stat. c. 32, § 44,) it is not necessary that the postage of the notice should be paid by the town sending it. *Athens* v. *Brownfield*, 443.

17. And where a notice, thus sent by mail, arrived at the town to which it was directed, but the overseers declined to take it, and it was sent to the general postoffice as a dead letter, no copy thereof having been retained by the overseers sending it, *it was held*, that it was competent to prove the contents of the notice by parol. *Ib.*

POOR DEBTORS.

1. The Statutes of 1835, c. 195, and of 1836, c. 245, for the relief of poor debtors, were repealed by the Revised Statutes. *Morse* v. *Rice*, 53.

2. After the Revised Statutes were in force, the oath to be taken by a debtor arrested on execution, is that prescribed in the Revised Statutes, c. 148. *Ib.*

3. Therefore where a debtor had given a bond, before the Revised Statutes were in force, to cite the creditor, submit himself to an examination and take the oath provided in the poor debtor act of 1836, c. 245, within six months; and where the oath was to be taken after the Revised Statutes

were in force and within the six months; *it was held*, that the forfeiture of the bond was saved, by the debtor's taking the oath prescribed in the Revised Statutes, c. 148, instead of that provided in the St. 1836, c. 245. *Ib.*

4. The substitution in such case of the oath prescribed in the Revised Statutes, c. 148, for that in the St. of 1836, c. 245, is not an unconstitutional act. *Ib.*

5. The poor debtor's oath must be administered within six months from the date of the bond, or the proceedings will not furnish a legal defence to an action on a poor debtor's bond, or afford the defendants any protection. *Longfellow* v. *Scammon*, 108.

6. By the provisions of the poor debtor act of 1839, c. 412, the oath should not be administered to the debtor, who has on his examination disclosed "any bank bills, notes, accounts, bonds, or other chose in action," until he has performed all the duties which the statute requires of him, one of which is to choose an appraiser, "to appraise off sufficient property thus disclosed to pay the debt." *Harding* v. *Butler*, 191.

7. And in such case, where the debtor is not entitled to have the oath administered, if the justices proceed and administer it, it is illegally taken and wholly inoperative, and will not be considered as a performance of the condition of the bond. *Ib.*

8. And if the parties, in the suit upon the bond, submit the case for decision upon an agreed statement of facts, which does not show that an appraisement was made, such agreement must be presumed to state all the facts material to a correct decision of the case; and the Court cannot imply that any appraisement was made. *Ib.*

9. All prior statutes for the relief of poor debtors, were repealed by the Revised Statutes. *Barnard* v. *Bryant*, 206.

10. If the time fixed in the notice for the examination and disclosure of the debtor, and for his taking the poor debtor's oath, was after the Revised Statutes went into operation, the proceedings should conform to those statutes throughout; the creditor has the right to select one of the justices, and the debtor has no right, in any event, to select more than one. *Ib.*

11. And if in such case the creditor claims the right to select one justice, and it is denied to him, and two justices, both selected for the purpose by the debtor, proceed in the examination and administer the oath, the proceeding is *coram non judice* and void. *Ib.*

12. In a suit upon the bond, where such proceedings only are relied upon as a performance, the defendants have not the right to have the damages assessed by a jury, in manner provided in the Revised Statutes, c. 115, § 78, but judgment is to be rendered in conformity to the provisions of the Revised Statutes, c. 148, § 39. *Ib.*

13. A poor debtor's bond must be executed by *the debtor* as well as by the sureties, or it will not be a good statute bond. *Howard* v. *Brown*, 385.

14. Nor will it be a good *statute bond*, unless the penalty be to the *amount required by the statute*. *Ib.*

15. But although the bond may not be signed by the debtor, or the penalty may be less than for double the amount of the debt, interest thereon, costs and officer's fees, still it may be a good bond at common law, and may be enforced as such. *Ib.*

16. In such case, unless the law be altered by the Revised Statutes, the amount of damages is to be determined by the Court. *Ib.*

17. However, if it be erroneously put to the jury to determine the amount of damages, and they are right in their estimation, a new trial will not be granted on that account. *Ib.*

18. Where judgment is rendered for the amount of the penalty of the bond, being sufficiently large to carry full costs, and execution issues for a mere nominal sum as damages, the plaintiff is entitled to full costs. *Ib.*

19. If a poor debtor's bond, given since the Revised Statutes were in force, be not taken for precisely double the amount for which the debtor stood liable, it is not a statute bond, and is good only at common law. *Barrows* v. *Bridge*, 398.

20. If it be shown by parol proof that a poor debtor's bond was in fact executed on a day subsequent to its date, the obligors are, for the purpose of making

a computation of the time of performance, bound by the date of the bond and the recital of the day of arrest. *Wing* v. *Kennedy*, 430.

21. Where the surety in such bond did not read it, and was truly informed of the date of the bond and of the day of the arrest of the debtor, but was misinformed as to the time when by its terms the conditions must be performed, and where there was no fraudulent design, he cannot be relieved from his liability by the terms of the bond. *Ib.*

22. In an action upon a poor debtor's bond, made prior to the statute of 1839, c. 366, *it was held*, that if it appeared that the justices, who administered the oath to the debtor, had acted only in pursuance of a citation issued on an application made directly to the magistrate by the debtor, instead of from the prison keeper as the law then required, that they had no jurisdiction of the matter, and that their proceedings would have been illegal and void, if the legislature had not interposed by that statute, and given to the defendants the right to have the action tried by a jury, to ascertain the amount of loss actually sustained, if any, as the measure of the plaintiff's damages. *Neil* v. *Ford*, 440.

23. On such trial, if it be shown, that the oath had been administered by the magistrates, it is still competent for the plaintiff to prove, "that at the time the oath was administered to the debtor, there was personal property, money, debts, credits, or real estate belonging to the debtor in the hands of his surety on the bond, sufficient, in whole or in part, to pay the execution referred to in said bond." *Ib.*

24. The conditions of the bond, given under the provisions of the St. 1835, c. 195, § 8, to liberate a debtor arrested on an execution from imprisonment, should require performance within six months *from the time of the arrest or imprisonment*. *Cushman* v. *Waite*, 540.

25. If the bond given by a debtor to procure his release from arrest on an execution, recites the day of arrest, and bears date on the same day, the debtor and his sureties are bound by the date of the bond and recital of the day of arrest. Parol evidence is therefore inadmissible to show that the bond was in fact executed on a subsequent day. *Ib.*

See PRACTICE, 1.

PRACTICE.

1. If there be an omission in the oath, required by the poor debtor acts to authorise the arrest of the body of the debtor, of the words, "*establish his residence beyond the limits of this State*," and of the words, "*that the demand in the writ is, or the principal part thereof, due him*," and there be no other words equivalent thereto, the arrest will not be regarded as a service of the writ, but is illegal, and the plaintiff can derive no advantage from it. *Maine Bank* v. *Hervey*, 38.

2. Where an action is entered in Court without a service of the writ, the defendant may voluntarily appear and take upon himself the defence; and by a general appearance he becomes a party to the suit, is regularly in Court, and authorises it to state that fact upon the record, and upon proper proof from the plaintiff, to render judgment against the defendant, unless in accordance with its rules of practice he can make a legal defence. *Ib.*

3. A general appearance to the action cures all defects in the summons and service; but a special one for the purpose of taking advantage of defects, is not attended with such consequences. *Ib.*

4. But a general appearance will not deprive the defendant of the benefit of the rules of Court; and he may still, within the rules, plead any matter in abatement. *Ib.*

5. Whenever it becomes apparent on inspection, that the Court has no jurisdiction, it will at any time stay all further proceedings. *Ib.*

6. The rules of the District Court must govern its practice; and if a plea in abatement, by its rules, is filed too late, it cannot be received. *Ib.*

7. If the defendant enter a general appearance, where the Court has jurisdiction, the action will not be dismissed on motion for any defect in the service of the writ, if made after it is too late to plead in abatement. *Ib.*

8. While the Court would act upon it, as a general rule of practice, that a motion to quash for defects apparent on the inspection of the record, if not made within the time required for filing a plea in abatement, should be overruled,

RECOGNIZANCE.

1. A recognizance entered into by a party, conditioned "*to prosecute with effect an appeal, made by him at the Court of Common Pleas,*" at the next Supreme Judicial Court, when the statute in force at the time required that the party appealing should recognize "*to prosecute his appeal, and to pay all such costs as may arise in such suit after such appeal,*" not conforming to the provisions of the statute, is void as a statute recognizance. *Owen* v. *Daniels*, 180.
2. It is denied, that a recognizance to prosecute an appeal is good here at common law. *Ib.*
3. If however it should be considered that the recognizance is good so far as it conforms to the statute, a condition "to prosecute his appeal," is performed by entering the action at the next Supreme Judicial Court, and afterwards becoming nonsuit. *Ib.*

REPLEVIN.

1. In an action by an officer upon a replevin bond, where it appeared that the plaintiff in replevin was a wrongdoer, having no title to any part of the goods attached and replevied, and that judgment was rendered for a return of the goods, and that no return was made, *it was held*, that the plaintiff was entitled to recover the value of the goods replevied, and damages for their detention. *Farnham* v. *Moor*, 508.
2. The plaintiff in the suit on the bond, who was the officer making the attachments, is accountable for the property to the attaching creditors and their debtors, and not to the plaintiff in replevin who was a mere wrongdoer without title; and a release by the debtors to the officer of all their claim to the goods attached will not enure to the benefit of the defendants in the suit upon the replevin bond, and entitle them to any surplus beyond the amount of property necessary to satisfy the judgments in the suits wherein the attachments were made. *Ib.*
3. Nor should any deduction be made, under such circumstances, if the attachments in some of the suits were made after the goods were replevied. *Ib.*

REVIEW.

See Costs.

SALE.

See Vendor and Purchaser.

SEAMEN.

1. Where the sickness is occasioned by the climate, without the fault of the seaman, or of the officers of the vessel, the expenses of the cure, by the maritime law, are a charge upon the vessel. *Pray* v. *Stinson*, 402.
2. But by the acts of Congress of the United States, if the vessel be furnished with a chest of medicines, accompanied with proper professional directions for administering them, in accordance with the provisions of those acts, the bill of the physician for attendance upon a seaman, sick on board at a port, is to be paid by such seaman. *Ib.*
3. And the rule is the same, whatever may be the nature of the disease, even if it be a violent and dangerous one, as the yellow fever. *Ib.*
4. The desire of the seaman to be removed on shore, cannot change the rights and the relations of the parties. His judgment, in such case, must necessarily be subjected to that of those who are by law entrusted with the prudential concerns of the vessel and crew for the common good of all. *Ib.*
5. Nor can the sickness and absence of the master on shore make a difference. The law devolves his duties, during such absence, upon the mate, who, in the absence of evidence to the contrary, it presumes, is able to perform them properly. *Ib.*
6. Where it was a proper case for medical advice, and the physician was called, without any request from the seaman, because the danger was such, that the laws of the place, as well as the feelings of humanity, required that he should be, the law will imply a promise from him who received the benefit of the services, to pay for them. *Ib.*

3. Where a person is liable to pay a debt, and promises to pay the same amount to a creditor of him to whom the debt was due, such promise is not within the statute of frauds, and need not be in writing; but if the promisor had not before been liable to pay such sum, his promise would not have been obligatory, under that statute, without a memorandum thereof in writing. *Rowe* v. *Whittier*, 545.

See CONTRACT, 4.

STATUTES.

1. The special act of 1834, c. 434, incorporating the town of Springfield, is to be considered as a public act, and as such not to take effect until after thirty days from the recess of the legislature. *Gorham* v. *Springfield*, 58.
2. The provision in the act that the territory "with the inhabitants be, and the same hereby is, incorporated into a town by the name of Springfield," is not sufficient to show that the legislature intended that the act should take effect immediately upon its approval by the Governor. *Ib.*
3. When the Revised Statutes went into operation, all the prior Statutes, which had been revised, were repealed, with certain exceptions and reservations as to crimes and vested rights. *Barnard* v. *Bryant*, 206.

See LARCENY, 2.

STATUTES CITED.

1821, c. 18, Gaming, 29
" c. 36, Deeds, 164
" c. 40, Dower, 369
" c. 45, Mills, 230
" c. 47, Betterments, 523
" c. 59, Indorsement of writs, 37
" c. 60, Execution, 105
" c. 62, Limitations, 204, 374
" c. 85, Depositions, 215
" c. 93, Service of Writs, 482
" c. 115, Elections, 68
" c. 116, Collectors' bonds, 469
" c. 118, Court of Sessions, 380, 391
" c. 122, Paupers, 61, 270, 302, 337
" c. 175, Indians, 536
1822, c. 193, C. C. Pleas, 183
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1829, c. 418, Witnesses, 200
" c. 444, Recognizances, 182
1831, c. 497, Recognizances, 183
" c. 500, County Commissioners, 380
" c. 519, Banks, 198
1834, c. 92, Public Statutes, 60
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" c. 121, Militia, 168, 262
" c. 135, Public Statutes, 60
1835, c. 149, Paupers, 303, 445
" c. 195, Poor Debtors, 56, 109, 192, 256, 388, 441, 542
1836, c. 211, Limited Partnerships, 120
" c. 212, Collectors' Bonds, 469
" c. 240, Assignments, 283
" c. 245, Poor Debtors, 56, 193, 388, 441
1837, c. 276, Militia, 169
1839, c. 366, Debtor's Bonds, 442
" c. 367, Ways, 380
" c. 373, District Courts, 183
" c. 412, Poor Debtors, 193
Rev. St. c. 25, Ways, 175
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" c. 97, Exceptions, 20
" c. 97, Recognizances, 183
" c. 115, Debtor's Bonds, 210
" c. 115, Costs, 400
" c. 133, Depositions, 215
" c. 146, Limitations, 178
" c. 148, Poor Debtors, 56, 209, 399
" c. 164, Nuisance, 85

MASSACHUSETTS STATUTE.

1793, c. 34, Settlement, 306.

TAXES.

On the twentieth of July, a tax list accompanied by a warrant, duly authenticated, was committed to the collector, but the tax list was not under the hands of the assessors, as the statute requires; and on the fourth of October following, a supplementary or additional tax list, correcting certain errors or omissions in the first list, and expressly referring to it as containing the assessment for that year, was signed by a majority of the assessors, and

committed to the collector, the two lists containing the assessments upon the polls and estates of the inhabitants of the city for that year.
Bangor v. *Lancey*, 472.

It was held: —

1. That it was a sufficient compliance with the requirements of the statute, that the lists should bear upon them the official sanction of a majority of the assessors, evidenced by their signatures. *Ib*
2. That by signing the supplementary list and therein referring to the former list, the assessors made a distinct declaration in their official character, and under their hands, that both lists constituted the list of assessments for that year. *Ib.*
3. And that such list, as a whole, must be considered as duly authenticated and committed to the collector after the fourth of October. *Ib.*

See Bond. Construction.

TENANT AT WILL.

1. A tenancy at will, or from year to year, is determined by the death of the tenant. *Robie* v. *Smith*, 114.
2. If one occupies a portion of the premises under a verbal agreement with the tenant at will, his right to occupy ceases at the death of the tenant at will and he is not entitled to notice to quit before an entry into the premises, by the owner. *Ib.*

See Mortgage, 9.

TENANT BY THE CURTESY.

If a tenant by the curtesy makes a conveyance of the estate in fee, he thereby creates a forfeiture of his estate, and the reversioner has an immediate right of entry. *French* v. *Rollins*, 372.

TITLE BY EXECUTION.

See Levy on Lands.

TOWN.

Towns exist at the pleasure of the State, and not at their own; and it is not necessary that a newly incorporated town should accept the act of incorporation. The rule applies only to private, not to public corporations.
Gorham v. *Springfield*, 58.

See Elections. Evidence, I. Indictment, 3, 4.

TRESPASS.

1. Possession alone, although for a less term than twenty years, is sufficient to maintain an action of trespass *quare clausum*, excepting against one who can exhibit a legal title. *Moore* v. *Moore*, 350.
2. Where one is the owner of goods, and has a right to take immediate possession, he may maintain an action of trespass for taking them.
Freeman v. *Rankins*, 446.
3. And if the plaintiff in such action, and also the person in whose actual custody the property was, should represent generally, that the plaintiff did own another article of the same description of property, when he did not own it, he would not thereby deprive himself of the right to recover damages for the taking of the article which was in fact his property. *Ib.*

See Action, 2. Evidence, 9.

TRUSTEE PROCESS.

1. Where the principal had performed services for the person summoned as trustee, and the latter had given the former a negotiable note in payment on the same day the process was served; and where the supposed trustee had deceased after the service and before making an answer, and his administrator came in and made a disclosure, and stated that "*the note was given to the best of his knowledge prior to the service of this trustee process;*" *it was held*, that although the answer might not have been satisfactory, if the intestate had remained alive, yet that being made by an administrator, it was sufficient as the best evidence. *Ormsby* v. *Anson*, 23.

2. If the intestate was not liable to pay for the services at the time of the commencement of the trustee process, no arrangement made after his death by the administrator by which the principal first became entitled to payment, could authorize a decision that the intestate was liable at the time when the process was served upon him. *Ib.*

See MORTGAGE, 9, 10.

USURY.

See BANK, 3.

VENDOR AND PURCHASER.

Where the seller sends to the purchaser a different article from that contracted for, and on learning the fact, directs it to be sent back by the first ship, and it is sent coastwise in conformity with the directions, but is lost at sea; the purchaser may recover back the consideration money paid, although no bill of lading was taken, or letter of advice sent.
Stinson v. *Walker*, 211.

See CONTRACT, 6.

VERDICT.

1. A general verdict of guilty applies to all the material allegations in the indictment; and therefore, where the indictment alleges that many different books, particularly described, were stolen by the accused, a general verdict finds him guilty of stealing all the books named and alleged to have been stolen. *State* v. *Somerville*, 20.
2. On the trial of such indictment, if the District Judge instruct the jury, that if they find that the accused was guilty of feloniously taking any one of the books specified in the indictment, they should find him guilty generally, the verdict of guilty will be set aside and a new trial granted, although the punishment may be the same for stealing one of the books as for stealing the whole. *Ib.*

See EVIDENCE, 12. PRACTICE, 12, 13.

WAY.

1. In an action against a town to recover damages sustained by an obstruction placed in the highway, the burthen of proof of due care is upon the plaintiff; but it may be inferred from circumstances.
French v. *Brunswick*, 29.
2. To decide what shall constitute reasonable notice to the town is, in many cases, attended with difficulty, as the words "*reasonable notice*" are undefined in the statute. It is not necessary to prove notice to the town in its corporate capacity; nor that the majority of the inhabitants should have had notice; nor is it even necessary to bring home the knowledge to any officer of the town; and it has sometimes been considered, if it be proved that some principal inhabitant had notice, it would be sufficient. *Ib.*
3. Where numbers of the inhabitants of the town were concerned in placing the obstruction, which caused the accident, across the highway, of whom one at least was a man of substance; and the obstruction was so left by all for a short time, during which the accident happened; *it was held*, that the notice was sufficient to render the town liable. *Ib.*
4. The location of a town or private way by the selectmen, or their order, must precede the issuing of the warrant to call the meeting for its acceptance. *State* v. *Berry*, 169.
5. A town or private way cannot be proved by parol, to sustain an indictment against an individual for obstructing it. The law on this subject was not changed by the Rev. St. c. 25, § 101. *Ib.*
6. The records of a town which are not admissible to prove the existence of a legal town way, cannot be admitted to show the limits, or outside lines, of the road, although it may have been proved that a road had been actually travelled somewhere within those limits for more than twenty years. *Ib.*
7. It is not necessary, that the common convenience should be promoted, in order to authorize the establishment of private ways.
Pettengill v. *Kennebec County Com.*, 377.

8. By the St. 1839, c. 367, "limiting the powers of County Commissioners," they were deprived of all power to lay out roads, except where the road should connect one town or plantation with another, or where a town should have refused to lay out a private way from a town or county road to the lot or lots of land, on which the petitioners should live. *Ib.*
9. While that statute was in force, the mere refusal of the *selectmen* to lay out a private way, where the *town* had not acted in the matter, did not give jurisdiction of the subject to the County Commissioners. *Ib.*
10. The County Commissioners had no power to establish or act upon private ways unless it appeared that the petitioners lived upon the lot or lots, which were to be opened to a town or county road. *Ib.*
11. A committee, agreed on and appointed instead of a jury, to assess the damages occasioned by the location of a county road, cannot act by a majority; but their proceedings will be void, unless they all concur in the result arrived at. *McLellan* v. *Kennebec County Com.*, 390.

WILL.

1. The intention of the testator is to have a controlling influence in the interpretation of the language used in the will; but if he would have that intention, when discovered, fully carried into effect, he must conform to those rules of law, which establish and secure the rights of property. *Ramsdell* v. *Ramsdell*, 288.
2. It has become a settled rule of law, that if the devisee or legatee have the absolute right to dispose of the property at pleasure, a devise over is inoperative. *Ib.*
3. An exception, however, to this rule, is, that where a life estate only is clearly given to the first taker with an express power, on a certain event, or for a certain purpose, to dispose of the property, the life estate is not by such power enlarged to a fee or absolute right; and the devise over will be good. *Ib.*
4. The testator, in his will, provided, "First, I give and bequeath to my beloved wife, S. C., the use, during her life, of all my plate and household goods, also all my personal property and real estate, except as is hereafter excepted." Then made pecuniary bequests to seven different persons, to be paid by his executrix. Then says, "I give and bequeath to my wife, S. C., the sum of one hundred and fifty dollars, to be paid, if she thinks proper, $50 to my neice, A. R., and $100 to my nephew, B. R., otherwise it is to be disposed of as may best suit her." Next, "I give and bequeath, after the decease of my wife, all my property, if any remains, to my brothers and sisters and her brothers and sisters, to be divided equally between them." Then — "It is my desire that my executrix sell my farm, either at public auction or at private sale." And made his wife executrix. *It was held*, — that by the will, the widow had the absolute right to dispose of the entire property, for her own use and benefit, subject only to the payment of debts and legacies. *Ib.*
5. If it be proved that a testator, a short time before making his will, was of unsound mind, it throws the burthen of proof upon those who come to support the will, to show the restoration of his sanity. *Halley* v. *Webster*, 461.
6. It is competent for the party opposed to the establishment of the will to prove, that the testator, a short time prior to the making of the instrument, was insensible; that he was unconscious of what was going on around him; that he was much prostrated by his sickness: that he did not appear to know an intimate acquaintance; and that endeavors to converse with him proved ineffectual; the same being not mere matters of opinion, but facts. *Ib.*

See DEVISE.

WITNESS.

See EVIDENCE.

WRIT OF ENTRY.

See BETTERMENT RIGHTS.

ERRATUM.

Page 246, line 6 from top, for "*in operation*" read *inoperative.*