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, }

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT,

ARGUED AT JUNE TERM, 1842.

Mem. — Twenty-eight cases argued at this term were published in the last volume.

Sumner T. Basford *versus* Charles P. Brown.

Where a paper, by which "*the signers of this do agree to join and subscribe our equal proportion of the expenses attending a dancing school, to be held at H. in D. to commence as soon as the majority of the school may think proper,*" was signed by the plaintiff and defendant, and by several others; and where it appeared that the school had afterwards been kept by a person employed by the plaintiff and two others, and that the plaintiff had paid more than his own proportion thereof, and that the defendant had paid nothing; and that the defendant had attended the school a part of the time, but had done no act to confer any agency on the plaintiff, or had knowledge that any had been assumed, or any liabilities incurred by him; it was held, that the action could not be supported.

Assumpsit on an agreement, with the common money counts. The agreement was in these words. "Dancing School. We the signers of this do agree to join and subscribe our equal proportion of the expenses attending a dancing school, to be held in the Hall at R. D. Crocker's Hotel at Dixmont corner, to commence as soon as the majority of the school may think proper." There was no date, and it was signed by twenty-six persons, of whom the plaintiff and defendant were two. Against the names of two of the signers was written the word "excused"; there was no writing against the name of the de-

fendant; and against the name of each of the others was written the word "paid." The whole amount paid, as appeared by the paper, was fifty-two dollars, but it did not appear on the paper, or by the testimony, by whom it was received. On the back of the paper was a memorandum, that J. W. Harris, S. T. Basford and S. D. Twitchell were chosen managers on Nov. 21, 1840; and also, that the school commenced under the instruction of B. C. Leavitt on Dec. 9, 1840.

To support his action, the plaintiff called B. C. Leavitt, who testified that he kept a dancing school in Crocker's Hall at Dixmont corner, in the winter of 1840; that he made his contract with Basford, Harris, and Twitchell, and had nothing to do with the subscription paper; that they attended the school, and that the defendant attended as a scholar, two or three evenings; that he was always ready to give him instruction; and that Basford had paid him thirty-four dollars, and Harris had paid him thirty-two dollars. Crocker testified, that Harris paid him eleven dollars, and Basford fourteen dollars. A witness testified, that the defendant said to him, that he would sign the paper if witness would; that the witness replied that he could not attend; and that Brown said that he too should not be able to be there much, but would sign to help the school.

The counsel for the defendant objected, that the action could not be maintained, because the paper set forth no contract on which the defendant was liable, and there was no proof to support the money counts.

The presiding Judge ruled that the action could not be maintained by the plaintiff alone, but the suit, if any, must be brought in the name of all the signers against the defendant; and thereupon the plaintiff submitted to a nonsuit, and filed exceptions to the ruling of the Judge.

J. Appleton, for the plaintiff, in a written argument, contended that the contract declared on is binding on the parties.

When one subscribes, with others, a sum of money to carry on some common project, lawful in itself, and money is advanced upon the faith of such subscription, an action for money

paid may be maintained by him against a subscriber for the amount of his subscription, or such proportion of it as may be equal to his proportion of the expense incurred. *Bryant* v. *Holland*, 5 Pick. 228; 12 Mass. R. 190; 12 Pick. 543; 5 Ham. 58.

It has been decided that a promise "to take and fill up the number of shares set against our names," is a promise to pay assessments. 1 Fairf. 478.

Webster defines the verb "to subscribe" thus, "a promise to give by writing one's name," "to promise to give a certain sum by writing one's name on paper." To subscribe, means an agreement to pay. The contract means, we agree to join and subscribe, we jointly promise to pay. It is in reality a joint promise to pay, in which each is responsible for the other's performance of the subscription.

The plaintiff has paid money more than he has received, and an action in some form has accrued. The District Judge erred in ruling, that the action should be brought in the name of all the subscribers. The payments were not made from a joint fund; and not being so, the action could not be jointly maintained. Where several sureties pay the debt of a principal, and there is no evidence of a partnership, nor joint interest, nor of a payment from a joint fund, the presumption of law is, that each paid his proportion of the same, and a joint action cannot be maintained. *Lombard* v. *Cobb*, 2 Shepl. 222, and cases cited.

The plaintiff, having paid the defendant's subscription, has a right to recover the same of him. *Goodall* v. *Wentworth*, 7 Shepl. 322.

G. F. Shepley argued in writing for the defendant.

The ruling of the presiding Judge in ordering a nonsuit was correct; the case showing no ground upon which the action could have been maintained.

1. The paper introduced in evidence contains no proof of any contract. There is no mutuality; no parties; no valuable consideration. The promise of one is not so connected with the promise of the other as to afford any mutual consideration.

Phillip's Limerick Academy v. *Davis*, 11 Mass. R. 114; *New Bedford Turnp. Corp.* v. *Adams*, 8 Mass. R. 138; *Essex Turnp. Corp.* v. *Collins*, 8 Mass. R. 292.

2. This is not a contract to *pay*, but only to *subscribe*. Adopting the plaintiff's definition of the word subscribe, this is an agreement to "*promise* to *give* a certain sum by writing one's name." Now a "promise to GIVE," being without consideration, and insufficient to support an action, what must be *an agreement to promise to* GIVE? Yet this is the plaintiff's construction. He would read the paper thus: — "We the signers of this do agree to promise to GIVE."

3. There is no contract between the *parties to this suit*. If each subscriber is liable, he must be liable to all others jointly, or to the instructor; not to a separate action from each one of the other subscribers.

4. The payment, if any, by the plaintiff was voluntary. He was not requested or authorized to pay by the defendant, nor was he *liable*. No implied assumpsit is raised, where one pays the debt of another without being requested, or being liable; and *a fortiori*, where it is against his will.

5. The case does not find that the defendant paid any thing for the plaintiff, or that he paid the plaintiff's subscription; or paid any thing more than he received from the other subscribers. It appears that the plaintiff and Harris, who were two of the managers, paid certain moneys from the receipts of the subscription to Leavitt and Crocker; but there is no evidence tending to show that the plaintiff paid any more than his share; or that he paid any thing for the defendant. There is precisely the same evidence with regard to Harris, that there is with regard to the plaintiff. Harris has as much right of action upon the evidence as the plaintiff.

The opinion of the Court was drawn up by

TENNEY J. — This action cannot be maintained. The original subscription of the plaintiff, defendant, and others, was undoubtedly for carrying into execution an object desirable to them and lawful in itself. But if it be a promise to pay, it is

one made to no particular person and founded upon no valuable consideration. It contains no authority in any one to act for the subscribers in furtherance of their common design. The report of the case shows, that the plaintiff and two others made contracts with the master and paid him money and also paid other bills for expenses incurred in carrying on the school. But no agency is found to have been conferred upon him, or any authority given to make contracts. The defendant did sometimes attend the school, but it does not appear, that he had knowledge, that the plaintiff had assumed any liabilities, if in fact any were assumed by him, in behalf of the subscribers; and such knowledge cannot be inferred from any thing in the case before us.

The authorities referred to by the plaintiff's counsel, as analagous to the one at bar, were those wherein the defendants had conferred on the plaintiffs an agency, or had distinctly recognized in them a power to act, in carrying into effect the purposes contemplated in the subscription papers. This case exhibits no such facts.

Assuming that the subscribers, including the defendant, had authorized the plaintiff and two others to make all the engagements, necessary to carry into execution the object expressed in the paper, there is no evidence, that the plaintiff has made advances for the defendant. He has paid a sum much less than that already received on the subscription paper, and there is nothing on which we can found the presumption, that the money paid by him did not all arise from those receipts. He and Harris have each paid an equal sum, and together more than that paid by the subscribers; but how can we say that the plaintiff and not Harris has advanced the sum, which has not been obtained on the paper? Harris has the same right of action as the plaintiff has, and we do not see how a judgment in this action against the defendant can bar one in the name of Harris.

The nonsuit confirmed.

CHARLES HAYNES *versus* OTIS SMALL.

When an officer attaches personal property, he should make a true, strict, minute and particular return of his doings.

If an officer returns on a writ, that he has "attached one hundred and seventy-five yards of broadcloth, the property of the within named defendant," it is not competent for him, in an action for not producing the property to be taken on the execution, to show that but thirty yards were in fact attached by him.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Case against Small, as sheriff of the county, for the default of J. H. Shaw in neglecting to keep and for refusing to deliver over certain broadcloths, by him attached on the writ, to be taken on the execution. Shaw had in his hands for service a writ in favor of the plaintiff against G. W. Morse & al. on which he returned, "I have attached one hundred and seventy-five yards of broadcloth, the property of the within named defendants." Judgment was rendered in the action, the debt being about $280; an execution was issued thereon, and placed in the hands of a proper officer, who within thirty days from the time of the rendition of judgment demanded of Shaw the property attached on the writ. The exceptions state, that "the defendant offered to show that he attached a certain lot of broadcloths, being all the defendant had or was in possession of; that the whole of the broadcloths so attached amounted to no more than thirty yards; that by mistake he over-estimated the number of yards in the lot; and that he caused all said lot of cloths of thirty yards to be sold at the full value, and appropriated towards the payment of this execution, while in the hands of the officer who made the demand, leaving a balance of but $29,31 unpaid. The Judge permitted the defendant to show how much of the cloth attached had been appropriated towards the payment of the execution, and ruled, that as the attaching officer had returned specifically so many yards of cloth, and not a lot or parcel estimated at so many yards, he was concluded by the return as to the quantity, and rejected the other testimony offered." And the Judge instructed

the jury, that if the whole one hundred and seventy-five yards attached had not been appropriated on the execution, they would return their verdict for the plaintiff for the balance of the 175 yards not already appropriated towards the payment of the execution, unless it exceeded the balance due. The verdict was for the plaintiff for the balance of the execution; and the defendant filed exceptions.

A. G. Jewett, for the defendant, contended that it was competent for the officer to show that the value of the property attached was less than the estimate put upon it in the return.

But if the officer cannot show, that the number of yards was different from the statement in the return, he may show, that all above thirty yards did not belong to the debtor. If this is not admissible in bar of the action, it is in mitigation of damages. It is enough to show, that the property did not belong to the debtor, and it is unnecessary to show to whom it did belong. *Bursley* v. *Hamilton*, 15 Pick. 43; *Fuller* v. *Holden*, 4 Mass. R. 501; *Learned* v. *Bryant*, 13 Mass. R. 224. It is always competent for the officer to show, that the property, attached and returned as the property of the debtor, did not in fact belong to him. 11 Pick. 524; 12 Mass. R. 196; 16 Mass. R. 8; 19 Pick. 522.

J. Godfrey, for the plaintiff, said that the law was well settled, that an officer could not for his own benefit introduce evidence to alter, falsify, or contradict his return. Were he permitted to do it, no reliance could be placed upon any thing done by an officer. He is always safe in returning the truth, and is protected in so doing, if he does his duty. He attached, as his return shows, an abundance of property to secure the debt, and declines to bring it forward to be taken on execution. He does not show, or propose to prove, that any of the property attached belonged to others. His cases therefore have no application. He cannot excuse himself by contradicting his own return. 6 Mass. R. 325; 10 Mass. R. 470; 7 Mass. R. 388, 392; 10 Pick. 45; 1 Fairf. 263.

The opinion of the Court, SHEPLEY J. taking no part in the decision, having been employed in trying jury cases at the time of the argument, was by

WHITMAN C. J. — Nothing is better settled than that an officer, making a return of his doings upon a writ, is not allowed to gainsay the truth of it. In the case set forth in the plaintiff's writ, one Shaw, a deputy of the defendant, who was sheriff of Penobscot, is alleged to have returned on a writ, in favor of the plaintiff and against Morse & al. that he had attached one hundred and seventy-five yards of broadcloth. The defendant proposes to show, in defence, that his deputy made a mistake; and that he in fact attached only thirty yards, which had been duly applied towards the discharge of the execution issued on a judgment rendered in said suit. That the thirty yards had been so applied was not questioned. The only controversy was as to the residue.

Officers ought to know what they attach; and to be holden to exactness and precision in making their returns. Neither the debtor nor the creditor would be safe if it were otherwise. And it will be well that the law should be so promulgated and understood. An officer, in such cases, is entrusted with great power. He may seize another man's property, without the presence of witnesses, whether it be goods in a store or elsewhere; and safety only lies in holding him to a strict, minute and particular account. To hold that he may, indifferently, make return of his doings at random, and afterwards be permitted to show, that what he actually did was entirely different, would be opening a door to infinite laxity and fraud, and mischiefs incalculable. Suppose the deputy had returned, that he had attached one hundred and seventy-five sheep, he might as well be permitted to show, that, by mistake, there were but thirty of them. It was the duty of the officer to have measured the cloth attached, or, in some other way, to have ascertained precisely what he had attached. Such a mistake as is here pretended could have arisen only from the grossest negligence, to which it would be a disgrace to the law to afford its countenance.

The principle, to which the counsel for the defendant attempts to assimilate this case, that the officer, notwithstanding his return, may show the property attached to belong to some one else, and not to the debtor, to excuse or justify himself for not levying upon it, on execution, is altogether different. It would not be contradicting his return in a matter of fact in which he was bound to possess himself of knowledge, nor is his return conclusive upon any one as to the ownership of property attached.

Exceptions overruled — judgment on the verdict.

SAMUEL F. MORSE *versus* JOHN WILLIAMS *& al.*

Where judgment was rendered against the principal and sureties on a note, and execution issued against them; and by order of a surety, being one of the execution debtors, the principal was arrested on the execution, and gave a debtor's bond; and afterwards the surety, who ordered the arrest, paid the greater part of the demand to the creditor, and it was then agreed between the creditor and surety that a suit upon the bond should be prosecuted for the benefit of the latter; in the action on the bond, *it was held*, that the sum so paid by the surety should be taken as so much paid on the bond.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

The parties agreed on a statement of facts, from which it appeared, that the action was on a poor debtor's bond, dated February 16, 1839. The judgment, on which the execution issued whereon the arrest was made, from which Williams was released on giving the bond, was founded on a note signed by him, and Peaslee and Smith, as his sureties, and was against the three. Williams was arrested on the execution by order of Peaslee, and gave the bond in suit with Davis, the other defendant, as his surety. In August following the giving of the bond, Peaslee paid the attorney of the creditor $60,00, being some less than the amount due; and it was then "agreed between the attorney and Peaslee, that the bond should be

prosecuted for said Peaslee's benefit; and on this consideration the sixty dollars were paid."

After the action was entered in the District Court, the defendants made an offer on the record to be defaulted for the sum of seven dollars and fifty cents, being the full amount due, if the sixty dollars paid by Peaslee are to be considered as a payment to be allowed on the bond.

A nonsuit or default was to be entered, as the opinion of the Court might be; and the Court were to determine the amount of damages.

The District Judge directed that the defendants should be defaulted and judgment be rendered for the seven dollars and fifty cents; and the plaintiff filed exceptions.

The case was submitted without argument, and continued nisi.

Washburn, for the plaintiff.

Weston, Jr. for the defendants.

At a succeeding term —

Per Curiam. — We see no good reason why the judgment in the Court below should be reversed. The amount paid by Peaslee was in satisfaction of the judgment formerly recovered against himself as surety, and Williams, who was the principal defendant in that action, as well as in this. That judgment was therefore satisfied *pro tanto.* All that the plaintiff can now recover is, what remains unsatisfied of that judgment, which does not exceed, it seems, the amount for which judgment was rendered in the Court below.

The judgment in the Court below is therefore affirmed.

SULLIVAN THAYER *versus* GEORGE K. JEWETT *& al.*

The plaintiff received a note from J. & Co. as the consideration for the conveyance of certain land, the sale of which was procured by the fraud of the plaintiff. That note was put in suit, and the action was settled by paying a part thereof in cash, and by giving a draft for the balance, accepted by them and indorsed at their request by the defendants. Johnson & Co. sold and conveyed a part of the land to others, and made no conveyance thereof, or offer to convey, to the plaintiff. The plaintiff brought a suit against Johnson & Co. as acceptors of this draft, and recovered judgment against them, they then knowing the facts. The present suit was brought against the defendants as indorsers of the draft. *It was held*, that under such circumstances, the fraud of the plaintiff in the sale of the land furnished no sufficient ground of defence to this action.

ASSUMPSIT upon a draft drawn by one Nay on W. H. Johnson & Co. and accepted by them, payable to the order of G. K. Jewett & Co. and by them indorsed, dated Oct. 20, 1837, to be paid in three months from date at the Suffolk Bank in Boston.

This draft was given in part payment of a note, dated July 30, 1835, made by Johnson & Co. to the plaintiff in part payment of a tract of land sold to them at the same time by Thayer, the plaintiff. There was much testimony in the case, at the trial before TENNEY J. tending to show, that the sale of the land by Thayer to Johnson & Co. was procured by means of fraudulent representations made by him to them. Johnson & Co. had conveyed a part of the land to others, and had not reconveyed, or offered to reconvey, any part of it to the plaintiff. A suit was brought by Thayer against Johnson & Co. as acceptors of the draft declared on in this suit, and judgment was recovered against them. The first note from Johnson & Co. to Thayer had been sued and was paid by them in money, and by the draft now in suit. This draft was indorsed by the defendants at the request of Johnson & Co.

It was insisted by the counsel for the defendants, that the plaintiff was not entitled to recover in this action, because the note which was taken up partly by the draft in suit, was obtained by fraudulent representations for which the plaintiff was

responsible, or by a mistake of the parties so essential as to render the contract of no obligation.

The counsel for the plaintiff insisted, that before the defendants could ask for relief on the ground of fraud, they must first execute and tender a deed of the land to the plaintiff, and that not having done so, their defence on this ground had failed, and requested of the presiding Judge instructions to the jury to that effect.

The Judge instructed the jury as to what in law constituted fraud or mistake, to which instruction no objection was made; and also instructed them, that no deed, or tender of a deed of the land back to the plaintiff was necessary if the defendants had already paid the value of the land. The jury were directed, if they found for the defendants, to find whether it was on the ground of fraud in the sale of the land. The jury found for the defendants, and answered, that there was gross misrepresentation by the plaintiff.

The verdict was to be set aside, if the instructions were erroneous.

J. A. Poor, for the plaintiff, argued in support of the ground taken by him at the trial; and cited *Kimball* v. *Cunningham*, 4 Mass. R. 502; 12 Wheat. 183; *Irving* v. *Thomas*, 6 Shepl. 418; *Holbrook* v. *Burt*, 22 Pick. 546; 12 Conn. R. 234; 6 Paige, 254; 23 Wend. 260; 3 Johns. Ch. R. 23; ib. 400; 3 Wend. 236.

J. Appleton, for the defendants, contended that the instruction given by the Judge was correct; and cited *Harrington* v. *Stratton*, 22 Pick. 510; 13 Johns. R. 302; 1 Hill, 484; *Crocker v. Lewis*, 3 Sumn. 1; 23 Wend. 260; *Hazard* v. *Irwin*, 18 Pick. 95; *Whittier* v. *Vose*, 16 Maine R. 403; 1 Penn. R. 32; 4 Sergt. & R. 483; 1 Rawle, 171; 11 Sergt. & R. 305; 1 B. & Pul. 270; 2 Car. & P. 397; *Huntress* v. *Patten*, argued in Penobscot in 1841, not yet published, (20 Maine R. 28;) *Bean* v. *Herrick*, 3 Fairf. 262.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action on a draft, indorsed by the defendants. The defence set up is fraud. The plaintiff, in 1835, had authority to make sale of a certain tract of land; and, by the finding of the jury, it seems, he was guilty of gross misrepresentation as to the quantity of timber on it, at the time of the sale, to Messrs. W. H. Johnson & Co. of whom he obtained a note of hand, payable in two years, in part for the consideration, which note, when at maturity he put in suit against them, and they settled the action by paying part of the amount due on the note; and by giving this draft, they being acceptors, for the balance, payable in three months from its date; on which it appears that judgment in a suit thereon has, since it fell due, been rendered against Johnson & Co.

The question now is, can the defendants, who were strangers to the original transaction out of which the draft ultimately originated, and who appear in the character of indorsers on the draft, by way of becoming sureties for Johnson & Co. be allowed to avail themselves of this defence? There was no pretence of fraud as between them and the plaintiff. Johnson & Co. who are alleged to have been defrauded, appear, in the course of the year after they had purchased the land, to have possessed themselves of full knowledge of the true state of it; and it was for them to repudiate the purchase, if any good cause existed for their doing so. Yet it does not appear that they were not content with the negotiation. No notice of any discontent appears ever to have been given by them to the plaintiff; and it would seem that they have never seriously resisted payment of the notes, originally given for the consideration; but on the contrary, two years or more after the purchase, with full knowledge of the value of it, when the note, out of which the draft originated, became due, voluntarily paid nearly one half of it, and gave this draft for the balance; and have suffered themselves to be sued, and judgment to be rendered against them upon it. It would seem to be for the party injured by the supposed fraud to take advantage of it, and not

for strangers, wholly disconnected with it. Johnson & Co. have, moreover, retained the land, and sold considerable portions of it to different individuals; and have never, so far as appears, rescinded, or offered to rescind the contract of sale. It is believed that no case can be found in which a defence, like the one here set up, and similarly circumstanced, has been sustained. The defendants, if they should pay this debt, unless they have improvidently and voluntarily done some act to prevent it, will have their remedy over against Johnson & Co. and therefore cannot be essentially injured by a recovery in this action.

Verdict set aside and a new trial granted.

AMOS CHURCHILL *& al. versus* ALLEN CRANE *& al.*

If during the pendency of an action the parties make a written agreement, out of Court, under their hands and seals, that a default should be entered, if certain arbitrators, agreed upon between them to adjust the controversy, should make their award in favor of the plaintiff, and return it into Court; and it is done; still the Court cannot, without the assent of the defendant, legally order a default of the action.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

The action was brought to recover damages to the land of the plaintiffs, occasioned by the alleged carelessness of the defendants in keeping a fire set by them upon their own land, and from which it came upon the land of the plaintiffs. While this action was pending in the District Court, the parties made an agreement, out of Court, under their hands and seals, "to refer the whole subject matter of dispute about said fire and property alleged to have been destroyed by the same," to three persons named, and then proceeded to say; "and therefore we, the aforesaid parties, hereby agree that the award and final determination of said referees, or any two of them, shall be final and conclusive between the parties in the premises; and that in case said referees award that the plaintiffs recover

nothing, then the plaintiffs are to become nonsuit in said action, and the defendants are to recover their legal costs; and in case the referees award that the defendants shall pay the plaintiffs' damages, then the defendants are to be defaulted in said action for such sum in damages, as shall be awarded by said referees, and shall pay the plaintiffs their legal costs. Said referees are to make their award in writing, to be signed by them, or a majority of them, and returned to Court, sealed, and to be opened by the Court and filed in the writ in said action, and not subject to any revision or alteration of the Court on exception by either party; but execution is to issue thereupon against the plaintiffs or defendants according to the award as aforesaid of said referees."

The referees, after stating a notice and hearing of the parties, "do award to the plaintiffs in the case the sum of one hundred dollars as damages." The report was signed and returned into Court in manner provided in the agreement.

The defendants made several objections to the acceptance of the report, stated in the bill of exceptions, and relied on in the argument, but having no reference to the ground of decision in this Court. The bill of exceptions states; "and now the Court having heard the aforesaid objections, and duly considered the same, overrule the same, and order that the defendant be defaulted. To which ruling of the Court the defendants except."

J. Godfrey, for the defendants, among other objections, contended, that the District Court had no power to order a default of the action, under the circumstances. The defendants had a right to proceed to trial in the action; and if the award was offered, to try its validity.

A. G. Jewett, for the plaintiffs, insisted that this was like the agreements every day made as to the disposition of actions. The Court hold these agreements valid, although made by counsel, and out of Court, if in writing, Much more should the agreement of the parties under seal, as to the disposition of an action in Court, be conclusive upon them.

At a subsequent term: —

Per Curiam. — In this case the Court below ordered a default to be entered, upon the ground, that the parties had agreed that such default should be entered, if certain arbitrators, agreed upon between them to adjust the controversy, should make their award in favor of the plaintiffs, and return it to Court, which was done. To this order the defendants excepted.

No default could be ordered under such circumstances. An agreement out of Court to refer a controversy to arbitrators, is not in the nature of a rule, entered upon the agreement of the parties present in Court, which is a matter of record. Agreements of the latter kind the Court can enforce; but those of the former, stand upon a very different footing. They bring into question matters of fact which the Court, without the intervention of a jury, is not competent to ascertain. The execution of the agreement, if contested, must be proved, and established; as must also the making and publication of the award; and that proceedings were had as agreed upon between the parties, preliminary to the making of it.

The exceptions are sustained; the default is to be taken off; and the action must stand for trial.

GEORGE DAVENPORT *& al. versus* AMOS DAVIS.

If the plaintiff brings his action as indorsee of a bill of exchange against the acceptor, and sets forth, in his declaration, an indorsement to certain copartners, by the name of their firm, and an indorsement by them, also in their partnership name, to himself; and on the trial, he produces the bill, and proves this indorsement to have been made by one of the partners by the name of the firm; this is *prima facie* evidence of that indorsement, and of the title of the plaintiff through them to the bill.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

This was an action of assumpsit on a bill of exchange, drawn by Samuel L. Valentine, as agent of the Penobscot

Mill Dam Company, on Amos Davis, by him accepted, made payable to the order of said Valentine, and by him indorsed, and also indorsed by "Miller & Co." all which indorsements were set forth in the plaintiffs' declaration. The defendant denied the indorsement of "Miller & Co." and the existence of any such firm. The plaintiffs thereupon introduced a witness, who testified that the indorsement of "Miller & Co." was in the handwriting of Adams Daniels, who was one of the persons composing that firm, which consisted of J. R. Miller, I. K. Gilmore and Adams Daniels. The defendants then offered to introduce testimony to show, that the only connexion which ever existed between the persons said to compose said firm of Miller & Co., arose from a special contract made for the purpose of procuring certain lumber in which each of the parties thereto agreed to furnish certain labor and materials; that by said contract neither of the parties thereto had a right to bind the other by any contract, or to use the names of the others as members of a firm; that the said parties to said contract never acted as partners or held themselves out to the world as such; and that before the date of this bill that contract was fulfilled, and all connexion thereby existing between the parties thereto was at an end. All which testimony so offered the Judge ruled to be inadmissible.

The defendants also offered to go into evidence of a failure of the consideration of said bill. This evidence the Judge ruled to be inadmissible. The plaintiffs called on the defendant to prove that notice had ever been given that the co-partnership of Miller, Daniels & Gilmore, was in any way limited or that the same co-partnership had ever been dissolved.

The jury returned a verdict for the plaintiffs; and the defendant filed exceptions.

T. McGaw, for the defendant, contended that as the plaintiff had set out all the indorsements, he must prove them. The plaintiffs gave but *prima facie* evidence of the indorsement, if any, and we offered evidence to rebut it. This was improperly excluded. Stark. on Ev. part 4, p. 247. This

shut us out of our defence. We could have proved want of consideration.

J. Godfrey, for the plaintiffs, said that the other members of the firm made no objection to the indorsement, and that the defendant could not do it. 7 East, 210; 15 Mass. R. 339; 17 Maine R. 180; 16 Maine R. 155; Gow on Part. 54; 2 Shepl. 271; 1 Taunt. 224.

The opinion of the Court was by

WHITMAN C. J. — The declaration is on a bill of exchange, and against the defendant as acceptor. The defence set up, and principally relied upon, is, that the plaintiffs have not made sufficient proof of their being the lawful owners of the bill.

To make out their title, the plaintiffs claim through Messrs. Miller & Co.; to prove whose indorsement a witness was produced, who testified that the indorsement of Miller & Co. was in the handwriting of one Adams Daniels, who belonged to that firm, the other members of which, as he stated, were J. R. Miller and I. K. Gilmore. This was *prima facie* proof of the indorsement, and of the title of the plaintiffs to the bill. And so long as the other members of the firm made no question of the efficacy of the transfer, it would scarcely seem to be competent for the acceptor to question it. The only ground upon which the acceptor could lawfully refuse to pay the amount due on the bill to the plaintiffs, for want of title in them, is, that he might be liable to be called upon by the alleged indorsees to pay the same to them. Whenever the plaintiffs could show enough to obviate any such ground of apprehension, it would seem to be no longer reasonable that the acceptor should refuse payment. In this case the plaintiffs, being the holders of the bill, is some evidence of their ownership; insomuch that, if the defendant had paid them the amount of it, he would have been discharged from the payment of it to any one else. But, in an action upon the bill, the law has made it requisite, that the holders should prove the indorsement of it to them. The plaintiffs having so done in

this case, to a common intent, it would seem to shift the burthen of proof upon the defendant, to show that, notwithstanding the plaintiffs are the apparent holders of the bill, and for aught that appears innocently, and notwithstanding that proof has been made, that the bill has been indorsed to them by one of the former owners of it, in the name of the firm, which he must be considered as claiming to have a right to use; yet, that his right so to do, is contested by the other individuals, who were jointly intrusted with him, so that the defendant, if he should pay the amount due on the bill to the plaintiffs, would still be liable to pay it again to the members of that firm.

The evidence offered by him, and rejected by the Court, was not to that effect. It no where appears, in his proposition, that any proof could be made, tending to show, that he was in danger of being called upon for payment by any one, other than the plaintiffs. This ground of defence therefore must fail him.

The next exception, taken to the ruling of the Court, is to the rejection of testimony, tending to prove a failure of consideration, a fact of which it was not pretended that the plaintiffs were conusant, when they purchased the bill; nor was there any offer to show that, when the bill came into their hands, it was overdue, or in any manner discredited.

The ruling of the Judge, therefore, in rejecting the testimony to this point, was unexceptionable.

Exceptions overruled
and judgment on the verdict.

SYLVANUS RICH, JR. *versus* LITTLETON REED *& al.* & Trustee.

An officer cannot be charged as trustee of the defendants, for his having attached goods, found by him in their possession, on writs against third persons, as the property of the latter on the ground that the goods had been fraudulently purchased by the former of the latter to delay and defraud their creditors; a question of fraud being involved in the issue which should be referred to a jury.

There must be a clear admission of goods, effects or credits, not disputed or controverted, by the supposed trustee, before he can be truly said to have them in deposit or trust.

THIS action was against Littleton Reed, William B. Reed and Arad Thompson; and William H. Johnson was summoned as their trustee. In his disclosure Johnson denies that he is trustee, as he understands the law, and states many facts, on the examination of the plaintiff's counsel. From these it appears, that the only intermeddling with the property, by him, was in his capacity of deputy sheriff, and by virtue of certain writs in his hands against William B. Reed and A. M. Kendrick, and against William B. Reed and Isaac A. Hatch, Kendrick and Hatch having formerly been partners of W. B. Reed; that on those writs he attached the goods as the property of those defendants or of one of them; that at the time of the attachments the goods were in a store which appeared to be occupied by W. B. Reed and Arad Thompson; that he removed the goods to another store, and there retained them until they were sold on executions issued on judgments in the suits in which the attachments were made by him; that a part of the proceeds of the sale had been paid over to the attorney of the creditors, and part still remained in his hands; that the creditors believed that the goods in fact belonged to William B. Reed, as they informed him; that the present plaintiff had claimed the goods, and had once sued the sheriff for the taking of these goods, and had become nonsuit in that action; that he was informed by one of the attaching creditors, that their demands against Kendrick and Reed, and Reed and Hatch, on which these attachments were made, were for goods sold by them to said firms, and that subsequently they were in-

formed and verily believed, that said William B. Reed purchased out the interest of Kendrick and Hatch, and had therefor given his bond to them conditioned that out of the proceeds of the sale he would pay the liabilities of those companies, but instead of so doing, he, said William B. Reed, had fraudulently sold the goods to Reed, Thompson & Co., the defendants in this suit, and took their notes therefor, payable at distant times, to delay and defraud his creditors, and to enable him to set them at defiance, and that on this ground they were attached; and that he, the said Johnson, has no doubt that the said creditors believed their statements to be true.

A. W. Paine argued for the plaintiff, citing, 2 Conn. R. 203; *Watson* v. *Todd*, 5 Mass. R. 271; *Ruggles* v. *Penniman*, 6 Mass. R. 166; *Pollard* v. *Ross*, 5 Mass. R. 319; *Wilder* v. *Bailey*, 3 Mass. R. 289; Rev. St. c. 119, § 63, & § 4; *Chealy* v. *Brewer*, 7 Mass. R. 259; *Pierce* v. *Jackson*, 6 Mass. R. 242; *Swett* v. *Brown*, 5 Pick. 178.

Cutting argued for the alleged trustee.

The opinion of the Court was by

WHITMAN C. J. — Johnson cannot be charged as trustee. He does not disclose any goods, effects or credits as being in his hands, belonging to the defendants. He states that as an officer, with a legal precept in his hands for the purpose, he attached as the property of Messrs. Reed & Hatch, or either of them, and of Messrs. Kendrick and Reed, or either of them, at the suit of certain of their creditors, certain goods and chattels. He does not, and with propriety, could not disclose that they were the property of any one else. He, however, states that he found them ostensibly in the possession of the defendants in this suit, who claimed them as their own; but that the circumstances, under which they were purchased by them, as he understood from the attorney of the creditors, at whose suits they were attached, were strongly indicative of a fraudulent intent to delay or prevent them from recovering their demands against those, as whose property, the goods were attached. From the whole disclosure it is manifest that

Johnson held the goods or their proceeds as an attaching officer, and that it is contended by those, who caused them to be attached, that the defendants, in this action were colorable purchasers, merely, of the goods attached, for the purpose of preventing the attachment. The counsel for the plaintiff in this action contends, that it is competent for the Court, upon this disclosure, to determine, that the goods and chattels in question were the property of the defendants; and to adjudge the trustee to be chargeable. But we cannot come to any such conclusion. A question of fraud is involved in the issue, which should be referred to a jury. It cannot be proper, that the Court should take cognizance of it, in the manner in which it is presented to us. in this process. Mr. Justice Story, in *Picquet* v. *Swan*, 4 Mason, 460, says "there must be a clear admission of goods, effects or credits, not disputed or controverted, by the supposed trustees, before they can be truly said to have them in deposite or trust." The trustee in this case makes no such admission, and states no facts that would authorize us to question his right to retain the possession of the goods or of their proceeds; but the reverse of it; and must therefore be discharged.

Walter Brown *versus* Samuel B. Daggett.

Where the plaintiff took a note of the then holder and paid the money for it, on the express promise of the maker to pay the amount thereof to him in sixty days, it is not competent for the maker, in a suit against him on the note, to set up a prior failure of consideration as a defence; although the plaintiff previously knew the facts in relation thereto.

And it can make no difference, if the money so paid for the note was appropriated at the time to the payment of a note on which the plaintiff was before liable as a surety for the holder.

Exceptions from the Eastern District Court, Chandler J. presiding.

Assumpsit on a note by the defendant to A. W. Hasey, or bearer, dated Jan. 1, 1838, and payable in June, 1839. There

was also a count in the declaration on a special promise by the defendant to pay the amount of the note to the plaintiff.

The plaintiff produced the note, and introduced Nathaniel French, as a witness, who testified, that in the fall of 1839, being about removing from Bangor, his then place of residence, he had conversation with the plaintiff about the note, which was then the property of the witness, having sometime before been transferred to him by Hasey; that he told the plaintiff that the defendant had promised to pay him the note in a few days; that the plaintiff replied, Daggett is good, and if he will promise to pay the note in sixty days, I will take it of you; that the witness afterwards, within a few days, saw the defendant and asked him to pay the note; that the defendant said he could not then, but would in a few days; that the witness then informed him what the plaintiff had told the witness about taking the note, if Daggett would agree to pay it in sixty days, and further said to the defendant, that if he would see the plaintiff and agree to pay him the note in sixty days, it would be as good to the witness as money, for the plaintiff would then give him the money for it; that the defendant replied, that there was no need of his seeing Brown, but that the witness might tell Brown from him, that if Brown would take the note, he would pay it in sixty days, and no mistake; that the witness immediately communicated to the plaintiff what Daggett had said; and that the plaintiff took the note, and paid the full amount for the witness on a note from the witness to Davenport and Hayward, then in the office of W. Abbott, Esq. and on which the plaintiff was a surety for the witness.

The defendant then offered to prove a total failure of consideration for the note, and that at the time the plaintiff took it, he was acquainted with the facts relating thereto. The plaintiff objected to the admission of this testimony, and it was ruled by the presiding Judge to be inadmissible. A verdict was returned for the plaintiff; and the defendant filed exceptions.

A. W. Paine, for the defendant, contended, that the question presented in this case was, whether the special promise, detailed in the bill of exceptions, was valid to support the action, a complete defence having been made out to the note. This promise is invalid, because it was not founded on any sufficient legal consideration.

The only consideration, which can be pretended, was the payment of the money to Mr. Abbott. The delay of payment of an illegal debt affords no consideration for a new promise to pay it. The payment of the money afforded no consideration for the promise, for in that payment he was only fulfilling a legal obligation already imposed upon him.

In order to make the consideration good, the act done must be either an advantage to the promisor, or a loss to the promisee. The former is not pretended. Neither did any loss or disadvantage accrue to the promisee. He merely paid a debt, which he was before obliged to pay. The law does not regard the payment of a legal debt as a good consideration for a new promise. 12 Johns. R. 426; 2 Cowen, 139; 2 Hall, 185; *Smith* v. *Bartholomew*, 1 Metc. 276.

The promise was made upon a consideration past and executed, and is therefore invalid to support the action. 2 Leon. 224; 1 Com. on Con. 16.

The proof of a total failure of consideration was one important fact in the defence; and that the plaintiff knew all the facts pertaining to it, was another. After proving these, the defendant might have proved other important facts not mentioned.

McCrillis, for the plaintiff, said that it was a sufficient consideration for the promise of the defendant to pay the note to the plaintiff, that he thereby obtained a delay of sixty days. It was also a damage to the plaintiff, for if he had not taken this note in consideration of the defendant's promise to pay it, he would have been otherwise indemnified for his suretyship. And it by no means follows, that the plaintiff would have been compelled to pay any thing, as surety for French, if he had not taken the note.

But as the plaintiff (before he took the note) applied to the defendant to know whether he would pay it, and was informed that he would, the defendant is now estopped to set up this defence. 2 Stark. Ev. 21.

The opinion of the Court was drawn up by

WHITMAN C. J. — The declaration is upon a note of hand with the usual money counts. The circumstances under which the plaintiff took the note, as detailed in the bill of exceptions taken to the ruling of the Court below, entitle him to recover the amount for which it was given; although he may have known that it was given for a consideration, which had failed. He himself paid a valuable consideration for it; and was encouraged to do so by the defendant, who expressly promised him to pay him the amount, in sixty days, if he would take the note, and advance the money for it. The plaintiff, thereupon, paid the holder the amount due on it; and if he could not now recover it of the defendant a reproach would deservedly rest upon the administration of justice.

But it is objected that the money was paid by the plaintiff, by direction of the holder, to discharge a debt for which the plaintiff had become his surety. This objection is as far removed from good sense and legal authority, as the other is from common honesty.

Exceptions overruled and judgment on the verdict.

SETH BILLINGTON *versus* DENNIS SPRAGUE.

A memorandum made out of Court, of an agreement to refer an action by rule of Court, from which an entry to refer is afterwards put upon the docket but having no reference to the memorandum, is wholly superseded by such entry, and cannot affect the construction thereof.

Where for many years such has been the understanding of the term, the word, "*referred*," simply, entered upon the docket, imports that a rule of reference is to be made out in common form, with power to the referees, to decide, in case of necessity, by a majority, and to proceed upon hearing one party, if the other, being duly notified, shall fail to be present.

If in making out the rule, the clerk changes the order of the names as entered upon the docket, placing the last name first, it is an irregularity which might prevent the acceptance of the report, if objected to seasonably. But it may be waived, and it will be considered as waived by the parties, if knowing the fact, they proceed to the hearing without objection. It is too late in such case to make it, when the report is offered for acceptance.

If the referees, appointed by rule of Court, make their report, awarding a certain sum to the plaintiff as damages with costs of court to be taxed by the Court, but wholly omitting to state the amount of the costs of reference; and the plaintiff moves that the report be accepted; this omission will not furnish any valid objection, on the part of the defendant, to the acceptance of the report.

And if the reference has been entered into on the part of the defendant, not only by him, but also by his creditor, who had, by leave of Court, come in and given bond, under the provisions of the Rev. Stat., c. 115, the report will be accepted, notwithstanding the referees, after awarding damages and costs against the defendant of record, also add, and "do recover of the said L. (the creditor) such costs of reference and damages as he may be legally entitled to pay."

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

This question came before the Court on the following objections to the acceptance of a report of referees, made in behalf of the defendant.

1. Because the rule was improvidently issued, and not according to the submission, which was to Jacob Hale, Calvin Copeland and Charles C. Cushman, and not to them or the major part of them, as appears by the docket of the Court. 2. Because the report is signed by but two of the referees, and they had not by the terms of the submission authority to act and decide in the premises. 3. Because by the agreement of the parties

Jacob Hale was appointed chairman of the referees, but by the rule of Court, C. C. Cushman was appointed chairman. 4. Because C. C. Cushman, not being chairman, acted as such. 5. Because the report is void for uncertainty; and not according to the submission; and because it is not final.

While the action was pending, an agreement was made, of which a copy follows: — "Dec. 31, 1841. It is agreed that the action pending in the D. Court, Penobscot County, *Seth Billington* v. *Dennis Sprague*, in which Asaph Leonard comes in under the statute for the benefit of subsequent attaching creditors and defends the action, by leave of Court, shall be referred at the next January Term to Jacob Hale, Calvin Copeland and Charles C. Cushman by rule of Court. Samuel McLellan, attorney for Asaph Leonard. Abner Knowles attorney to Billington."

Certain entries by the clerk on his court docket were referred to as part of the exceptions, and were as follows: —

"*Seth Billington* v. *Dennis Sprague.*

"October Term, D. C. 1840. Asaph Leonard has leave to come in and defend, and has filed his bond approved.

"January Term, 1842. Referred to Jacob Hale, Calvin Copeland and Charles C. Cushman."

The rule, made out by the clerk, on which the report was made, had Cushman's name as the first of the referees, instead of the last, as it was on the agreement; and concluded with: "The report of whom or a major part of whom, to be made as soon as may be; judgment thereon to be final; and if either party, on due notice, neglect to attend, the referees to proceed *ex parte*."

The referees made their report at the May Term, 1842. It was signed by two of the referees, and the third made a certificate that he was present at the hearing and adjudication, and that the report was presented to him for his signature, but that he declined signing it, because he differed in opinion. The report, after stating that they had "duly notified the parties therein named, as also Asaph Leonard, who was permitted by the Court to come in and defend as subsequent attaching

creditor, met them," &c., says, that the referees "do award and determine, and this is our final award and determination in the premises, that the said Seth Billington do recover of the said Dennis Sprague the sum of six hundred and four dollars and twenty-eight cents, debt or damage, and of the said Asaph Leonard such costs of reference and damages as he may be legally entitled to pay; and costs of Court, to be taxed by said Court, of said Sprague. Given under our hands," &c.

The exceptions then set forth, that "it appeared in evidence that S. McLellan, counsel for both Leonard and the defendant, offered a rule similar to the one presented, except that C. C. Cushman's name was first; that was noticed, but both were before the referees at the same time. J. B. Hill, Esq. counsel for the defendant, testified that he was not aware, at the hearing, of the error in the rule, and that if he had known it, he should have objected to the further hearing, which last evidence was objected to. C. C. Cushman, Esq. one of the referees, testified that no objection was made to the rule that was used, and that the reason of using it instead of the other was, because the parties were notified under it. The several objections of the defendant's counsel the presiding Judge overruled, and accepted the report.

"To the above ruling of the Court the defendant excepts, and prays that his exceptions may be allowed.

"By John Appleton, Attorney for Leonard."

At the June Term of this Court, 1842, the case was continued nisi to be argued in writing; and written arguments were afterwards furnished.

John Appleton, for the defendant.

By the agreement of the parties and by the entry on the docket this action is to be referred to three individuals named. The reference was not, nor was it intended to be a reference to three or a major part. This agreement is to be construed according to its legal effect.

A submission to arbitrators, is a delegation of power for a *mere private purpose;* it is necessary that all should concur in the award, unless it is otherwise provided by the parties.

Thompson J. in *Greene* v. *Miller*, 6 Johns. R. 39, and cases cited.

Unless it be *expressly* provided in the submission, that a *less* number than all the arbitrators named may make the award, the concurrence of *all* is necessary ; &c. Kyd on Awards, 106 ; 1 Dall. R. 119, 293 ; 4 Watts, 75.

They would go too far were they to infer an authority not *intimated*, by any expression of the parties to their submission, to the three arbitrators, arising constructively by an unnecessary implication from the terms of the submission. *Towne* v. *Jaquith*, 6 Mass. R. 49.

The contract of submission is to govern and by that all three are to decide, not two.

The reference is to be "*by rule of Court.*" But the object of a rule of Court is only by the process of the Court to carry out more effectually the contract of the parties. It must correspond to that contract, from which alone it derives its existence. It cannot be altered, varied, or changed by the Court, or its officer. If legal, it is binding on all.

To change the agreement from a submission to three to a submission to three or the *major* part would be an alteration of the agreement. Had either of the parties interpolated "*or a major part*," without the consent of the others, it would be a forgery. The clerk cannot do that, any more than a party. Being a contract binding on *both*, it can be altered in any *essential* part only by concurrence of both.

It was the duty of the Court to have carried into effect the agreement of the parties and to have made the rule conform to the *agreement* to refer which is the basis of all proceedings.

"When the *submission* is to three persons, an award made by *two* of the *three* is *bad* although in the rule issued by the prothonotary, two of them were authorized to make an award ; no such authority being contained in the submission." *Witty* v. *Tentman*, 4 Watts, 75.

Where an agreement to refer a suit appointed *three* persons as referees without giving authority to any *two* of them to report, and the clerk by mistake expressed the rule in *usual*

form, the Court set aside the report made by only *two* of the referees. *Tetter* v. *Rapesnyder*, 1 Dallas, 293.

The Court on the authority of these cases should have set aside the award.

A rule agreed on by the parties cannot be enlarged by the Court without the parties' consent. *Rice* v. *Clark*, 8 Vermont R. 104.

The award is void for uncertainty, and for not following the submission.

The reference was of *this* action, which was on three notes signed by defendant.

The award is, that Billington do recover of Sprague $604,28, damage, and of Asaph Leonard *such* costs *of reference and damages as he may be legally* entitled to pay, and costs of court to be taxed by the Court. The plaintiff recovers of Sprague, $604,28, and costs of court; of Leonard *such costs of reference and damages* as he may be legally entitled to.

That the award is void for uncertainty, in reference to the costs of reference, and damages, is abundantly obvious, no costs of reference, *no* damages are fixed. The whole is as indefinite as can be conceived. Now such an award, one so vague and uncertain will never be supported. No judgment can be rendered at present as two *items* are yet undetermined.

The report does not conform to the submission.

A report is bad which refers to the Court, what was referred to the referees. *Kingston* v. *Kincaid*, 1 Wash. C. C. R. 448.

A report finding that the sum of £75 was due the 3d of March last was set aside for uncertainty. *Young* v. *Rubens*, 1 Dal. 119.

An award to pay the costs of arbitration, without saying how much is to be paid, is void. *Schuyler* v. *Vanderveer*, 2 Caines, 235.

An award to give *security* for certain sums is void for uncertainty. 3 S. & R. 340; 9 Johns R. 43.

As to awards void for uncertainty, see Caldwell on Arbitration, Am. Ed. 117, and seq.; Kyd on Awards, 194.

The award then being uncertain, as to *costs* and *damages*, is void.

Cutting, for the plaintiff.

The defendant's counsel's first objection to the acceptance of the report is, because the rule was not made out by the clerk in conformity with the record. And this presents the question, whether or not, when an action is referred "by Rule of Court" to three individuals, the clerk is authorized to issue a rule authorizing the three or a major part of them to report.

That the clerk is so authorized, I infer from the invariable and uniform practice of all clerks so to issue rules, when a reference is to three, in this county, for the last twenty years; and the Court on inspection, will perceive in the copy of the rule annexed a blank space in which to insert "a major part."

But assuming, that such is not the fact, and that the defendant's objection is valid, what consequences hereafter are to follow? Most assuredly writs of error and a reversal of judgments in all such cases, and a glorious harvest for the profession. And the defendant's counsel at this late day shall have all the credit of having made the discovery, and of springing a trap upon the community and catching his own clients.

None of the authorities cited by defendant's counsel support his proposition; they refer to arbitration and arbitrators, and not to rules issued by Courts, or to statute references. Between the two classes of cases there is a broad distinction; by the former it may perhaps be said, that power is delegated, as the defendant's counsel has remarked, "for a mere private purpose," that the arbitrators receive their authority and jurisdiction solely from the agreement and assent of the parties, and that such authority and jurisdiction cannot be controlled by statute or the common law without affecting their free agency. But see American Common Law, 1 Vol. p. 465, and cases cited, viz. 1 McCord's S. C. R. 137. *Lockhart* v. *Kidd*, 2 Const. R. 217. Courts have no control over an arbitrament excepting incidentally, when the award is pleaded in bar. Otherwise with rules of Court and statute references, such being for the advancement of public justice. 1 Bos. & Pull. 239.

The authority of Courts to issue a rule is derived from the common law, and is not a statute regulation. The power of Courts over the report of referees entered into before a justice of the peace is conferred by statute; and their power over both, when regularly before them, is precisely the same. The latter remedy differs only from the former, inasmuch as it dispenses with the necessity of suing out a writ and entering the same in order to give the Court jurisdiction.

So in England, until the statute 9 & 10 W. 3. c. 15, § 1, Courts had no authority to issue a rule except in cases depending in Court. "The intent of this act was to put submissions where no cause was depending in Court, upon the same footing with those, where the cause was depending, *and it is only declaratory of what the law was before in the latter case.*" 2 Petersdorff's Abr. 79 [110] Note.

Even so our own statute; Rev. St. c. 138, is declaratory of what the law was before as to references entered in actions depending. See Sec. 8 "The referees, &c. shall have the same authority, as those appointed by a rule of said Court."

See Sec. 2, as to the substance of the prescribed agreement. "The report of whom (or a major part of whom,)" &c. The part embraced within the parenthesis to be inserted when the referees consist of any number more than one or two, as by this act the parties may submit their controversy to one or more referees. It is otherwise in the statute of 1821, c. 78, where the form prescribed is to three referees, in which case the paenthesis is omitted, but the words retained. The authority therefore given by statute to referees, is, that a majority may report, and consequently is "*the same authority*" referred to in Sec. 8.

But the defendant's counsel, as though aware of the fallacy of his proposition on general principles, attempts to support it by the introduction of the agreement to refer.

This paper was designed and had no other force and effect than to convey to the Court the assent of the parties to refer the action "*by rule of Court,*" and to authorize the clerk to make the entry in the absence of one or both of the attorneys.

The Court will notice the expression, "*by rule of Court,*" which is general in terms and must mean such a rule as is issued in ordinary cases, which was the rule in fact issued; and which, as I have attempted to show, was in accordance with the principles of the common law and the uniform practice of our Courts.

But I consider this question setfled in favor of the acceptance of the report on authority, in our own State. *Inhabitants of Cumberland* v. *Inhabitants of North Yarmouth*, 4 Greenl. 459. This case I consider to be precisely in point. I have stated that none of the authorities cited by defendant's counsel support his proposition. Perhaps I ought to except the case of *Tetter* v. *Rapesnyder*, 1 Dall. 293. This case I consider no authority; it was only the decision of an inferior Court, and whether an inferior Judge or not, we have no means of determining, excepting from the absurdity of the decision. Mr. Dallas, in 1788, must have been hard pushed for materials for his reports, when he was obliged to resort to the decisions of a Judge of the Court of Common Pleas; as also the defendant's counsel when he is compelled to resort to those decisions in support of his propositions. And besides we do not know whether references in Pennsylvania at that time were regulated by statute or the common law.

But I still have another and, as I apprehend, a full and complete answer to this proposition.

The evidence discloses that the tenor and terms of the rule, as issued by the clerk, was known to the counsel at the time of the reference. "*It appeared in evidence that S. McLellan Esq., counsel for both Leonard and the defendant, offered a rule similar to the one presented except,*" &c.

Now it cannot be argued very consistently, that McLellan, who was the principal counsel in the case and who signed the agreement to refer, should have taken out a rule and produced it before the referees, and at the same time was ignorant of its contents. Such a supposition would argue gross ignorance and carelessness on the part of counsel. Now I contend, indeed, I think I may assume, that under these circumstances,

after having proceeded to trial before the referees, without objection, and putting the plaintiff to the hazard of an unfavorable issue, that when he finds the report against him, it is too late to make his objection; it is unjust; yea, it is dishonorable. It is a kind of finesse not to be sanctioned in a court of justice; it is like a party, who, knowing of some legal objection to a juryman during the progress of a trial, but keeping it concealed until finding a verdict against him, and then comes in for the first time and moves the verdict to be set aside for that cause; or like a party who suffers a witness to be examined without objection, and then moves for a new trial, after having tried an experiment, in consequence of interest in the witness which he knew as well before as after the trial. *Fox* v. *Hazeltine*, 10 Pick. 275.

The next and only other objection made by the defendant's counsel to the acceptance of the report is, "that it is void for uncertainty."

So far as it regards Sprague, the defendant of record, and against whom we claim judgment for debt and costs of Court, I am unable to perceive any uncertainty. So far as it respects Leonard, in this suit we do not expect, neither can we in any event recover any thing, and we never claimed any thing, and that portion of the report which alludes to Leonard was intended to have relation hereafter to his bond; if by force of the statute the plaintiff should be entitled to recover any thing. Rev. St. c. 115, § 117.

Now if this "*defence had not been made*" by Leonard, what would have been the judgment against the defendant, Sprague? Certainly nothing more nor less than the debt and costs of Court, for Sprague had no concern with the reference; he was willing to be defaulted. Leonard caused the action to be referred; and the referees very properly, and in strict conformity with the statute, awarded debt and costs of Court against the defendant, Sprague.

By Sec. 115 of the same statute, it is provided, "If the Court shall admit the petitioner to defend against such prior suit, he shall give bond, or enter into recognizance with suffi-

cient surety, in such sum, as the Court shall order, to pay to the plaintiff in such previous suit, all such costs and damages, as the Court shall adjudge and decree to have been occasioned to the plaintiff, by such defence." Now, that part of the report respecting Leonard, viz. "*and of the said Asaph Leonard such costs of reference and damages as he may be legally entitled to pay,*" is intended particularly for the consideration of the Court "in awarding execution on the recognizance," and to inform the Court that costs of reference was not included in the amount awarded against Sprague. And if the Court, when the subject matter of the recognizance comes properly before them, (which cannot be until after the termination of this suit,) should adjudge that the plaintiff was *legally entitled to recover the costs of reference* of Leonard, then the Court would probably give the plaintiff an execution for that sum to be taxed subject to their inspection and approval. *And the same consequences would have followed had the referees said nothing about Leonard and costs of reference*, and in this point of view, that part of the rule is immaterial. Mr. Appleton objected to the acceptance of the report as attorney for Leonard, and if that part of the report is void for uncertainty, why should Leonard complain? It cannot injure him by accepting the report as against Sprague, since the execution will issue only against Sprague.

The cases cited on this point have no relevancy to this case. They relate to parties of record.

But, "where part of the award was void for uncertainty, and is not so connected with the rest as to affect the justice of the case, the award is good for that part." 1 Wheeler's American Common Law, 450, citing *Martin* v. *Williams*, 13 Johns. R. 264, and *Adams* v. *Willoughby*, 6 Johns. R. 65; Kyd on Awards, 280; *Clement* v. *Durgin*, 1 Greenl. 300.

The opinion of the Court was drawn up by

WHITMAN C. J. — No doubt is entertained, that the powers delegated to arbitrators, and referees by rule of Court, depend alike in each case, upon the agreement of the parties thereto.

To establish such a position in the defence, the citation of authorities was a work of supererogation. The memorandum, however, from which the entry on the docket of the agreement to refer was made, and to which no reference is made in such entry, cannot be regarded as in anywise affecting the construction thereof.

A memorandum of an agreement, made out of Court, to refer, and subsequently carried into effect by an entry in Court, and under its sanction, on the docket, is thereby wholly superseded, as much so as if it had never existed. The question then depends upon the construction to be put upon the entry upon the docket. Such entries are always brief, and merely to indicate to the clerk, when about to make up an extended and permanent record, what is to be the scope and effect of it. Such abbreviated entries by long usage, become perfectly intelligible to the Court and the bar; as much so as LL. D. or S. T. D. *et cetera,* in a university catalogue.

In entering an agreement to refer upon the docket it almost never occurs, that the parties contemplate a reference otherwise than in the common form, viz. that if the referees cannot agree, after hearing the parties, a report made by the major part of them shall be final.

So generally has this been the case, that, formerly, some, if not all the clerks, while we were a part of Massachusetts, when they entered upon the docket "referred," added, "*common rule ex parte.*" This addition would be unintelligible to all such as were not conversant with such entries. A common rule was one in which it was agreed, that a majority should decide in case of necessity; and *ex parte* meant, that the referees should proceed, if one of the parties, upon being duly notified should not appear.

For many years past, it is believed, the above addition to the entry of "*referred*" has been wholly omitted; and the word referred has been considered as importing, without it, the same as it formerly did with it. If any thing different were intended the parties have been expected to specify it. This modern practice would seem to have obtained, in the county of Pe-

nobscot, from the time of its establishment; for this is asserted to be the case by the counsel for the plaintiff, and not controverted by the indefatigable counsel for the defendant. It is not to be questioned, therefore, that there has been a perfect understanding at the bar, when, "referred," simply, has been entered under an action, that it has been perfectly well understood to import a reference in the common form, viz. with power to the referees to decide, in case of necessity, by a majority, and to proceed upon hearing one party if the other, being duly notified, failed to be present. The report of the referees was therefore upon this ground unobjectionable.

It is further objected that in the rule issued by the clerk, the order of the names of the referees, as they stand upon the docket, is reversed, whereby the one on the docket, who, being first there named, would be expected to act as chairman, was superseded; and the last there named as a referee, substituted in his place. This was undoubtedly an irregularity on the part of the clerk; and we are by no means prepared to say, if it had not been acquiesced in at the hearing before the referees, that the report should not have been set aside for this cause. The parties have clearly a right to agree as to which of their referees shall act as chairman, and, not unfrequently, much importance is attached to such an incident. The first name in the order in which the names are introduced upon the docket, is considered as affording a designation of the one intended to act as chairman. But it is not apparent, that the irregularity complained of could be attended with much, if any detriment to the parties; and it would seem that it could not be otherwise than competent for them to waive any exception on account of it. Such waiver may be implied or express. At the hearing it could not have been unknown to them, who was acting as chairman, even if they can be believed to have been guilty of so great an oversight as not to have inspected the rule for the purpose; and knowing who acted as chairman, and going through the whole investigation without making any objection to the procedure, should certainly preclude the right to do so, when the result became known.

This objection, therefore, we do not consider as open to the defendant at the coming in of the report.

As to the exception, that the report is uncertain for want of an ascertainment of the costs of reference, as the plaintiff moves for the acceptance of the report, in whose favor, in case of acceptance, judgment is to be rendered for such costs as he may be entitled to; and as no costs can be taxed for him, except such as may be ascertainable by the Court, according to the rules of law, it is not apparent why the defendants should, for the cause alleged, object to the acceptance of it. As to the costs, which Leonard would be bound to pay to the plaintiff, it is true, that the report of the referees contains no definite award; and the subject does not seem to have been, and perhaps could not be embraced in the submission.

According to the requirement of the statute, with which it is to be presumed he had complied, he should have given bond, or have recognized, with sureties, to pay to the plaintiff all such costs and damages, *as the Court* should adjudge and decree to have been occasioned to the plaintiff by his defence. If it were competent to the parties to refer this question, by rule of court, it would not seem that they had done it. All that is embraced in the rule is the subject matter of the action pending between the original parties; and this would seem to have been done with the concurrence of the principal defendant; for in the exceptions, by the defendant's counsel, it appears that one of them, McLellan, appeared as well for the defendant as for Leonard.

The award therefore may be regarded as correct, and well made, independent of any adjudication as to what would concern Leonard and the plaintiff, and hence, if the latter is content with it, it is sufficiently certain.

The exceptions therefore are overruled, and the acceptance of the report is confirmed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WASHINGTON & AROOSTOOK,

ARGUED AT JULY TERM, 1842.

William F. W. Owen *versus* James Boyle.

By the laws of the Province of New Brunswick, being in that respect the same as in England, a common warehouse, in the sense in which the word is used in relation to distress for rent in arrear, is a building, or an apartment in one, used and appropriated by the occupant, not for the deposit and safe keeping or selling of his own goods, but for the purpose of storing the goods of others, placed there in the regular course of commercial dealing and trade, to be again removed or reshipped.

Where a quantity of his own salt was deposited in a warehouse of this description, within that Province, by a person other than the occupant thereof, in the regular course of trade, the duties being paid, to be stored and again removed or reshipped, *it was held*, that such salt was not liable in law to be taken by a warrant of distress for rent in arrear, due from the lessee of such warehouse to the owner thereof.

And if the salt of such depositor, not being liable therefor, should be taken by the landlord on a warrant of distress and sold for the payment of rent due from the tenant, and purchased by the landlord, the course of proceedings in the sale being in conformity to the laws of the Province, such sale would not have the effect so to transfer the property in the salt to the landlord, as to enable him to maintain replevin therefor against the depositor thereof.

In an action of replevin for the salt, brought after the sale, by the landlord against the person so depositing it in the warehouse, the tenant is a competent witness for the defendant.

This was an action of replevin for 600 bushels of salt, and the question was, whether the property of the salt when replevied, was in the plaintiff. For eight or ten years before

the trial the plaintiff had been and then was owner of the island of Campo-bello, in the province of New Brunswick, on which island he resided. For many years prior to and on the 22d of September, 1835, William McLane was the tenant under the plaintiff of a wharf and store on said island. On the above named day the plaintiff distrained the said salt, which was then in that store, for rent, due on said lease to him from McLane, which salt was then the property of the defendant. The same not having been replevied by the said Boyle, was sold at auction and purchased by the plaintiff. Prior to such sale and after the distraint was made, the directions of the act of said province, c. 21, § 4, were complied with. The salt remained in the store till the spring of 1836, at which time the defendant, without the permission or knowledge of the plaintiff, took and removed the salt to a store at Lubec in this county, entered the same at the custom house, and paid the duties, immediately after which the plaintiff replevied the salt. At the trial, before SHEPLEY J. at the July Term, 1840, one ground of objection against the right of the plaintiff to distrain the salt, was, that the same was so distrained in the said store where the same had been deposited on storage by the defendant, with the consent of said McLane, after he had brought the same from St. John for the purpose of exportation; and that the said store was at the time a common warehouse for the deposit of goods on storage paid to said McLane. Evidence to prove the above facts was produced on the trial.

The defendant offered in evidence the deposition of the said McLane, to the admission of which the plaintiff objected; and being inquired of by the Court for what reason, answered, because he was the party whose property was distrained. The Judge remarked, if there was no other reason, it must be admitted; and it was admitted.

The counsel for the plaintiff contended, that inasmuch as the defendant, after the salt was distrained, and he had immediate notice of it, did not commence an action of replevin of the same, in the manner pointed out in the annexed copy

of the statute of the province, and thereby stop all further proceedings as to the distress, but lay by and permitted the whole of the same to be sold at auction, that therefore by such sale the defendant's property in said salt was divested, and the same was vested in the purchaser, whether the same salt was liable or not liable to be distrained; and that the proper and only remedy of the defendant was an action of trespass, or trover, against the landlord, in which damages would be recovered equal to the injury sustained by means of the distress and sale, if the plaintiff had no legal right to distrain the salt.

Alfred L. Street, a counsellor at law in the Province of New Brunswick, testified that the course of proceedings in distress for rent is the same in England and New Brunswick, except and so far as it is altered by the Provincial statute; and that the common law of England in relation to distress for rent is in force in the province of New Brunswick.

The Judge instructed the jury, on the point here presented, that a common warehouse, in the sense used in the law relating to this matter, was a building, or an apartment in one, used and appropriated by the occupant not for the deposit, safe keeping or selling of his own goods, but for the purpose of storing the goods of others, placed there in the regular course of commercial dealing and trade, to be again removed or re-shipped; and that if they should find from the testimony, that the building or apartment in which the salt was seized, had acquired the character of a warehouse in the sense stated, and that the salt was the property of the defendant, and had been there placed by him in the regular course of trade, the duties being paid, to be stored and again removed or re-shipped, it was not liable in law to be taken by a warrant of distress for rent in arrear, due from the lessee of that building, and that the proceedings in New Brunswick, if regular, would not under such circumstances have the effect to transfer the property in the salt to the plaintiff.

The verdict for the defendant was to be set aside and a new trial granted, if these rulings and instructions were erroneous.

The following were proved to be true extracts from "The Acts of the General Assembly of Her Majesty's Province of New Brunswick."

"CHAP. XXI.

"An Act to regulate the proceedings in actions of replevin, and to enable the sale of goods distrained for rent, in case the rent be not paid in a reasonable time, and for the more effectual securing the payment of rents and preventing fraud by tenants. Passed the 14th March, 1810.

"IV. *And be it further enacted*, That when any goods and chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract, whatsoever, and the tenant or owner of the goods so distrained, shall not within five days next after such distress taken and notice thereof (with the cause of such taking) left at the dwellinghouse or other most notorious place on the premises, charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff, according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the persons distraining shall and may, with the sheriff, or under sheriff of the county, or with a constable of the parish, city or place where such distress shall be taken (who are hereby required to be aiding or assisting therein) cause the goods and chattels so distrained, to be appraised by two sworn appraisers (whom such sheriff, under sheriff or constable are hereby empowered to swear) to appraise the same truly according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction for the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, leaving the overplus, if any, in the hands of the said sheriff, under sheriff, or constable for the owner's use."

At the term at which the trial took place, it was agreed that the case should be argued in writing; and arguments were afterwards sent to the Court.

Mellen and *S. S. Rawson*, for the plaintiff.

The first ground of our motion for a new trial, is the admission of the deposition of William McLane, on the application of the defendant, though objected to by the plaintiff. Before the objection had been made, we had introduced proof that McLane had, for several years been the tenant of Owen, and that the salt had been distrained by him for rent, in the store, being part of the leased premises; and that the salt, when distrained, was the property of said Boyle. On this ground our objection, on account of McLane's interest, was placed. His interest is this; Boyle's salt was, on the leased premises, distrained and sold for payment of rent due from McLane to Owen; and the question, then depending before the Court, was, whether the same was lawfully distrained and sold; for, if so, then Boyle had thereby, in effect and legal contemplation, paid a sum of money for McLane; he had paid his debt, or a part of it to Owen; and, in consequence, had a legal right of action against McLane to obtain a reimbursement of it. It was therefore for McLane's interest to defeat the present action, and, by so doing, to relieve himself from all liability to Boyle, if he could by his testimony establish facts, shewing that the salt was illegally distrained and sold. *Skillinger* v. *McCann*, 6 Greenl. 364.

The second ground of our motion for a new trial has respect to the instructions of the presiding Judge, as to the effect of the sale of the salt, after it had been distrained, and the proceedings, prior thereto, had taken place, in relation to it. It is familiar law that certain goods are not liable to distress for rent; as goods of a stranger, though found on the leased premises, when there are sufficient goods of the tenant, which may be legally distrained. So also goods which are protected, as being stored in a common warehouse or in the possession of persons to be wrought in various ways which need not be here mentioned. So also certain beasts and articles in use, &c. And no articles can be distrained by a landlord, when no rent is due. In all these cases the law furnishes an appropriate remedy to any person, whose rights or property may be invaded

in any of the before mentioned circumstances. This principle no one can violate with impunity. But it is equally true that it is the province, and in the power of the legislature, to prescribe any constitutional and lawful mode in which a person injured in his property, shall seek redress, either in procuring a restoration of the specific property, or damages for the injury he may sustain by an illegal disposition of it. Of these provisions there is a vast variety in all governments. In *Gedney* v. *Inhab. of Tewksbury*, 3 Mass. R. 307, and *Smith* v. *Drew*, 5 Mass. R. 514, the Court say, "When a statute gives a *right* and furnishes the *remedy*, that remedy must be pursued." We may add that when the remedy, as prescribed, is to be employed under certain limitations, as to time or circumstances, it must be sought and enjoyed accordingly.

We will first examine the cause merely by the language of the section of the Provincial statute, and its plain provisions, conditions and directions. The whole statute is, from its nature, a general one; applicable to *all* distresses for rent. In the first part of the section we meet with this idea. The language is, "if the *tenant* or *owner* shall not within five days next after such distress taken and notice thereof, &c. &c. *replevy* the same, with sufficient surety given, &c. &c." then the goods shall and may be sold at auction. The use of the words "*tenant* or *owner*," shows that the legislature had in view property distrained belonging either to the *tenant* or some *other owner;* yet the same provision as to the *replevin* is applicable equally to both; and in the present case there was no replevin to stay the statute proceedings, terminating in a sale of the distress. What reason had Owen to suppose that Boyle would ever assert any claim to the salt? By omitting, after notice, to replevy the salt, he impliedly assented to a sale, relying on a future remedy for his damages. What course could Owen pursue? If he had abandoned the salt and proceeded no further and no sale had been made he would have been liable to an action for damages, as was expressly decided in the case of *Smith* v. *Goodwin*, 2 Neville & Manning, 114. Besides, he had no other mode of obtaining the expense of the distress,

notice and appraisement, as provided for in the fourth section. He followed the plain directions of the statute from the beginning to the end, as to the course of proceeding with the distress. This leads to the inquiry, "what is the effect of a lawful sale of a chattel? There is but one plain answer to this question. It *divests* the property of the *owner* and *vests* it in the *purchaser.* A legal sale surely is not a *nullity.* Can such a sale be condemned as such, and the purchaser lose the purchase money? The question is a *general* one; not merely applying to this case.

The Judge instructed the jury, that if the salt, when it was distrained, had been the property of McLane, the *tenant*, instead of Boyle, inasmuch as the sale was not prevented by a replevin, such sale would have transferred the property to the purchaser, *though the same was not liable to distress.* The fourth section recognizes no such distinction; but excludes it; the section is general, and embraces all kinds of distresses, without considering whether they are lawfully made or not; the question as to the *lawfulness* of it is to be decided in an action of *replevin*, if the owner prefers *that* mode; or, he may let the distrainor proceed and sell the distress, and seek recompense of the landlord in an action of trespass or trover and recover damages, if the distress was unlawful. Again, what good or plausible reason can be assigned why a distress and sale at auction of goods belonging to the *tenant*, though not liable to distress, should convey a good title to the purchaser, and yet that such a seizure and auction sale should convey no title, if the property belonged to *any one else*, or if the distress was made when *no rent was due?*

Chancellor Kent seems to recognize no such distinction as that which we have been considering. In volume 3d, page 476, he says, "when rent is due and unpaid, the landlord, on demand, may enter immediately, by himself or his agent, upon the demised premises and distrain any goods and chattels that are to be found there belonging to the tenant or others." He then mentions certain articles not liable to distress; and, on page 180, proceeds thus, "after the distress has been duly

made, if the goods are not replevied within, &c. after notice, the goods shall be appraised and sold at public auction." Judge Blackstone, volume 3d, page 13, when speaking of goods which have been distrained, says, that they "must remain impounded till the owner makes satisfaction or contests the right of distraining by replevying the chattels; a replevin answers the same end to the distrainor, as the distress itself; since the party replevying gives security to return it if the right be determined against him."

By the language of the provincial statute, the right of preventing a sale of the salt and the effects of such a sale, was granted to Boyle *conditionally;* and the condition was a *precedent* one; and it was *not* complied with. Our argument proceeds on the principle of perfect respect for the rights of all parties, and a perfect protection of the rights of Boyle; but, by his own election and conduct, that protection must be enjoyed in the form of *damages*, if any rights have been violated. He has *waived* his right, if he has any, to all other protection and remedy.

Very numerous cases in the English reports support the position for which we are now contending. *Francis* v. *Wyatt*, 3 Burr. R. 1498; *Parry* v. *House*, 1 Holt, 498; *Bradbury* v. *Wright*, 2 Doug. 624; *Newman* v. *Aderton*, 2 New. R. 224; *Braddytt* v. *Jones*, 4 Doug. 52; *Fenton* v. *Logan*, Bing. 676; *Read* v. *Burley*, Cro. Eliz. 596; *Davis* v. *Gyde*, 2 Adol. and Ellis, 623; *Walker* v. *Rumbald*, 12 Mod. 76; *Davies* v. *Powell*, Willes's R. 46; *Moss* v. *Gallamore*, 1 Doug. 279; *Brown* v. *Shevitt*, 2 Adol. and Ellis, 138; *Gilman* v. *Eaton*, 3 Brod. & Bing. 75; *Thompson* v. *Mashita*, 1 Bing. 283; *Shepherd* v. *Case*, 5 Car. & P. 418; *Tenner* v. *Yolland*, 2 Chitty's R 167. The prescribing course of proceeding and series of decisions in this class of actions prove how the principles and practice of law are established and understood in the English courts, and which are similar in the province of New Brunswick; and we also further believe that they are applied to all cases of distress whatever, for rent due, and sale of the distress without distinction; whether the property distrained was

liable to distress or not; or whether it belonged to the *tenant* or *another owner*. Bradley, in his treatise on Distress, neither makes, nor alludes to any distinction between the above cases; but on page 228, after prescribing the forms respecting the appraisement of the goods and the oath of the appraisers, adds, "the next thing is to search the sheriff's office to see if the goods have been *replevied;* and if they have not, and the rent and charges are still unpaid, then to *sell the goods*, after they have been appraised."

We will now present to the consideration of the Court three more cases, which we presume are decided on principles which completely show that we are entitled to a new trial on the merits of the cause. *Simpson* v. *Hartopp*, Willes's R. 512; *Gorton* v. *Faulkner*, 4 T. R. 564; *Matthias* v. *Mesnard*, 2 Car. & P. 353.

The same principle was sanctioned in *each* of the last three cases, though in *Gorton & al.* v. *Faulkner*, the verdict was for the defendant. In each of the other two the property distrained was not liable to distress when taken, and did not belong to the tenant who was indebted for the rent. In those two cases the facts exactly resemble those in the case of *Owen* v. *Boyle;* the property distrained was not liable to distress and did not belong to the tenant. The same judgment would have been given in the case of *Gorton & al.* v. *Faulkner*, had the property been in *actual use* when it was distrained. So that the *whole Court*, in the case of *Simpson* v. *Hartopp*, and Best C. J. in *Matthias* v. *Mesnard*, *concur* as to the law; and the approving opinion of the learned Judge Buller gives additional weight to the decision in *Simpson* v. *Hartopp;* as stated by him in *Gorton & al.* v. *Faulkner.*

In the most careful examination which we have been able to make, not a single case or sentence has been found, in which an auction sale of a distress has been a question, or the validity of a title, under such a sale, doubted. On the contrary, the verdicts in cases of trespass and trover are evidently intended as a compensation for the goods distrained and sold, when on trial it appeared that the distress was unlawful. "When a

distress and sale for rent are made when *no rent is due*, the owner may recover of the distrainor *double* the value of the goods distrained and sold with full costs." Comyn, Distress, D. 9. The probable reason is, that he *must have known* that he was acting unlawfully; but in *other* cases *single* damages only are recoverable.

We conclude this long argument with respectfully observing that in the present case the powers of the Court are more limited than they are in those cases where they are examining the construction of the statutes of this State, or the correctness of the construction which may have been given to them, or the manner in which the principles of the common law have been applied in certain cases, which are the subject of re-examination. In forming their decisions, when *thus* sitting in judgment, the whole province of judicial investigation is opened to our Courts, so far as our laws prescribe rules of action, and subject principles to the government of their sound and legal judgment and final decision. But in the case now before the Court, permit us to inquire, what is the *legal discretion* of the Court, and what are its legitimate boundaries? If the plaintiff ever acquired any title to the salt in question, he acquired it under the law of New Brunswick, *as administered or executed* by the officers of the government of that province; and it seems to be merely a *question of fact* what *that law is.* We apprehend that our Courts have no power to revise the decisions made in any foreign court, or give any construction of an English or provincial statute different from that which the Courts of England or New Brunswick have given; or adopt a course of proceeding, in carrying into execution their statutory provisions, different from that which has been adopted there; or give *less* effect to a sale of a distress, according to the act of New Brunswick, in *one* case, than in *another*, where, by the course of proceedings and practice in that province, no such distinction appears in the reports relative to this class of cases. As we have no such system in this State as the summary process of distress for rent, it is most respectfully submitted to the Court whether a safer course can be pursued in such

a case as the present, than to follow in the footsteps of those whose province it was to execute the laws, by which the plaintiff, on appealing to them, became the purchaser of the property demanded in this action.

We apprehend that, from our examination and argument, the following conclusions are legitimately drawn and firmly established.

1. That certain property may be *legally* distrained for rent; and that certain property *cannot* be *legally* distrained for such purpose.

2. That there is but *one* provision in the province statute which points out the course to be pursued by the person distraining, as to notice, inventory, appraisement and sale of the property distrained, *when it is not replevied.*

3. That the right to replevy distrained property, whether the distress is lawful or unlawful, exists in all cases, whether exercised or not, in the manner provided by the statute.

4. When such right of replevying the property, is not exercised, and a sale thereof prevented, such sale, made according to the provisions of the statute, transfers the property to the purchaser.

5. And that the construction of said section of the statute *by*, and the proceedings thereon *in* the English Courts, furnish evidence of the correctness of the four preceding conclusions.

Hobbs, for the defendant.

The counsel for the defendant proposes to do no more than submit the following heads of an argument.

First. The deposition of McLane was properly admitted:

1. The objection taken by the plaintiff's counsel was not warranted by the facts in the case. The property taken was not McLane's.

2. At the former trial McLane's deposition was objected to generally, on the ground of interest, and the defendant shewed that he was released by him before testifying, and the deposition was thereupon read. The limited character of the objection taken at the last trial rendered it unnecessary to shew a release.

3. But assuming that McLane was interested, and was not released, his interest was a balanced one. If the plaintiff prevails, the witness must account with the defendant for the value of the salt. If the defendant prevails he must pay the rent.

Second. The plaintiff's counsel assume, that the legal effect of the statute proceedings in the Province of New Brunswick, in reference to the salt, was to divest the property of the owner, the defendant, and to vest it in the purchaser, the plaintiff. This position is denied:

1. It is not supported by the numerous cases cited and commented upon by plaintiff's counsel. They go to shew the particular remedy each party sought, for a violation of his right of property in those cases. They by no means establish the proposition contended for, that replevin, trespass or trover against the *landlord or his servants* is the *only* remedy a party has for an injury to his property in distraint for rent. The legal effect of a sale on distress for rent, where the property distrained belonged to a third person, was not raised or considered in any one of them. Nor is it fairly deducible from all the cases cited. They merely show what property is, and what is not, the subject of distress in England, and consequently in the Province of New Brunswick; and they establish conclusively, what this Court has already decided, that the salt in controversy was not, under the circumstances, liable to that process.

2. The position taken by the plaintiff's counsel is against a fundamental principle of the British constitution. It goes to deprive the subject of his property without judgment of law. 4 Bl. Com. 425; 29 ch. Magna Charta.

A judgment of law without notice will not bind the debtor nor his property. *Buchanan* v. *Rucker*, 9 East's R. and cases cited in notes; *Sawyer* v. *M. F. & M. Ins. Co.* 12 Mass. R. 291; *Bradstreet* v. *Neptune Ins. Co.* 3 Sumner, 600.

Much less will it bind the property of a third person not a party to the suit.

If the principle contended for is correct, then a judgment creditor may levy his execution on the property of a stranger,

and make a good title to the purchaser. This is against the first principles of natural justice.

But it is said that the statute of New Brunswick has created a right, and given a remedy for its violation, which alone can be pursued. If the statute has created the right to take the property of a subject without judgment of law, or without his consent, and without compensation, it is unconstitutional.

But the Act in question creates no such right, and confers no such power. It merely regulates proceedings, between the parties, in case of distraint for rent. It gives the tenant, or owner of the property distrained, a choice of remedies, a right to replevy the distress within a limited time, or, abandoning the specific chattel, to go for damages. It is silent as against whom he may bring his action. It does not say, that he shall not have his remedy against the vendee. The cases cited by the plaintiff's counsel show that he may have his action against the landlord or his servants. Upon principle the vendee also is liable.

3. It is against the authority of decided cases. The purchaser acquires no title to property which he buys at a sheriff's sale unless it belongs to the judgment debtor.

Yelverton's Reports, 180, (a) in the notes, where are cited: *Cooper* v. *Chitty*, 1 Burr. 20; *Shaw* v. *Tunbridge*, 2 Bl. R. 1064; *Sheric* v. *Huber*, 6 Binney, 2; *Stone* v. *Ebberley*, 1 Bay, 317; *Pettingell* v. *Bartlett*, 1 N. H. R. 87.

In *Cooper* v. *Chitty*, (which was the case of the assignees of a bankrupt against the sheriffs of London for taking the goods of the bankrupt after the act of bankruptcy and before the assignment, and a sale after the assignment,) the counsel for the plaintiff contended that the action could be maintained either against the plaintiff in the cause, the sheriff, *or the vendee of the goods.* This principle was not controverted by the defendants' counsel, and Lord Mansfield, in delivering the opinion of the Court, says, "It is admitted on the part of the defendants *that an innocent vendee of goods so seized can have no title under the sale but is liable to an action.*" Again, in remarking upon the

cases cited for the defendants, he says, "None of these cases authorize the sheriff to sell the goods of a *third person*, and it is admitted *the vendee* is not protected here because at the time of the sale the sheriff had no authority to sell."

4. But the plaintiff, in the present case, is both vendee and landlord. The case finds that he was affected with notice of the defendant's rights. He knew, or is presumed to have known, all the facts which made the distraint unlawful; to wit, that the salt was the property of the defendant, that it was placed in McLane's warehouse on storage and for exportation, and was, therefore, not liable to be distrained for rent.

It is an attempt on his part to avail himself of proceedings *inter alios* under a statute of the Province to deprive the defendant of his right of property without judgment of law; which this Court will not sanction.

The opinion of a majority of the Court, WHITMAN C. J, dissenting, and giving his reasons, was drawn up, and delivered, at the July Term in this county, 1843, by

TENNEY J. — The building or apartment, where the salt was stored, was used and appropriated by the occupant, not for the deposit and safe keeping or selling of his own goods, but for the purpose of storing the goods of others, placed there in the regular course of commercial dealing and trade, to be again removed or re-shipped, and the building or apartment had acquired the character of a warehouse, and the salt was the property of the defendant, and had been there placed by him, in the regular course of trade, the duties being paid, to be stored and again removed or re-shipped. The questions now presented for consideration and decision are: —

First. Was the salt thus situated liable to be distrained or taken for the rent, due to the landlord from the tenant, of the premises, where it was deposited? and if not: —

Second. Did the proceedings, being regular, in New Brunswick, have the effect to transfer the property in the salt to the plaintiff? And Third. Was the tenant of the premises a competent witness for the defendant?

The case finds, that the course of proceedings in distress for rent in England and New Brunswick are the same, except so far as it is altered in the latter by the Provincial statute; and that the common law of England in relation to the subject, is in force in the Province of New Brunswick. The two first questions must be settled by the statute of that Province, and the common law of England, and in determining whether the salt was subject to be taken in distress for arrears of rent we look to the latter exclusively, as the statute does not undertake to point out what goods are liable and what exempt, but only prescribes the mode of proceeding. Whatever may be the law in other places, this case is not to be affected thereby. We are not at liberty to adopt any principles established elsewhere, however reasonable they may appear, in violation of the settled law of New Brunswick. But in the absence of authority giving a construction to that statute, or to the law relating to the subject generally, we may be materially aided by the reasoning and opinions of other Courts, in giving a construction to a similar statute.

The salt was indisputably that of the defendant, when it was taken in distress; and if it was subject thereto, the title passed to the plaintiff. It is well settled in England, that whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to a tenant or a stranger, are distrainable by him for rent. But to this rule are exceptions, and certain articles are exempted from distress, not only belonging to strangers, but to the tenant himself. Animals *ferae naturæ* cannot be distrained. Whatever is in the personal use and occupation of any man is for the time privileged and protected from any distress. Valuable things in the way of trade shall not be liable to distress. As a horse standing at a smith's shop, to be shod, or in a common inn; or cloth at a tailor's house; or corn sent to a mill or market. For all these are protected and privileged for the *benefit of trade;* and are supposed in common presumption not to belong to the owner of the house, but to his customers. 3 Bl. Com. 8.

In *Gisbourne* v. *Hurst*, 1 Salk. 250, it was agreed by the Court "that, goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employment, are for that time under legal protection and privileged from distress for rent." In *Simpson* v. *Harcourt*, Willes, 512, Lord Chief Justice Willes mentions the several classes of goods exempted for the sake of trade and commerce. "The exceptions out of the general rule are all of them tending to the benefit of trade and commerce and general advantage." Bur. 1500. In *Gilman* v. *Elton*, 3 Brod. & Bing. 75, Dallas C. J. said, "It, (the distraining chattels on the premises belonging to others than the tenant) was a rule to prevent particular species of inconvenience, which would otherwise have arisen. But as it was found, that this rule, when universally enforced, created another kind of inconvenience, extensive in its nature, exceptions were necessarily introduced. In like manner therefore, and on the same principle of public convenience, a rule has been adopted in favor of trade and commerce." And again, "The Court is bound to consider the rule of public convenience as applicable to trade and commerce." "It seems to me, that all the decided cases are consistent with public advantage, and that it would be at once detrimental to the public and inconsistent with the cases, if we were to hold, that goods in the custody of a factor are liable to seizure." "The nature of the exception on the score of necessity or public convenience is laid down by Blackstone, in the argument of *Francis* v. *Wyatt*," 1 W. Bl. 484. "It is where it would be quite impracticable or highly incommodious to dispose of and manufacture the goods at home." And again it is said, "as to the case of *Francis* v. *Wyatt*, (where all the analogies are in favor of the exemption of goods in the hands of a factor, and there is no decided case at variance with such a position) it seems to me important, that the assertion in argument touching the exemption of such goods was not controverted by the opposing counsel or by the Court itself." And goods sent to a wharf or market and holden within the exception on grounds of pub-

lic convenience. It is settled, that goods in the hands of a factor have been held privileged from distress, and it is not a favor shown to the factor as an individual, it is to the trade. And in the same case, Park J. says, "though the general rule be old, the exceptions themselves are as old. The instances mentioned under the exception as to trade, in Lord Coke, are not put as limiting or comprehending the whole exception, but merely by way of illustration. The principle of the exception is admirably put together by Lord Holt, in Salkeld, 250, and his language shows that the exception was not established for the benefit of the individual, but of trade in general; he extends it to goods to be carried, wrought, or managed; and are not goods placed in the hands of a factor to be managed? The case of *Rede* v. *Burley*, Cro. Eliz. 596, is also strong to show, that it is the trade which is favored, and not the individual." And Burrough J. remarks, "from the earliest times, these exceptions to the general right of the landlord to distrain have existed;" he says, "no one can read the case of *Francis* v. *Wyatt*, in Burrow, without seeing that the case of a factor falls within the principles there laid down." "But commerce in general and the business of London and the country could not be carried on without it." Richardson J. says in the same case, "The advancement of trade equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage;" "it would be highly injurious to trade, if goods sent for sale, were liable to be distrained for the private debt of the factor."

The case of *Thompson* v. *Mashiter*, 1 Bing. 283, was where the plaintiff consigned to one Cleasely as a factor or agent, whalebone for sale. The whalebone was landed at Ramsay's wharf, a public waterside wharf, and was afterwards placed in Ramsay's warehouse over the wharf for safe custody. The whalebone was afterwards taken from the management of Cleasely, and placed by the plaintiff under the management of Devereux & Lambert, for sale, as the brokers and factors of the plaintiff, and it was transferred from the name of Cleasely to

Devereux & Lambert. Ramsay became insolvent, and the whalebone was taken in distress for arrears of rent due from Ramsay, and it was held privileged. Dallas C. J. says, "so the case is the same as if the owner had sent them immediately to Ramsay's where, on the broad principles of public convenience, I think they were not liable to distress;" and in express terms rejects the idea of a distinction between goods sent to a factor or directly sent to a warehouse. And Park J. holds, that certain exceptions of goods from distresses were permitted, not on account of the character of the individual in whose hands they are deposited, but for the benefit of trade. "On that general ground we now decide and not on the ground, that Ramsay was the servant and stood in the place of the factor." Burrough J. said, "these goods were brought to the wharf in the course of trade, and ought therefore to be protected."

The same doctrine is fully recognized by the Court of King's Bench, in the case of *Brown* v. *Shevill*, 2 Adol. & Ellis, 138, and the authority of the cases before cited fully confirmed.

Matthias v. *Mesnard*, 2 Car. & Payne, 353, was where the plaintiff was a corn merchant, and the defendant landlord of the premises occupied by Ryland & Knight, lightermen and granary keepers to Ryland & Son, who were the plaintiff's factors. Ryland & Son having no warehouse of their own, deposited the corn sent them by the plaintiff for sale, in the warehouse of Ryland & Knight, from whom rent was due to the defendant, and for it distress was made of the corn lying on the premises, and this action, brought for the corn, was sustained. Best C. J. is reported to have said, "I am of opinion there is no substantial difference of a factor's warehouse, and the warehouse of another, which the factor uses. And again, a landlord has by the general law, a right to take any property found upon the premises of his tenant. But many years ago in favor of trade, exceptions were made, as in the case of delivery of cloth to a tailor, and in many other cases. A landlord must know he cannot take the corn of other parties, and

therefore if his tenants are granary keepers, he can take other security for his rent. What foreigner or what person living in the country would send articles to a granary keeper, if they were to be put in danger in this way? It seems to me, I should be breaking in upon a principle, almost essential to the existence of trade, if I were to hold that this plaintiff was not entitled to recover." *Adams* v. *Grave*, 3 Tyrwh. 326.

Chancellor Kent, Vol. 3, 477, is equally clear, and adopts the doctrine deducible from the English cases. "A horse at a public inn, or sent to a livery stable to be taken care of, or corn at a mill, or cloth at a tailor's shop, or a grazier's cattle put upon the land for a night or on the way to market, or goods deposited in a warehouse for sale or on storage in the way of trade, or goods of a principal in the hands of a factor, are not distrainable for rent." *Brown* v. *Sims*, 17 S. & R. 138.

The doctrine of these cases is, that goods and chattels temporarily in the hands of others, for the purpose of being, "carried, wrought or managed," are privileged from distress for rent. This is a protection to the articles thus situated and not intended in the least as a special favor to those in whose charge they are left. An innkeeper, common carrier or tradesman are no more entitled to advantages, than those otherwise employed. But if property falling under their care, was not thus guarded by the laws, the business of certain mechanical trades would be entirely arrested, carriage of goods would be confined to their owners themselves, and vast commercial dealings would be essentially impeded in their progress. The agencies, which commercial enterprise render necessary, would in a measure cease to exist, on account of the hazard which would attend their operations.

No precise rules are given, by which to determine in all cases the line, which divides the property privileged, from that which is liable. But when we keep in view, the great object of the exception, can there be any doubt, what the general rule was intended to be? And the difficulty of application will arise, from the want of a distinct character of a given

case, rather than from any uncertainty in the rule of exemption.

If the exceptions are to favor trade and commercial dealing in general, and not to protect any particular employment, will they not embrace the management of goods in their progress to a market? If, when they are delivered to a common carrier to be carried, or to a mechanic to be wrought, they are free from distress, can it be said with any regard for the reason of exemptions, as stated by the English Judges from the time of Lord Holt to the present day, that goods deposited in a warehouse or on a wharf, for safe keeping, to be again removed in the regular course of trade, are liable to seizure for arrears of rent due from the tenant of the premises, where they are deposited? What species of goods could be more a proper subject of protection in a country like England, whose pride, whose wealth, whose strength and whose fame have arisen and are continued by the liberality and far-sightedness of their mercantile regulations, than that which is brought into their ports, entered at their custom houses, the duties for the support of the government being paid, and deposited in a warehouse, like the one used by the defendant, for security, till a satisfactory sale can be made? In the language of C. J. Gibson, in the case of *Brown* v. *Sims*, "where the course of business must necessarily put the tenant in the possession of the property of his customers, it would be against the plainest dictates of honesty and conscience to permit the landlord to use him as a decoy, and pounce upon whatever should be brought within his grasp, after having received the price of its exemption in the enhanced value of the rent."

The salt we think was exempted from distress, and the plaintiff was guilty of a legal wrong, in causing it to be taken. But it is insisted in the second place, by the plaintiff's counsel, that the defendant having omitted to bring his action of replevin previous to the sale of the salt, he is now precluded by his own neglect to resort to that remedy; and that by the 4th section of the Provincial Act referred to in the report and by the laws of England, the defendant is divested of the property,

and it is that of the plaintiff. Cases have been cited and relied upon to show, that when replevin has been brought, it has been before a sale of the distress, and within the time expressly given by the statute and the law of England; and if that time had expired, the right to distrain was determined in actions of trover or trespass. No cases have been referred to precisely similar to the one at bar, and none of those cited for the plaintiff were actions in which it appeared that the purchaser of the distress was called upon; but they were against the landlord, who caused it to be made. Here the landlord and the purchaser are the same.

The defendant in this case, finding his property after the sale, in a warehouse, where he had originally stored it in the regular course of trade, instead of replevying it, took and removed it into the United States without any judicial process. This he was authorized to do, if he was at the time the lawful proprietor, and his defence in the present suit must be determined by the same principles, which would sustain an action of replevin in his favor, if he had resorted to that to recover possession of the goods in controversy. The maintenance of such an action must be upon the ground, that the salt was his, and there can be no doubt that one may retain possession of his own property, though that possession was acquired without process.

From the result to which we come on the first question, that the salt was privileged from distress, it follows that the plaintiff was guilty of a violation of law in causing it to be taken. This is not denied by his counsel, but expressly admitted, provided the distress was unauthorized; and indeed the authorities adduced by them are all upon the truth of such a proposition.

It is established doctrine in England, that replevin will lie generally for a wrongful taking, and when trespass could be maintained. And in fact, aside from the statutes in England and the Province of New Brunswick, authorizing the action of replevin by the tenant against the landlord for property taken in distress, it is not perceived that such action could be

maintained. Where property is taken in execution, the debtor therein cannot ordinarily maintain this action, but strangers, who are owners, may do it.

In looking at the history of the law applicable to the subject of distresses for rent, we find, that this and other provisions were intended to favor the tenant, to preserve his rights and not to limit them; and at the same time to indemnify the landlord; and the act under which the plaintiff professes to derive his title, gives the tenant or owner of the property this remedy against the landlord, leaving the law in other respects unaffected thereby. "The exorbitant authority and importance of the feudal aristocracy and the extreme dependence and even vassalage of the tenants, was the occasion of introducing the law of distresses; for the non-payment of rent was a forfeiture of the feud, and the landlord could enter and assume it. The right of distress was given, that the landlord could seize a pledge in order to obtain justice, and he could take and detain cattle and other moveables found upon the land until the damages were paid. This was found to be as distressing to the tenant, as the feudal forfeiture, and was an engine of oppression. Then followed the statutory provision of 51 Henry III, that when beasts were taken in distress, the owner might feed them without disturbance, and that a sale should not take place, till the expiration of fifteen days. All these did not prevent the abuses practised by landlords, which were found to be intolerable in their refusal to permit the king's courts to take cognizance of the distresses, made at their own pleasure, and therefore, as Sir Edw. Coke observes, they assumed to be judges of their own causes, contrary to the solid maxim of the common law; and in the 52 Henry III, the statute of Marlebridge was passed, providing if the tenant was disposed to controvert the legality of the distress, either by denying the rent due, or averring it to be paid, the law provided him with a remedy by a writ of replevin." 3 Kent's Com. 2nd Ed. 473, 474, 475, and 476. And in 3 Bl. Com. 13, it is said, "as a distress is at common law only in the nature of security for the rent or damages done, as replevin answers

the same end to the distrainor as the distress itself, since the party replevying gives security to return the distress if the right be determined against him." And by the settled doctrines of the English Courts, the remedies which previously existed to secure subjects in the possession and enjoyment of property not liable to distress were in nowise diminished by the provisions intended to protect tenants in the unreasonable exercise of the power of their landlords. Titles to property in dispute were left to be settled in the same manner as before. We have seen no authority, which forbids to third persons an adoption of those means of indemnity which they could have before resorted to. And the statute of New Brunswick has given to landlords in this respect, no more power over the property of those, who may have left it on the lessee's premises, than was and is possessed by landlords in England.

Gilbert calls the writ of replevin at common law a *judicial* writ, intended as a speedy remedy; and he says, "replevin lies for goods in which the plaintiff has a qualified as well as an absolute property; as if goods were in my hands to be delivered to J. S. and J. N. takes them, I may have replevin to recover possession, because I have a right of possession against every body but J. S. and J. N. is therefore a trespasser." Gilb. on Distress & Replevin, 3d Ed. 87; Com. Dig. Replevin, a. "Replevin lies of all goods and chattels unlawfully taken." 6 Com. Dig. 224, Replevin, a.

In 18 Viner's Abr. 577, Replevin, B. F. 2, F. 3, it is said, "If a trespasser take beasts, replevin lies for this taking at election," and Bro. in replevin, pl. 37—39, cites 2 Edward IV, 16, "for the owner may affirm property in himself by bringing replevin." In *Shannon* v. *Shannon*, 1 Schoales & Lefroy, 327, Lord Redesdale says, "that the writ of replevin is founded on an unlawful taking, and is calculated to supply the place of detinue or trover."

In New York, the common law of England on the subject of distress for rent, has been adopted, and they have re-enacted the substance of the English statutes of 52 Hen. III, 3 Edw. I; 13 Edw. I; 21 Hen. VIII; 17 Car. II; 2 W. & M; 8

Anne & 11 Geo. II, which statutes were made to control abuses, and mitigate the rigor of the common law. 3 Kent's Com. 472. And it may be useful and important to ascertain, whether their Courts have made any exception, when called upon to determine, to what cases, the action of replevin can apply. In *Pangburn* v. *Patridge*, 7 Johns. R. 140, Van Ness, in delivering the opinion of the Court says, "this action [Replevin] is usually brought to try the legality of a distress, but will lie for any unlawful taking of a chattel. Possession by the plaintiff and an unlawful taking by the defendant are the only points requisite to support the action. The old authorities are, that replevin lies for goods taken tortiously or by a trespasser, and that the party injured may have replevin or trespass at his election," and again it is said, "If this question be considered upon principle, it is proper that this action should be maintainable, wherever there is a tortious taking out of the possession of another. A great variety of cases might be stated, in which no damages, which a jury is competent to give, can compensate for the loss of a particular chattel."

In *Thompson* v. *Button*, 14 Johns. R. 84, it is clearly implied, that replevin will lie, where an action of trespass can be sustained. *Clark* v. *Skinner*, 20 Johns. R. 465, was where the plaintiff's goods were taken on an execution against John Clark, his father, who had the possession for the purpose of enabling him to do certain business for the plaintiff, and it was insisted that the goods, being in the possession of the debtor in the execution, and in the custody of the law, could not be replevied. Platt J. said, "I am of opinion, that replevin lies, in favor of any person, whose goods are taken by a trespasser; in my judgment, the law does not deny the remedy by replevin to any person whose goods are taken from his actual or constructive possession by a wrongdoer. It is in many cases the only certain and efficacious remedy, and without it a man's personal chattels would never be safe, unless he keeps them in his own absolute custody. If I leave my watch to be repaired or my horse to be shod, and if it be taken on a fi. fa. against the watch maker or blacksmith, shall I not have re-

plevin? If the owner put his goods on board a vessel to be transported, shall he not have his remedy, if they are taken on execution against the master of the vessel? It seems to me to be indispensable for the due protection of personal property. In many cases it would be a mockery to say to the owner, bring an action of trespass or trover against the man, who has despoiled you. Insolvency would be both a sword and shield to trespassers. Besides, there are many cases, where the possession of chattels is of more value to the owner, than the estimated value in money." And it is said again, "The rule, I believe, is without exception, wherever trespass will lie, the injured party may maintain replevin."

If goods be taken on a lawful precept, it is not in the power of him, against whom that precept is directed, to maintain replevin, excepting in cases of distress; but when a stranger to that precept, brings replevin, it is for the purpose not to examine the legality of the process on which the goods are taken, but to obtain redress for the trespass on his property. *Mills* v. *Martin*, 19 Johns. R. 31.

The act the plaintiff relies upon, authorizes the appraisement and sale of "any goods and chattels distrained for any rent reserved and due, upon any demise, lease or contract whatever, if the tenant or owner shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the dwellinghouse or other most notorious place on the premises, charged with the rent distrained for, replevy the same," &c. "Any goods and chattels," here referred to, must mean such as are subject to be taken in distress. It certainly could not be construed to extend to those, which had never been on the premises leased, or owned by the lessee; and where the real owner had no notice of the distress, till after the lapse of the five days or after the sale, and where he had no actual notice, and perhaps, from a distant residence, no means existed to convey any, is he precluded from the right to take his property, or from the ordinary remedy of replevin against the wrongdoer? The property here, neither belonged to the tenant, nor was it liable to be taken for arrears for rent; it was

equally protected with any other goods of the defendant, wherever situated, and can it be said they were taken or distrained within the meaning of the act? Platt J. in the case of *Clark* v. *Skinner*, referred to, in commenting upon the following language in the 6 Com. Dig. Replevin, a, viz. "though replevin does not lie for goods taken in execution," says, "this last proposition is certainly not true without important qualifications. It is untrue as to goods taken in execution, where the fi. fa. is against A. and the goods taken from the possession of B. By goods taken in execution, I understand goods rightfully taken in obedience to the writ, but if through design or mistake, the officer takes the goods, which are not the property of the defendant, in the execution, he is a trespasser, and such goods were never taken in the true sense of the rule laid down by Baron Comyns."

The action of replevin referred to, in this act, is one to be brought by the tenant or owner of the goods taken, where the *goods themselves* were liable. But if the goods were exempted, there was nothing on which the warrant could operate, and any proceedings under it could certainly confer no rights on the plaintiff, when every step was unauthorized and tortious. If goods not belonging to the tenant were lawfully taken in distress, the tenant is accountable to the owner. But if a stranger's property which is not liable, is taken, and resort is made by the owner to the tenant, it is not believed that it can prove successful; and the stranger is deprived of the ordinary indemnity, if the doctrine contended for by the plaintiff be sound.

When goods not belonging to the debtor, or in any manner subject to attachment, have been taken on execution and sold, they have not been considered as passing the property to the purchaser and giving him title. In *Skipp* v. *Harwood*, cited by Lord Mansfield in *Fox* v. *Hanbury*, 2 Cowp. 445, he is reported to have said, "If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same

manner the debtor had it, subject to the rights of the other partner."

In *Hayden* v. *Hayden*, 1 Salk. 392, Caleman & Hayden were co-partners, and the judgment was against Caleman; and all the goods both of Caleman & Hayden were taken in execution. And it was held by Holt C. J. and the Court, that the sheriff must seize all, because the moieties are undivided, for if he seize but a moiety and sell that the other will have a right to a moiety of that moiety." *Melville* v. *Brown*, 15 Mass. R. 8. We have been directed to no authority where an innocent purchaser even of goods taken in execution has been allowed to hold them against the true owner by virtue of a sale thereon. Can it be contended that such owner would be divested of his rights, when there was nothing in reality or appearance, authorizing the seizure. If the officer has wrongfully held out title in the debtor and thereby induced persons to purchase, he is responsible for the injury to those whom he has misled; and it cannot be contended with any appearance of reason, that the purchaser has acquired title by reposing unworthy confidence, and that the innocent owner is deprived of his property and driven to a suit to obtain the value of that, which he never consented to part with. And can it with more reason be contended, that a sale of chattels, entirely privileged from distress, can pass into the hands of a purchaser, when the process is not one of judicial authority, but issued at the instance exclusively of a party interested? Such a principle would strongly tend to invite persons, to resort to such means as would take from individuals in nowise guilty of wrong or neglect, the most valuable portions of their property, without the judgment of their peers and the law of the land, and where no opportunity could be given to arrest it till recovery should be beyond their power; and for their indemnity be compelled to look to those who may be wholly irresponsible.

We have examined carefully the decisions, which give protection from distress to property in certain situations. This protection is, for reasons which apply with great force, to that which is embarked in commercial pursuits, and which the

owner is obliged to intrust to factors and agents. This exemption is as old as the law of distresses; the proprietors of this property from its very nature, and destination are far removed and in no situation to exercise over it their personal control, the law provides no means of notice to them, and shall all these salutary provisions, which have rested on the deep foundations, that centuries have not moved, be evaded, annulled by a sale of the property, upon a process, which could not lawfully reach it, and which originated in no judicial authority?

But in the case at bar, the plaintiff cannot and does not complain, that he has, in ignorance of the facts, paid the value of the goods, for he is at the same time the landlord, who caused the distress and the purchaser at the sale, and he is now seeking the fruits of each. He knew the law, and is presumed to have known, that the taking of the salt was in violation of its provisions. He does not even contend, that his claim is based upon any legal commencement, but insists that a series of unauthorized acts, because they have resulted in a purchase by him, have ripened into a perfect and indisputable title; he does not deny his liability in another form of action for having taken this very property, but insists that he must retain it to remunerate him for the expense, which he has caused, equally without legal right. The defendant deposited his property, where well he might. It was then guarded by the law, and privileged from distress. He went after several months, found it, as he had left it in the way of trade, entered it at the custom house in the United States, and paid the duties, thereby materially enhancing its value. The plaintiff had not previously sought the advantage of his purchase, but then followed and took it in replevin, admitting, if he can obtain it, thus increased in value, he must submit to compensate the owner, for the price which it bore, when he attempted wrongfully to deprive him of it. Such propositions cannot be tolerated unless by unquestionable authority. They present a case too absurd to be regarded with favor, till it is shown that the law of New Brunswick, which we are bound not only to respect, but which in this instance requires implicit obedience,

clearly establishes the plaintiff's title. Cases cited fail to do this, and we feel bound to yield to those principles of universal justice, in giving a construction to the act in question, which if not expressly settled in cases similar, are deducible from those which are analagous.

From the view, which we have taken on the two first questions presented, we can have no doubt, that McLane was legally admissible as a witness. Even if in the event of a failure in the defence, he should be responsible for the value of the salt to the defendant, his rent would be paid, and the interest would be balanced. But it is questionable whether he would be liable to the defendant in any event, and it would then be clearly for his interest that this cause should be so settled, that the rent should not be a charge upon him.

Judgment on the verdict.

WHITMAN C. J. — This is an action of replevin for a quantity of salt. The defendant was the original owner of it, and had stored it for safe keeping, in a store belonging to the plaintiff but, at that time, in the occupation of his lessee; and situated on the island of Campo Bello, in the Province of New Brunswick, on a wharf there, belonging to the plaintiff. While the salt was so stored, rent becoming due from the lessee, the plaintiff, on the 31st of September, 1835, finding the salt so in the store, distrained it for rent in arrear; and it was duly proceeded with, and sold for the payment of the rent; and the plaintiff became the purchaser of it. These proceedings were in the province of New Brunswick, where the plaintiff lived. In 1836 the defendant, without permission from, or knowledge of the plaintiff, obtained possession of the salt, and conveyed it into the State of Maine, where this action was brought to recover it, and in which a verdict has been returned for the defendant. The plaintiff moved for a new trial, and the Court reported so much of the evidence and of its ruling and instructions, as were necessary to present the grounds of the motion: one of which was, that the Court erroneously admitted the lessee as a witness for the defendant,

although objected to on the ground of interest; and the other, that the Court erroneously instructed the jury, "that a common warehouse, in the sense used in the law relating to this matter, was a building or an apartment in one, used and appropriated, by the occupant, not for the deposit, and safe-keeping of his own goods, but for the purpose of storing the goods of others, placed there in the regular course of commercial dealing and trading, to be again removed and re-shipped. That if they should find from the testimony, that the building or apartment, in which the salt was seized, had acquired the character of a warehouse, in the sense stated, and that the salt was the property of the defendant, and had been there placed by him, in the regular course of trade, the duties being paid, to be stored, and again removed or re-shipped," it was not liable to be distrained for the rent of the store.

It may be proper, that we should first consider the instruction to the jury. If that should turn out not to be sustainable, it will be unnecessary to examine the other question raised. It appears, that the laws of England and of New Brunswick are the same, as to the rights of landlord and tenant, in reference to the circumstances authorizing distraint to be made. The general principle in England is laid down to be, that whatever chattels are found by the landlord on the premises leased, whether belonging to the tenant, or a stranger, may be distrained for rent in arrear. 3 Blackstone's Com. 8. And numerous other cases might be cited to the same effect. To this general principle, however, exceptions have from time to time, been recognized. And the question is, was that stated by the Court on the trial, one of them?

In the time of Lord Holt it was adjudged "that goods delivered to any person, exercising a public trade or employment to be *carried*, *wrought* or *managed*, in the way of his trade or employment," were for the time, privileged from distraint. *Gisbourn* v. *Hunt*, 1 Salk. 249. This authority seems to be the basis upon which all the after decisions have been placed. Comyn in his treatise upon landlord and tenant, p. 385, adopts the same general principle. He says, that "when property

has been delivered over to the lessee for some purpose, connected with trade, it is privileged from distress, and instances a horse sent to a farrier's shop, yarn sent to a weaver, cloth sent to a tailor, corn sent to mill, or to market, goods delivered to a common carrier, a horse, &c. at an inn, and goods of a principal sent to a factor, and placed by him in a warehouse on a wharf, at which they were landed. In all these cases the articles would be in the hands of such persons, exercising, in the language of Lord Holt, a public trade, and would be so in their hands "to be carried, wrought, or managed."

The first case in which it was expressly decided, that goods in the hands of a factor, were within the exception, was that of *Gilman* v. *Elton*, 3 Brod. & Bingham, 355. Dallas C. J. remarks, that the goods distrained in this case, it clearly appears, were received by the factor, in that particular character, and that it would be detrimental to the public, and inconsistent with the cases, if he were to hold them liable to seizure, in the manner contended for. Park J. after noticing the principle laid down by Lord Holt, asks, if goods so situated were not so placed to be managed. Burrough J. remarked, that no one could read the case, *Francis* v. *Wyatt*, 3 Burrow, 1498, (in which a carriage put up at a common livery stable, had been seized for rent, and was not supposed to come within the exception,) without seeing that the case of factors falls within the exception. Richardson J. remarked, that the advancement of trade equally, requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage. And that goods put into the hands of a trader to be wrought, or manufactured, or managed, are always protected from distraint.

In the next case which came before the same Court, 1 Bingham, 282, *Thompson* v. *Mashiter*, the reporter's abstract is, that "goods landed at a wharf and deposited by a *factor*, to whom they were consigned, in a warehouse on the wharf, till an opportunity for sale should present itself, are not distrainable for rent due in respect of the wharf and warehouse." Dallas C. J. in that case says, that "it has not been argued, that

the goods would have been liable, if they had been sent immediately to the wharfinger, and had remained on his hands. We may therefore assume, that for public convenience, and the benefit of trade, goods so deposited would not have been liable." Again he says, "it makes no difference whether the warehouse be in the factor's occupation, or hired for the purpose of the deposit. At the close of the case, the C. J. recollecting seemingly, that he had no authority, from any adjudged case, for including goods landed on a wharf in the exception, remarked, "that the exception for goods on a wharf, though only asserted in argument, in *Francis* v. *Wyatt*, was not dissented from by the Court or adverse counsel." And there is much reason for this exception, as wharves are ordinarily, public landing places, to, from, and upon which people are accustomed to come, and go, at their pleasure, as upon a highway, and the landlord must know, that goods are continually landed thereon, indiscriminately, for short periods, for amotion in various directions.

The next case, in the order of time, on the subject of this exception, came before the Court at the nisi prius, *Matthias* v. *Mesnard*, 2 Car. & P. 366. The reporter's abstract is, that "corn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself." The counsel for the lessor in this case took the exception, that "the decisions had never extended farther than to the protection of goods in the store, occupied by the *factor* himself." Best C. J. said, "if the cases referred to had decided only the insulated points, as to a wharfinger's and factor's protection, he should have paused; but, that the Judges in those cases only decided the general principle, &c. But that many years ago exceptions in favor of trade were admitted, that a landlord must know, (meaning doubtless in the situation this was,) that he cannot take the corn of other parties; and, therefore, if his tenants are granary-keepers, he can take other security for his rent. What wharfinger, or what

person living in the country would send articles to a granary-keeper if they were to be put in danger in this way?"

These are all the adjudications in England, that have come under my observation, directly bearing upon the case at bar; which seems to be a case of simple storage, by the owner himself, until an opportunity should offer to re-ship the goods. Now, can the defendant's goods be brought within the exceptions of the right of the landlord to distrain, "any goods found on the premises, whether belonging to the lessee or to a stranger?" If an exemption can be claimed in this case, in what case could a landlord distrain the goods of a stranger in a store or a warehouse of his lessee? The Court, however, in charging the jury in this case took a distinction between a public warehouse, kept publicly for storing goods, and one kept for the private use of an individual. But it may be doubted if any such distinction will hold. There is no adjudged case, that distinctly sanctions it. It is true that in a late edition of Bradby's Treatise on Distresses, by Adams, chap. XI, the editor has introduced into the text, the following passage, "so also goods landed at a wharf, and deposited in a warehouse there, cannot be distrained for the rent of the warehouse, and it is immaterial whether they are deposited by the principal or his factor." And cites the before mentioned cases of *Francis* v. *Wyatt*, and *Thompson* v. *Mashiter*. But these cases do not authorize any such interpolation. Dallas C. J. in the latter case, speaks of goods sent to a wharfinger, with reference to the case then before him, which was a case of goods sent to a *factor* for sale, and was no doubt, of opinion that goods so sent to a wharfinger or landed on a wharf would have been protected. And from the language he uses it may be inferred that he considered goods imported, and landed on a wharf would be protected *there* from distraint. But there is not a scintilla in either of the cases, that would tend to show, if the owner imports goods, and stores them in a warehouse on the wharf, whether owned by himself or others, or elsewhere, for safe custody merely, and until they can be conveniently re-shipped, that they would be exempted from

distraint. I therefore cannot come to any other conclusion than that the ruling and instruction of the Court was incorrect; but as my brethren are of a different opinion, judgment must be entered on the verdict.

WILLIAM L. MCALLISTER *versus* ALFRED BROOKS.

If the assignee of a chose in action would render his claim available against the debtor, who has been summoned as trustee by a creditor of the assignor, the assignee must give notice of such assignment to the trustee before or at the time of the disclosure, that it may be stated therein as a fact.

A judgment in a trustee process, having been rendered and duly recorded, must stand until reversed by due course of law; and is conclusive upon the creditor of the trustee to the extent of the judgment against him, unless he can question the correctness of the disclosure.

In a trustee process, where the Court had jurisdiction of the subject matter, and the parties were regularly in Court, and might have objected, in any stage of the proceedings, to whatever might have seemed to have been irregular, and where no objection was interposed, it is to be presumed, that if any ground existed therefor, it was waived.

When there is a subsisting judgment against a trustee, it constitutes a good defence for him in an action by his principal for the same cause of action, without proof of satisfaction.

ASSUMPSIT on three notes, dated March 23, 1839, signed by the defendant, and made payable to the plaintiff in specific articles. This action was commenced Sept. 3, 1839.

The parties agreed upon a statement of facts, from which it appeared that on March 30, 1839, the defendant was summoned as trustee of the plaintiff in a suit against him and others in favor of Luther Brackett, on a process returnable to the then next S. J. Court in that county, holden in July; and that he then and there was adjudged to be trustee upon a disclosure by him made, and which was referred to as part of the case.

A nonsuit was to be ordered, if the action could not be maintained; and if the proceedings under the trustee process were not a bar, the action was to stand for trial.

At the commencement of the disclosure of the trustee, was a certificate, signed by the attorneys of the plaintiff in that action, that the trustee might disclose before a magistrate; and it was sworn to before a justice of the peace, on July 6, 1839. No interrogatory appears to have been put to the trustee by any person; nor does it appear whether either party was present, or not.

The trustee stated in his disclosure, that he had given notes for specific articles to the plaintiff, describing them, the description showing them to be the same declared on in the present suit; that with the exception of a small portion of the amount, they remained unpaid; that after he had been summoned as trustee, on May 11, 1839, he received a letter, bearing the date of March 23, 1839, and purporting to be signed by Austin Preble, stating that he had "bought the three notes against you in favor of William L. McAllister or order, which you will pay to me," and describing the notes in suit; that he did not know the handwriting of Preble; and that this was all the notice he had received in any way of any transfer or assignment of the notes.

The amount of the judgment recovered by Brackett did not appear in the statement of facts; nor whether any thing had been paid by the trustee.

B. Bradbury, for the plaintiff, contended, that the action could be maintained.

The Court will protect equitable assignments. This is well settled. Preble, for whose benefit this action is brought, is the equitable assignee of the notes in suit.

The judgment against Brooks as trustee, offered as a bar to this suit, was rendered upon a disclosure not properly before the Court, and consequently, over which it had no jurisdiction. The St. 1830, c. 469, provides that a person summoned as trustee may disclose before a justice of the peace, provided the plaintiff consents thereto in writing, and the parties are notified of the time and place of such disclosure by the magistrate. The defendant as well as the plaintiff must be notified, that the disclosure may have the effect of one made in open Court.

The examination and disclosure, therefore, were not properly before the Court, and the judgment is invalid, and may be avoided by the plaintiff in this suit.

But if the judgment is to be considered to be valid until it is reversed, it can be no protection to the defendant in this suit, because the judgment has not been satisfied. *Wise* v. *Hilton*, 4 Greenl. 435. The plaintiff may be called upon to pay the judgment, and if the unsatisfied judgment is to bar this suit, the plaintiff may be compelled to pay the amount, and be wholly without remedy against the defendant on the notes.

Fuller, for the defendant.

The judgment in Brackett's suit is valid and subsisting against the defendant. So long as that judgment stands unreversed, it is a perfect bar to the present suit. *Boynton* v. *Fly*, 3 Fairf. 17; *Foster* v. *Jones*, 15 Mass. R. 185.

The case was within the jurisdiction of the Court, and it appears by the disclosure, and by the adjudication thereon, that there had not been exhibited to the trustee any legal evidence of an assignment. The whole facts in reference to the assignment were disclosed. If the trustee is not furnished with such evidence of an assignment as the law requires, he will be adjudged trustee. *Foster* v. *Sinclair*, 4 Mass. R. 450; *Wood* v. *Partridge*, 11 Mass. R. 491.

The parties were the plaintiff and trustee. The plaintiff has shown his assent in writing, and that he was present by the same writing, it being upon the disclosure. Preble had given no notice of an assignment, and neither he nor the defendant in that suit could put any question or appear as parties to the disclosure. But McAllister had notice of the suit, and if he wished for further answers, and had the right to interfere, he might have moved the Court to require them before judgment was rendered.

The opinion of the Court was drawn up by

Whitman C. J. — By the statement of facts, agreed upon in this case, it appears that the defendant had been summoned,

in a process of foreign attachment, as the trustee of the plaintiff, by a creditor of his; and had disclosed; and thereupon had been adjudged chargeable as such. As the statement is silent, as to whether the debt due to the creditor of the plaintiff was equal to the amount in the hands of the defendant, it is to be presumed that it was so; especially as nothing in the arguments of the counsel indicates any thing to the contrary. It is admitted, that this action is brought for the benefit of one Austin Preble, to whom the notes declared upon had been assigned before the defendant was summoned as the trustee of the plaintiff. But of this the defendant had not at the time of his disclosure, received such notice as to enable him to make a disclosure of it as a fact. *Foster* v. *Sinclair*, 4 Mass. R. 450; and *Wood* v. *Partridge*, 11 ib. 491.

The counsel for the plaintiff objects, that the disclosure was taken before a justice of the peace, without notice to the parties, as contemplated in the statute, passed in 1830, ch. 469, § 2, and was therefore *coram non judice*; and that the adjudication, that the defendant was trustee, for that reason, is not conclusive against him. It appears that the plaintiff in that case, and the trustee, were satisfied with that course of procedure; and if the present plaintiff had been notified and present, it would not have been competent for him to have interfered in the proceeding, or to have put interrogatories. He must have been a mere silent spectator of what was going on. And, therefore, when the statute speaks of notifying the parties, it may well be doubted if it was in contemplation that the defendant should be notified. The word parties may be taken perhaps to mean those only, who were parties to what was actually to be done. However this may be, it does not appear that the parties were not notified; and the presumption should be that due proceedings were had, prior to the adjudication. The Court had jurisdiction of the subject matter. The parties were regularly before them; and might have objected, in any stage of the proceedings, to whatever might seem to be irregular. No such objection appearing to have been interposed, it is to be presumed, that, if any ground therefor existed,

it was waived. A judgment, having been rendered and duly recorded, it must stand till reversed by due course of law. And the statute makes it conclusive upon the creditor of the trustee, to the extent of the judgment against him, unless he can question the correctness of the disclosure, which is not attempted in this case.

It is next objected that, as it does not appear that the defendant has satisfied the judgment, his defence is not complete. The case of *Wise* v. *Hilton*, 4 Greenl. 435, is relied upon as an authority in support of the position. The Court there say, "We are very clear that the disclosure and trustee judgment did not bar the plaintiff." And well they might, for the plaintiff therein was not the debtor in the trustee judgment referred to. He was a stranger to it; and of course could not be conclusively affected by it. The decisions, it is believed, have been uniform, that, where there is a subsisting judgment against a trustee, it constitutes a good defence for him, in an action by his principal against him, for the same cause, without proof of satisfaction. *Perkins* v. *Parker*, 1 Mass. R. 117; *Stevens* v. *Gaylord*, 11 ib. 265; *Matthews* v. *Houghton*, 2 Fairf. 377; *Norris* v. *Hall*, 18 Maine R. 332. Although in *Boynton* v. *Fly*, 3 Fairf. 18, cited by the counsel for the plaintiff, the trustee had satisfied the judgment against the principal, yet the Court do not intimate that such satisfaction was essential to the defence.

As agreed by the parties, the plaintiff must become nonsuit.

WILLIAM POOL *versus* JOHN HATHAWAY.

Where there is a conveyance by the mortgagee to one who had previously acquired a right in the equity of redemption, the rule is well established, that the mortgage will not be considered as extinguished, when it is for the interest of the grantee to have it upheld, unless the intention of the parties to extinguish it is apparent.

Where the conveyance from the mortgagee to the purchaser of the equity of redemption concluded thus; — "meaning and intending hereby to convey all the right, title and interest now vested in me by virtue of any and all conveyances heretofore made to me by I. & J. C. Pool," the mortgagors; *it was held*, that no intenion to discharge the mortgage appeared, but the reverse.

WRIT of entry to recover a tract of land and wharf in Calais. Both parties claimed title under Isaac Pool and John C. Pool.

On Feb'y 1, 1834, I. and J. C. Pool mortgaged the premises to B. F. Copeland, C. Copeland and N. P. Lovering, to secure a large sum of money then due, the deed having been recorded May 28, 1834. By another deed of the same date, recorded at the same time, the same grantors acknowledged that the same grantees had taken peaceable possession of the mortgaged premises for condition broken. By an indorsement on this deed, dated Dec. 24, 1836, the time for redemption was extended to July 1, 1838. By quitclaim deed, dated May 21, 1838, and recorded the 28th of the same month, B. F. & C. Copeland and Lovering conveyed all their interest in the premises to John Hathaway, the tenant, the descriptive part concluding with "meaning and intending hereby to convey all the right, title and interest now vesting in us by virtue of any and all conveyances heretofore made to us by Isaac and John C. Pool." On Nov. 2, 1837, the mortgage deed was assigned to the tenant by the mortgagees.

On Dec. 6, 1836, J. Ellis & al. brought their suit against I. & J. C. Pool, and attached their right of redeeming the premises, recovered judgment, and caused the equity to be sold, which was purchased by the demandant, and a deed was given by the officer to him, dated August 31, 1837, and recorded March 7, 1838. The course of proceedings was regular

in the sale of the equity, and it was taken on the execution within thirty days after judgment.

The demandant called John C. Pool, and he testified, that I. & J. C. Pool, in August, 1838, conveyed the premises to Isaac Jackson, and agreed to pay off the mortgage, but did not do it, and Jackson informed them that he had done so, and charged the Pools with the amount thereof in account, and they gave their notes to Jackson therefor. On the cross-examination of this witness, he was asked, if they did not convey the premises to the tenant instead of to Jackson. This was objected to by the demandant. SHEPLEY J. then holding the Court, ruled that the evidence might be admitted merely as explanatory of the statement of the witness, that they had sold to Jackson, and not as evidence of title in the defendant.

The tenant introduced the depositions of B. F. Copeland and N. P. Lovering, from which it appeared, "that at the time of the conveyance to Hathaway, there was due on the mortgage, 7680 dollars, and that the tenant paid them 4648,02, and 1548,02, by Isaac Jackson."

A default or nonsuit was to be entered by consent, as the Court might direct.

Bridges argued for the demandant, and contended that the mortgagees released the premises to the tenant without any assignment of the securities, and that the legal effect of the proceedings was to merge and discharge the mortgage. Whatever the tenant purchased of the Pools was defeated by the attachment and levy. The mere release of the mortgagee to the tenant, who was not in possession, could give him no title, and could only operate as a discharge. When the mortgage is once merged, it cannot be revived by any subsequent proceedings. The tenant can stand in no better situation, than the mortgagees, and they could not hold under the mortgage, for their debt has been paid off by the Pools. 6 Pick. 492; 8 Pick. 143; 14 Pick. 98; 1 Hill. Abr. 309; 2 Bl. Com. 323; 4 Kent, 194; 2 Story's Eq. 291; 14 Pick. 374; 15 Pick. 82.

Downes & Cooper argued for the tenant, and among other points, contended that as the mortgagees had entered for con-

dition broken, the only remedy for the mortgagors, or those claiming under them, was by bill in equity, even if it were true that the debt had been paid. This writ of entry could not be maintained. *Parsons* v. *Wells*, 17 Mass. R. 419; *Howe* v. *Lewis*, 14 Pick. 330.

The fair construction of the deed to the tenant shows, that it was intended as an assignment of the mortgage, and not a discharge of it. It is a well established principle, that a mortgage is not extinguished, if it be for the interest of the assignee to uphold it. *Freeman* v. *Paul*, 3 Greenl. 260.

If it is the interest of the party to uphold a mortgage, an intent to do so will be presumed, and no merger will take place. Shep. Touch. 83; Co. Lit. 301; Coke's R. 35; 3 Pick. 482; 3 Johns. C. R. 395; 6 Johns. C. R. 417; 8 Mass. R. 491; 15 Mass. R. 278; 5 Pick. 180; 4 Pick. 405; 14 Pick. 375; 2 Shepl. 9.

But if the tenant is but the equitable owner of the mortgage, the action cannot be maintained; for the purchaser of an equity of redemption cannot aver seizin against any other person than the execution debtor, and his immediate tenants. *Foster* v. *Mellen*, 10 Mass. R. 421.

The opinion of the Court was drawn up by

Shepley J. — The demandant alleges, that by an attachment made by Ellis and others, and by a subsequent seizure and sale on execution, he acquired a title to the equity, which the Pools had to redeem the estate mortgaged by them to Copelands and Lovering. And if he thus became the owner of the equity of redemption nothing could pass by the deed, by which the Pools attempted to convey the same to the tenant; who would not therefore become the owner of the estates both of the mortgagor and mortgagee; and the doctrine of merger could not be applied. And if the demandant did not thus acquire a title to the equity, he has no title. Even if the tenant could be considered as acquiring the equity of redemption by the conveyance from the Pools to himself on the second of November, 1837, and the title of the mort-

gagees by the deed of Copelands and Lovering on the twenty-first of May, 1838, the rule is well established, that the mortgage would not be considered as extinguished, when it was for his interest to have it upheld, unless the intention of the parties to extinguish it was apparent. But the deed from Copelands and Lovering to the tenant, so far from disclosing such an intention, undertakes to convey the estate to the tenant, who would thereby become the assignee of the mortgage. After a release of the title that deed contains this clause, "meaning and intending hereby to convey all the right, title and interest now vested in us by virtue of any and all conveyances heretofore made to us by Isaac Pool and John C. Pool." It is not necessary therefore to inquire, whether the mortgage was foreclosed so as to prevent the demandant from acquiring any title by the sale of the equity of redemption, for if he did thus acquire the title he cannot maintain this action. *Plaintiff nonsuit.*

THE FRONTIER BANK *versus* SAMUEL A. MORSE.

Where bills of a bank, which was in good credit at that time in that place, were received in exchange for other bills, when in fact the bank had previously failed, but the failure was unknown to both parties, and each supposed the bills to be current, the loss on the bills is to be borne by the payer, and not by the receiver.

The rule that where both parties are equally innocent or equally guilty, *potior est conditio defendentis*, does not apply to cases of money paid by mistake.

Where bills are thus received as currency, when the bank had failed, it is not necessary that the receiver should present the bills at the bank for payment. It is sufficient, if the payer was seasonably notified of the failure, and that the amount would be required of him, and that the bills, which had been sent to the place where the bank issuing them was located, would be returned to him as soon as practicable.

And if the payer of the bills is seasonably notified, and replies, that he will have nothing to do with the bills, it is not necessary that they should be returned by the earliest mail, or tendered to him.

THE action was assumpsit on the common money counts, and was brought to recover of the defendant the amount of

two bills of one hundred dollars each, of the Commonwealth Bank, Boston, exchanged by the defendant with the plaintiffs on the 12th day of January, 1838, after the failure of the Commonwealth Bank.

The plaintiffs introduced the deposition of Edward Ilsley, their cashier, from which it appeared that the exchange was made at his request, he being desirous of obtaining bills of a large denomination to remit to Boston; that he gave the defendant therefor bills of a small denomination on banks within the United States at that time current in Boston and which the defendant on the next day deposited in the Frontier Bank; that the defendant at that time had a deposit in said bank; and that at the time of the exchange, there was no agreement as to the responsibility of the Commonwealth Bank.

It further appeared that the bills of the Commonwealth Bank were sent to the New England Bank by the deponent on the 13th day of January, 1838, by mail. That on the 16th day of said month, having heard of the failure of the Commonwealth Bank, he immediately called on the defendant, and notified him of that fact; that said bills had been sent to the New England Bank, and that he should return them to him; and that the defendant replied, that he should have nothing to do with them; that if said bills had been immediately returned from Boston by mail, they would have been received in Eastport by the 21st or 22d of January, 1838; that they were returned by a packet regularly plying between Boston and Eastport, and were in fact received in Eastport on the 21st day of February, 1838, and on the same day, or within a day or two, were by the deponent tendered to the defendant, who declined to have any thing to do with them.

The plaintiffs also offered the deposition of Philip Marett, President of the New England Bank, who testified that said bills were received by him in Boston in a letter from the cashier of the Frontier Bank, dated January 13th, 1838, and that on the 17th of said month he acknowledged their receipt and informed the said cashier of the failure of the Commonwealth Bank; that at the time said bills were received it was perfectly notorious

that said bank did not redeem its bills, and that he did not present said bills to said bank.

The defendant introduced the deposition of Ebenezer Smith, Jr. who testified that in December, 1837, he sent to the defendant a large amount of Commonwealth Bank bills of one hundred dollars each, together with some bills of other banks, and informed him that the Commonwealth bills were the best of all that were sent; that after the failure of that bank he communicated that fact to the defendant, and that shortly after the defendant returned to him five hundred dollars of said bills for which he paid the defendant specie to the full amount with interest from the time of the failure; that if the defendant had sent a larger amount, he should have redeemed to the extent of his means, and could have paid five hundred dollars more; that the reason of his paying specie for said bills, was that they had been sent to the defendant through the deponent's instrumentality and had been kept by the defendant through his strong recommendation.

The said bills were by arrangement of the parties sold in Boston in Dec. 1838, for sixty-nine per cent.

The plaintiffs attempted to prove, that the bills were received by them after, and the defendant before the failure of the bank; and the jury were directed by SHEPLEY J. then holding the Court, to find for the plaintiffs, if satisfied the exchange took place after the failure of the bank; and to find for the defendant, if the exchange took place before the failure. The jury found a verdict for the plaintiffs, which was to be set aside and a nonsuit entered, or judgment to be entered for plaintiffs for the amount of the loss on the bills, according to the legal rights of the parties on these facts.

This case was fully and ably argued in writing, but the arguments are too much extended for publication. Some of the positions taken, only will be given, with authorities cited in their support.

J. A. Lowell and *S. S. Rawson*, for the defendant.

1. The bills in controversy having been received by the cashier of the Frontier Bank in exchange for other bank bills,

not in payment of a pre-existing debt, but for the express accommodation of the bank; and at the time of the exchange the bills being current at Eastport, neither party having any knowledge of the failure of the Commonwealth Bank, or reason to apprehend that it had failed, and both parties being equally innocent; the defendant is not liable for the loss, and this action cannot be maintained.

It is a well settled and universal rule of law, that where the parties are equally innocent, or equally guilty, "*melior est conditio defendentis,*" and no action can be maintained by either party. 1 Mass. R. 66; 6 Mass. R. 182, 321; 3 Burr. 1354; Dougl. 654; 2 East, 314; 2 Caines, 48; 2 Johns. R. 235; 1 B. & P. 260; 17 Mass. R. 1, 33.

Bank bills being a part of the currency of the country, and universally considered and treated as money, the person who holds them at the time the failure of the bank *becomes known,* must suffer the loss; unless he had been fraudulently imposed upon by some person who had obtained prior information of its failure. 6 Mass. R. 182; 1 Burr. 457; 3 T. R. 554; 9 Johns. R. 120; 19 Johns. R. 144; 5 Cowen, 186; 4 Cowen, 420; 1 Hammond, 178; 6 Har. & J. 47; 10 Wheat. 347; 12 Johns. R. 220, 395; 1 Johns. C. R. 238; 5 Taunt. 488; 1 Marshall, 157; 2 Ves. Jr. 120; 3 Atk. 232; 6 Cowen, 468; 8 Yerger, 175; 4 Dallas, 345; 1 Bin. 27; 10 Verm. R. 141; *Bayard* v. *Shunk*, decided in the Supreme Court in Pennsylvania, and found in the Law Reporter, Vol. 4, 214. These cases were commented upon, and considered, especially the last, as conclusive for the defendant.

By the English common law, recognized in Maine, Massachusetts, and most of the other States, and by our U. S. Courts, the receipt of a bill or note from the debtor of a third person for goods sold is regarded as payment. 6 Mass. R. 321; 11 Johns. R. 414; 17 Mass. R. 1, 33; 3 Cranch, 311; 6 Cranch, 253; 1 Mason, 192.

It was the original intention of the defendant to sell, and of the plaintiffs to buy the hundred dollar bills in controversy, and to make payment in bills of a small denomination. The

defendant has fulfilled his contract, and the plaintiffs cannot maintain this action.

2. It was the duty of the plaintiffs to present the bills to the Commonwealth Bank for payment; and the reputed failure of that bank to redeem its bills in specie, did not excuse the performance of that duty. The bills were depreciated, but not worthless. 18 Johns. R. 341; 14 East, 498; 2 Taunt. 60; 3 Taunt. 397; 16 East, 108.

3. It was the duty of the plaintiffs to have returned the bills to the defendant, as soon as they could have been transmitted from Boston to Eastport in the ordinary course of the mails; and the neglect to do so from the 17th of January to the 21st of February was an unreasonable delay and neglect, prejudicial to the interests and rights of the defendant, which discharged him from liability, if it would otherwise have existed.

It is respectfully, but earnestly and confidently contended, that there is no principle either of law, justice, or equity, on which this suit can be maintained; and the defendant compelled to suffer a loss sustained by the plaintiffs through their own act, in effecting an exchange of bills for their own accommodation; or their own neglect in presenting the bills for payment; and if not paid, returning them forthwith to the defendant.

D. T. Granger, for the plaintiffs.

The principle which lies at the foundation of the plaintiffs' case is this. When one passes to another bank bills as money, and at the time, the bank which issued the bills has in fact failed, the loss shall fall on the party paying the bills, where both parties acted in good faith, in ignorance of the failure. This has been settled as a principle of law by several cases which the Court will recognize as authority; and if it is regarded as a question depending merely on decided cases the weight of authority seems altogether with the plaintiffs. *Moses* v. *Gridley*, decided recently in the Supreme Court of Ohio; *Fogg* v. *Sawyer*, by the Supreme Court in New Hampshire; *Lightbody* v. *Ontario Bank*, 11 Wend. 9, and

in the Court of Errors, 13 Wend. 101; 2 Hill, (S. C.) 509; 11 Vermont R. 516; ib. 576; 1 J. J. Marsh. 523; ib. 503.

While it will not be denied, that under some circumstances, and for some purposes, bank bills are regarded as money, it is on all hands conceded, that they are invested with this character, not by force of any enactment, but by the common consent of the community, by a conventional law. There is a point however when they lose this character, and become either so many pieces of worthless paper, or mere articles of bargain and sale. And the plaintiffs say, that bank bills are to be regarded as money so long, only, as the bank issuing them continues, in good credit, to conduct its ordinary business; and that they cease to be as money when the bank fails.

The object is, or should be, to fix on some rule that can be easily applied, and which shall be uniform at all times and in all places. Now this, the failure of the bank, seems to be just such a rule.

The extent of the conventional law which impresses bank bills with the character of money would seem to present a question of fact. If so, it has been decided by the jury in favor of the plaintiffs.

It is said by the defendants, that if the plaintiffs are right in their principle as applied to the case of a pre-existing debt, that it becomes inapplicable here, because this was an exchange. It is believed, that the distinction thus set up is entirely illusory. The only difference between the cases is one of time; payment at the moment or at a subsequent period. Two of the cases cited, 11th Vermont R. 516, and the New Hampshire case, were cases of the purchase of goods and payment at the time; and the New York case, *Lightbody* v. *Ontario Bank*, covers the whole ground.

We are met with another objection, that it was the duty of the plaintiffs to present these bills for payment forthwith, and upon their non-payment, to have tendered them to the defendant, as soon as by the ordinary course of mail they could be returned to Eastport.

The correctness of this position is denied. The rules in

regard to the presentment of notes and bills of exchange have no applicability to the present case; and in none of the cases cited was there a presentment of the bills for payment to the banks that had failed, But in fact, there was an extraordinary degree of diligence on the part of the plaintiffs. The bills were received on the afternoon of Jan. 12, and sent to Boston by the mail of the next day; and on the 16th they received notice of the failure of the Commonwealth Bank, and gave notice thereof to the defendant. No tender of the bills was necessary. *Cambridge* v. *Allenby*, 6 B. & Cr. 373, (13 Eng. Com. L. R. 202.) But if a tender was necessary, it is enough, that it was made within a reasonable time. It was made immediately on the return of the bills from Boston in the ordinary mode. What is a reasonable time is a question of law for the decision of the Court, to be determined on a view of the circumstances of the case. 1 Metc. 172, 369. But if a tender at an earlier day would have been necessary under other circumstances, it was wholly excused in this case by the unqualified refusals of the defendant to have any thing to do with the bills. He has waived all pretence of right to have the bills actually offered to him. 16 Maine R. 407; 2 Car. & P. 77; 7 Johns. R. 476.

We believe this action to be maintainable upon the broad principles of equity and moral honesty. It was supposed by both parties at the time of the transaction, that the bills of the Commonwealth Bank, were current in Boston at par. That was the very gist of the contract. Had the fact of the failure of the Bank been known or suspected, the bills would not have been received by the plaintiffs. The parties acted under a mistake of a very material fact, a fact that strikes at the vitals of the contract. *Norton* v. *Marden*, 15 Maine R. 45; 3 Wend. 412.

The rule that where the parties are equally innocent, "*potior est conditio defendentis*," cannot aid the defendant. It does not apply to any transaction founded on a mutual mistake of the facts. And yet the cases are abundant to show that such mistakes may be rectified. It is believed that the

cases relied on for the defendant are those cases where it was well understood by the parties, at the time, that a risk was to be incurred, and each party was to take his chance.

The opinion of the Court was drawn up by

WHITMAN C. J. — It is a well established principle of law, that, if money be wrongfully paid under a mistake of the facts it may be recovered back, in an action for money had and received; it being considered unconscionable, that money, so paid, should be detained from the payer. That the case here presented for our consideration is of that class seems incontrovertible. The plaintiffs were desirous of obtaining from the defendant that, which could be regarded as in the nature of money, with which to pay a debt due, where nothing but that, which was regarded as tantamount to the lawful currency, would be accepted in satisfaction. The plaintiffs delivered to the defendant the bills of banks of that description. In consideration thereof the defendant delivered to them an equal amount of bank bills, believed by both parties to be what the plaintiffs were known to be in pursuit of, but which, unfortunately, the day before, had, in fact, ceased to be current as money; and had become mere merchandize, capable, as the case shows, of being sold at only sixty-nine per centum of its nominal value. The question now is, who shall bear the loss of the residue.

The defendant contends, that he was the innocent vendor of the bills, at the request of the plaintiffs, and for their accommodation; and at what was then, at the place where they were sold, their current value; likening it to the traffic in merchandize, in which the principle of *caveat emptor* take place. And his counsel have argued ingeniously, and cited numerous authorities in support of his positions. On the other hand many cases are cited, and urged with great force upon our attention, supposed to be of an opposite tendency.

The case relied upon by the defendant, as most directly in point, is to be found in the Law Reporter, Vol. 4, p. 214, purporting to be a decision by the Supreme Court of Pennsylvania,

in which it would seem to have been held, that "a *bona fide* payment of the notes of a broken bank discharges the debt." Mr. Chief Justice Gibson, in that case, as reported, would seem to have deemed it proper to go into an elaborate course of reasoning to sustain the decision. And well he might, for two important reasons: first — because the Supreme Court of the State of New York, and the court for the correction of errors of the same State, had decided otherwise,—*Lightbody* v. *The Ontario Bank*, 11 & 13 Wend.; — and secondly — because, independently of any adverse decision, he was probably aware, that doubts might be entertained of its soundness. And moreover, he has found it necessary to urge, to quote his own language, that "the civil law principles of equity, however practicable in an age, when the operations of commerce were simple, slow and deliberate, would be utterly unfit for the rapid transactions of modern times."

It may be admitted, that there is some difficulty in extracting from the decisions in analogous cases, which are not, at all points, in perfect harmony with each other, the rule which ought to be applied in such cases. The New York rule is unquestionably more conformable, "to the civil law principles of equity." If not, however, in correspondence with the principles of the common law we should not be at liberty to adopt it. And if it be inapplicable to the state of things in this commercial age, as the common law is founded on principles of practical utility, we might well hesitate before yielding to it our sanction as a rule of action. But we are very much inclined to consider equity and utility, in reference to rules of action, as nearly, if not quite, synonymous terms. That which is not equitable is not just, and that which is not just ought not to be law, and can scarcely be of practical utility.

The Chief Justice seems to entertain great veneration for the principles of the common law, and in this we fully concur with him. And without intending to make any invidious comparisons between the decisions of the Courts of Pennsylvania and New York, in this particular, we are free to confess, that we entertain great respect for the decisions of the Supreme

Court of the latter State; and, especially, when accompanied by the almost unanimous concurrence of their court for the correction of errors. The fountains of the venerated common law are no where in *America* more copiously drawn upon for the correct rule of decision than in that State.

To fortify his decision the Chief Justice relies mainly upon the dictum of Lord Mansfield, in *Miller* v. *Race*, 1 Burr. 452, that bank notes are treated as money, "as much so as guineas themselves," which no one at this day will question, so long as banks maintain their credit, and it cannot be believed that Lord Mansfield had reference to bills of banks of any other description; and upon the cases of *Cambridge* v. *Allenby*, 6 B. & C. 373; and *Young* v. *Adams*, 6 Mass. R. 182.

In the case of *Cambridge* v. *Allenby*, the vendor of goods had received in payment the notes of a banking house, which had, a few hours before, stopped payment, neither party, at the time, having any knowledge of it. The vendor kept the notes seven days without demanding payment of the bankers, or giving notice to the vendee to receive them back. The Court held, that by this delay, the vendor had made the notes his own. It is true that the Judges do remark, in giving their opinions, that, if the notes had been received as cash, the plaintiff must also have failed; but this was not the ground of their decision. And it is believed that there is no English decision to be found directly to that effect.

In the case of *Young* v. *Adams* the decision was, that payment made in a counterfeit bill was a nullity; and that the amount of it was recoverable in an action for money had and received. Nothing more was decided in that case. The residue of the opinion of the Court, drawn up by Mr. Justice Sewall, contains some loose *obiter dicta*, in a style somewhat obscure, from which it would seem, the Chief Justice must have gathered, what he denominates, as *tending* to support his conclusion, the "decree of the Supreme Court of Massachusetts." No decision of that Court can be found directly in support of any such doctrine. We think that neither the principles of the common law or of common honesty should

uphold it. And we do not believe that there is to be apprehended any embarrassment "to the rapid transactions of modern times" from the adoption of the opposite doctrine.

Our numerous banks, of small capitals, or of almost no capital, issuing and pressing into circulation their notes, and gaining for them in numerous instances an ephemeral credit and currency, cannot be considered as cash, if at all, longer than their credit is maintained. To hold otherwise would open a door to frauds innumerable. The holder of the notes of a broken bank, living in its vicinity, would be tempted to hasten into remote and obscure places; and before the news of the discredit of the bills had reached there, pass them off to the simple and unwary, who would be utterly unable to prove knowledge of their discredit on the part of him, who had passed them off; and be therefore compelled to pocket the loss; whereas if the loss is made to fall upon him, in whose hands they might happen to be, at the time of the failure, no such result could happen.

Mr. Chief Justice Savage, in delivering the opinion of the Court, in *Lightbody* v. *Ontario Bank*, recognizes one rule, which we think cannot be questioned. It is, that, what can be ascertained to have been the intention of the parties, as to the import of their contracts, shall be conclusive upon them. If it could be inferred, from what took place between the parties, that the party accepting bank bills in payment or exchange was to run the risk of their genuineness and value, he should be required to abide by the consequences. But if it should be apparent, from the nature of the transaction or otherwise, that no such risk was in the contemplation of the parties, a different result should follow. If goods were offered for cash, and the buyer should take them with a full understanding, that he was to pay cash for them, and, in making payment, should, inadvertently, pay for them, in what had the semblance of cash, but which was not, in effect, its equivalent, nothing would seem to be more reasonable than that he should make good the payment.

In the negotiation between the parties, in the case at bar, there does not seem to be any difficulty in ascertaining what must have been the understanding between them. On the one hand the plaintiffs wanted to avail themselves of that, which was, at the moment, equivalent to cash, and convenient for remittance by mail. Of this there is no reason to doubt, that the defendant was fully aware. The plaintiffs had an equivalent to offer him for it in bills of small denominations, not convenient for remittance by mail, which he accepted. At the time of making the exchange the defendant had, what, to a reasonable intent, he supposed was cash, and precisely that which the plaintiffs wanted, and passed it off to them accordingly. It does not seem that there could have been any misunderstanding as to the real intention of the parties. It was, however, afterwards discovered, that what the defendant let the plaintiffs have was not what he intended, nor what he well knew they expected they had received from him. What shall the defendant be holden to do in such case? Certainly to reimburse the plaintiffs the amount of the loss originating from the disappointment. In doing so he would but conform to what must be believed to have been the intention of the parties.

As to the rule, that, where both parties are equally innocent or equally guilty, *potior est conditio defendentis*, it can no more apply to this case than to every other case of money wrongfully paid by mistake. Both parties, in all such cases, are, or may be presumed to be, equally innocent, yet no such objection to a recovery could be interposed.

This simple, and to us seemingly obvious view of the transaction, between these parties, will supersede the necessity of going into a review of all the numerous cases cited by the counsel for the parties, and in their elaborate arguments, urged upon our attention.

The defendant, however, contends, that the plaintiff should have presented the bills in question to the bank, from which they had been issued, for payment. The answer to this is, that they were not received for any such purpose. The plain-

tiffs received them as currency, and to be paid as such. Not finding they would answer any such purpose the defendant was notified, as soon as was practicable, of their inefficiency; and that the bills would be returned to him as soon as practicable.

The defendant further objects, that they should have been returned to him by the return of the mail, after they had been received at Boston, or as soon as practicable by mail; and that the plaintiffs should not have delayed their offer to return the bills, by waiting for their return by private conveyance from Boston. But it appears that he was notified by the plaintiffs of the failure of the bank, which had issued the bills, as soon as it became known to them, which was on the third day after they were remitted to Boston, and that he would be looked to for reimbursement; and that he replied, he would have nothing to do with the bills. After this it would not seem reasonable, that he should complain, that the bills were not returned to him in due season. And a similar reply might be made to his allegation, that, if the bills had been seasonably returned to him, he could have obtained specie for them of the person, who remitted them to him. After the defendant had declared, in peremptory terms, that he would have nothing to do with the bills, the plaintiffs were surely excusable in not taking the trouble to tender them to him.

Judgment on the verdict.

CHARLES PEAVEY *versus* JAMES BROWN *& al.*

Before the Revised Statutes were in force, if the payee of a note, otherwise barred by the statute of limitations, "*promised to renew the note, and appointed a time to do it*" within six years next before the commencement of the suit, it was thereby taken out of the operation of that statute.

ASSUMPSIT on a promissory note given by the defendants to the plaintiff, dated Sept. 16, 1825, payable in one year with interest. Two payments had been made and indorsed thereon, the last of which was under date of March 4, 1828.

The action was commenced Jan. 22, 1839. The defendants relied on the statute of limitation.

The parties agreed upon a statement of facts, which appeared in the depositions of J. B. Clark, H. S. Favor and L. Morang, taken in 1840. The Court were to make such inferences from the testimony contained in the depositions, as a jury would be authorized to make. One ground taken by the plaintiff was, that the defendant resided at Campobello, in New Brunswick, when the note was made and has not been openly in this State since the note fell due. The testimony and arguments on this point are omitted, as the decision did not rest upon it.

A new promise was also relied on. On this point the deponent stated, that the plaintiff "asked me, two years ago this fall, to call upon James Brown, and ask him to pay a note which he, Peavey, had against him. I asked Mr. Brown if he would take up this note, and give a new one, he said he would, and a time was appointed for it to be done, but he afterwards got some one to look at or over the note, and then refused to give the new one, and said he would not pay the old one. He gave for his reasons, that he was bound on it with his father-in-law and brother-in-law, that he had paid his part of it, that it was out of date, that he had been at Eastport several times after it was out of date, and General Peavey had not asked him to pay it. I understood also, though I cannot exactly tell, that the Schoolmaster had overhauled the calculations of interest upon the note, that compound interest had been computed upon it, and that this furnished another objection to his paying it."

D. T. Granger, for the plaintiff, remarked that the testimony of the deponent related to several distinct conversations with the defendant. Each conversation is to be considered by itself, and the admissions and promises made at one time are not to be controlled by any denials at another and different time. In the first conversation Brown made an express promise to take up the note now in suit, and give a new one for it, and even went so far as to fix the time, when it should be

done. This seems to be all the law requires to revive a demand once barred by the statute; here is an acknowledgment that the note was an existing demand upon the defendants, due and unpaid, involved in the express promise to settle it. An acknowledgment made to a mere stranger is sufficient, and therefore it is wholly immaterial whether the witness did or did not exceed the powers given to him as agent. Besides, the plaintiff ratified his acts, and the defendant cannot make the objection. He however acted as requested.

Chadbourne & S. S. Rawson, for the defendants, said that the deponent did not ask Brown for payment, but for a new note, and Brown said he would give it. If he had given it there would have been no consideration for the promise. In that conversation he did not promise to pay the old note or the new note, if given. In asking for a new note, the deponent did not conform to his instructions, but departed from them.

It does not appear that Morang had the note with him which he wished to have renewed, or whether it was the note in suit, or what note. If the conversation referred to this note it does not appear how much of it was at one time and how much at another. The plaintiff must make out his case, and not leave it uncertain. The burthen is on him.

As there was no express promise to pay, the most that can be relied on is an implied one. And an implied one can only be created by the fact of a positive and unqualified admission of the debt; but if the acknowledgment is accompanied by any circumstances or expressions, which repel the idea of an intention or willingness to pay, no implied promise is created, and the debt is not revived. Angel on Lim. 247; *Porter* v. *Hill*, 4 Greenl. 41; *Jones* v. *Moore*, 5 Binney, 530; 3 Bingh. 329; 3 Greenl. 97.

The opinion of the Court was drawn up by

Tenney J. — The note by its terms was barred by the statute of limitations, when this suit was commenced, and the defendants rely upon that statute. The plaintiff attempts to avoid that defence, by showing a new promise on the part of

one of the defendants within six years before the action was brought. Another ground is also taken by the plaintiff, which it is unnecessary to consider.

To determine, whether a new promise was made or not we must look at what took place at the time, when it is said to have been made, and ascertain the meaning of the party, attempted to be charged. It is well settled, that previous to the time, when the Revised Statutes took effect, an express promise, or one made upon a condition, which has been performed, or a clear, unambiguous, and unqualified acknowledgment of the debt, as existing and due at the time of such acknowledgment, though such promise or acknowledgment be verbal, was sufficient to take the case from the operation of the statute. *Perley* v. *Little*, 3 Greenl. 97; *Porter* v. *Hill*, 4 Greenl. 41. The acknowledgment must be unaccompanied with any declaration, which expresses or implies an intention in the one who makes it not to pay, and to rely upon his legal rights. It is to be determined too, by all, which he said at the time, when taken together. *Clements* v. *Williams*, 7 Cranch, 74; *Bangs* v. *Hall*, 2 Pick. 368; *Whitney* v. *Bigelow*, 4 Pick. 110; *Bailey* v. *Crane*, 21 Pick. 323.

Let us apply these principles to the note in suit. The evidence relied upon by the plaintiff is, "Charles Peavey asked me two years ago this fall to call upon James Brown, and ask him to pay a note, which he, Peavey, had against him. I asked Mr. Brown, if he would take up this note, and give a new one; he said he would and a time was appointed, for it to be done."

It is argued for the defendants, that the witness was employed to put one specific question to Brown, and the answer was given to another inquiry and therefore not binding. It does not distinctly appear, whether the defendant at the time referred to, had possession of the note. If it were put into his hands, the request of the plaintiff, that he would call on the defendant, Brown, would imply an authority, to receive the amount, and a promise to one thus empowered would be equally valid, as if made to the plaintiff. The acknowledgment however, if made would be sufficient, on the authority of decided

cases, though the same was to one not authorized to make any request of the debtor. *Whitney* v. *Bigelow*, 4 Pick. 110.

Was the evidence of the promise to renew, unambiguous? The deponent testifies, in addition to the language already quoted, "but he afterwards got some one to look at or over the note and then refused to give the new note, &c." In order to relieve the note from the effect of the statute, the burden is on the plaintiff to produce satisfactory evidence. The defendants' counsel insists, that as "afterwards," will alike apply to a subsequent part of the same conversation, and to a conversation at another subsequent time, the language, here relied upon, when taken in connexion with the other, is ambiguous and equivocal, and is therefore insufficient. The term "afterwards" is certainly susceptible of both these meanings, and we must look at the whole sentence in which it stands, to ascertain the intention of the witness. And this we are to do, by the agreement of the parties, in the same manner that a jury would do under the instruction of the Court. No reason can be imagined, why the defendant, Brown, should not have looked at the note himself, if it were present, instead of employing another to do it. If it were not present, it would be very unnatural to suppose, that a messenger would have been sent to the place, where it was, and that he should have examined it and made report, before the parties to the conversation separated. We think, when the whole is taken together, that "afterwards" refers to a subsequent time and a different conversation.

Again, it is urged, that Brown may have referred to another note, than the one in suit. It is not pretended, that there was another, and without proof, of any besides the one in suit, we think a jury would be authorized to infer, that this was the one referred to. The deponent testifies, that he asked him, if he would renew *this* note.

The want of consideration is not a sufficient objection to the effect of the acknowledgment. The same could be urged with equal propriety where an express promise to pay, is made.

What then is the meaning of the language used? "He promised to renew the note, and a time was appointed to do it."

This must be taken to mean, that at the time appointed, he would take up the note referred to, by giving his other note, for the amount due. Would a person, not intending to pay the note use this language? Did he not by promising to give a note, which if given would bind him for the whole sum claimed, convey to the mind an admission, that the note was still due, and an existing debt against him? Will a man promise to give his note, for what he does not intend to say he owes? Suppose he had said, that he would take up that note, by one of another person, or of a bank, would it not be an acknowledgment of indebtedness? If he had given such a note, he surely would have been holden thereon. And when he promised to do that, which if done would bind him, we cannot conceive, that the language did not clearly imply that the note was unpaid. He had some meaning, and we cannot doubt that it was a willingness to consider himself liable. *Bangor Bridge* v. *McMahon*, 1 Fairf. 478.

WILLIAM H. POPE, Adm'r. *versus* ALVAN CUTLER.

A levy on land duly made, and recorded within the time prescribed by the statute, has precedence over a prior levy not recorded within three months, nor until after making the second levy.

It is the return of the officer of the appraisal and proceedings, which operates as a statute conveyance of land set off on execution, and divests the debtor of his title; and the delivery of seisin is an acceptance of that title by the creditor in satisfaction of the debt as of the date of those proceedings.

The record of the levy of an execution upon land must be made within three months of the date of the officer's return of the seizure on execution, or of the date of his return of the proceedings in making the levy.

THE facts pertinent to the understanding of this case are stated in the opinion of the Court.

The trial was before EMERY J. when several other questions were raised. On this point, the jury were instructed, that the levy of the defendant, Cutler, was seasonably recorded, and that he acquired a title to the land in controversy by that levy

against the title under which the intestate claimed, the defendants being prior in point of time. The verdict was for the defendant, but was to be set aside, if the instruction was erroneous.

Hobbs and *R. K. Porter*, for the plaintiff, contended, that the whole proceedings in a levy upon land have relation to the time of seizure on the execution, and that therefore the defendant's levy was not seasonably recorded. The levy under which the plaintiff claims has the priority. St. 1821, c. 60, § 1, 27; *Heywood* v. *Hildreth*, 9 Mass. R. 393; *Berry* v. *Spear*, 1 Shepl. 187; *Gorham* v. *Blazo*, 2 Greenl. 232; *McLellan* v. *Whitney*, 15 Mass. R. 137; *Blanchard* v. *Brooks*, 12 Pick. 47; *McGregor* v. *Brown*, 5 Pick. 170.

Lowell, for the defendant, said that when the inquiry was, whether the levy was made within thirty days of the time of judgment, the computation was to be made from the judgment to the first act, the seizure on execution. The cases cited for the plaintiff, principally, relate to that question. But when the inquiry is, as in the present case, whether the levy was recorded within three months, the three months commence at the time the levy is completed by the delivery of seizin to the creditor. *Bagley* v. *Bailey*, 16 Maine R. 151; *Blanchard* v. *Brooks*, 12 Pick. 47; *Burgess* v. *Spear*, 13 Maine R. 187; *Darling* v. *Rollins*, 18 Maine R. 405.

The plaintiff's grantors must have had notice of the defendant's levy within the three months, and that is sufficient. *Doe* v. *Flake*, 17 Maine R. 249; *McMechan* v. *Griffing*, 3 Pick. 149.

The opinion of the Court was drawn up by

Shepley J. — The plaintiff has been admitted to prosecute an action of trespass commenced by his intestate, John Lemist, against the defendant for taking and converting to his own use certain mill logs alleged to be the property of the intestate. Both parties claimed to be the owners of lot numbered forty-three in plantation numbered eighteen, and to have derived their titles to it from Josiah Miles. The defendant caused the lot

to be attached on September 7, 1830, on a writ in his favor against Miles, on which judgment was recovered on September 26, 1831, execution issued thereon, and the officer's return of a levy on the lot bears date on October 25, 1831, although the return of the appraisers bears date as of the following day. The officer stated in his return that he delivered seisin on the first day of November following, and the levy was recorded on the first day of February, 1832.

The intestate derived his title from a levy made by Priest and Clapp on the same lot, on October 26, 1831, recorded on January 19, 1832, who had caused it to be attached on a writ in their favor against Miles on October 14, 1830, and had obtained a judgment in that suit on September 26, 1831.

If the defendant's levy was recorded as the statute requires within three months, he had acquired the title to the lot. And if not, the intestate would appear to have acquired the title, through conveyances from Priest and Clapp. It is said in the case of *McLellan* v. *Whitney*, 15 Mass. R. 139, that a creditor or purchaser could not avoid it for want of record, "they having knowledge of the former levy." But in *McGregor* v. *Brown*, 5 Pick. 170, it was decided, that the rule relating to notice of prior conveyances did not apply to attaching creditors, each of whom "is entitled to take advantage of defects in the proceedings of the others." The question in *McMechan* v. *Griffing*, 3 Pick. 149, was whether an attaching creditor had notice of a prior conveyance, not of a prior attachment or levy. In *Doe* v. *Flake*, 5 Shepl. 249, it was decided, that a levy made and recorded had "precedence over a prior levy not recorded within three months, nor until after the registry of the second levy." It was in that case insisted, that the creditor making the second levy could not take advantage of the neglect to record the first, if he had notice of it. And the late Chief Justice, in delivering the opinion says, "assuming this position to be correct, and such seems to be the bearing of the decisions, the case will turn upon the question of notice." The decision was, that no sufficient notice was proved, and it did not become necessary to decide, whether if proved, it would have

been effectual to destroy the title of the party. Nor is it necessary to decide that question in this case, for there is no proof, that Priest and Clapp had notice of the attachment or levy of the defendant. And his title must therefore depend upon a decision whether by a correct construction of the statute, his levy was recorded within three months.

In *Heywood* v. *Hildreth*, 9 Mass. R. 393, it was said, "the whole proceedings after the seizure on execution have relation to the day of the seizure." And in the case of *Bagley* v. *Bailey*, 4 Shepl. 151, it was decided, that the proceedings must have reference to the day of the seizure to determine the state of the title for the purpose of deciding, whether to make a levy on the land or to sell the right in equity of redeeming it. While in the case of *Blanchard* v. *Brooks*, 12 Pick. 61, the levy was considered as made on the day, when the appraisal was made and the officer made his return of the proceedings, although he had stated in his return, that he had seized the land on the execution sometime before. And in the case of *Berry* v. *Spear*, 1 Shepl. 187, it was decided, that in making the computation of the three months, the day on which the levy was made, should be excluded; as the whole of that day might be consumed in examining the land, making the appraisal, and completing the return; thus implying that the levy would be considered as made on the day, when these proceedings took place. In *Darling* v. *Rollins*, 6 Shepl. 405, the levy was decided to be incomplete to pass the title without any delivery of seisin to the creditor. In *Waterhouse* v. *Waite*, 11 Mass. R. 207, it was held, that a reasonable time after the seizure might be allowed to complete the levy, and that "yet the neglect of the creditor for a month after seizure and appraisement to receive seisin was an unreasonable delay." If the levy being otherwise perfected be not considered as so far completed as to pass the title to the creditor, on condition that he does not repudiate it by neglecting or refusing to receive seisin within a reasonable time; and the subsequent delivery of seisin does not have reference either to the seizure on execution, or to the date of the appraisal and officer's return; the

levy would not be considered as made within thirty days after judgment unless seisin was delivered within that time; and the title would not relate back to the day of the attachment, which would be lost. It is the return of the officer of the appraisal and proceedings, which operates as a statute conveyance and divests the debtor of his title; and the delivery of seisin is an acceptance of that title by the creditor in satisfaction of the debt as of the date of those proceedings. The officer's return states, that the debt at the time, when these proceedings bear date, is satisfied. The attachment is preserved only for thirty days after judgment, and the record is required within three months after the levy is made; and the intention appears to have been to have the whole proceedings completed and recorded within that time to make a statute title, which would be effectual from the date of the attachment. A literal construction of the statute might seem to require, that the whole proceedings, including the delivery of seisin, should take place at one time; but it has received a construction permitting them to take place at different times, yet all having reference to the time, when the title is considered as conveyed; and that, according to the decided cases, must be either at the date of the seizure on execution, or at the date of the officer's return of the proceedings in making the levy. And the record must be made within three months from the time, when the title is thus conveyed. The levy of the defendant cannot therefore be considered as recorded in season; and the title of Priest and Clapp must be regarded as the better title.

The verdict is to be set aside

and a new trial granted.

JOHN COMINGS *versus* JOHN STUART.

In giving a construction to the *betterment* acts, the fifth section of the St. 1821, c. 62, should be considered in connexion with the first section of the St. 1821, c. 47. The actual possession named in the statute first mentioned for the term of six years or more before entry, is such a possession as the tenant holds by virtue of a possession and improvement under the latter.

Where one was appointed the general agent of the owners of a half township of land, to take care of their interests thereon, it was his duty to protect and preserve their estate and its title, and to watch over and secure all their rights, and to keep them informed of his acts and proceedings; and while such agency continues, he cannot be permitted to deny his agency as to one particular lot, and he cannot acquire a right to betterments thereon by a possession thereof for six years or more.

And if such agent enters into the possession of a lot, and continues it for more than six years, and makes improvements, but does not inform the owners of the land thereof, and they, without any knowledge of such possession or improvements, convey the lot to another person, who had knowledge of the improvements, the agent cannot enforce his claim for betterments against such purchaser.

THIS was an action of assumpsit for $500, for money laid out and expended. The general issue was pleaded and joined. The action was brought under the statute 1821, c. 62, § 5, for improvements made upon land in possession of the plaintiff upon which the defendant had entered as proprietor. It appeared that the plaintiff had been in possession of the land, prior to the defendant's entry, long enough to be entitled to betterments, if his possession had commenced and been continued under circumstances, which would legally give him that right.

It appeared that the land in controversy was a part of a half township of land which had been granted to the trustees of Belfast Academy, that in 1825 the plaintiff had agreed with the trustees to survey said half township, to put on certain settlers and to make a road, for all which he was to have conveyed to him 500 acres in the township and also to have 500 acres more, paying therefor thirty-five cents an acre; that the plaintiff performed on his part, and that he located himself upon one of the lots, extending his improvements upon the lots in question, which adjoined that upon which he had erect-

ed his buildings; and, that the plaintiff was the general agent of the trustees of the Belfast Academy to take care of their interests upon the half township.

On the 16th day of February, 1835, the trustees of Belfast Academy, by their deed of general warranty, conveyed to the defendant eighty acres of land, including the land in controversy. The defendant was fully apprised from the beginning of the improvements made by the plaintiff; but the jury found that the trustees at the time they made their deed to the defendant, had not been acquainted with the fact, that the plaintiff had made improvements upon any part of that land. The jury further found that the value of the plaintiff's betterments, if he was entitled to recover, was $250,00.

The plaintiff did not claim an interest in the land in controversy as any part of either 500 acres, to which he was entitled by the contract; but claimed the same as a disseisor of the trustees. Weston C. J. then holding the Court, ruled that, as he was the agent of the trustees, the plaintiff could not claim rights in this land against them or against their grantee, the defendant. The jury returned a verdict for the defendant, upon which judgment was to be rendered, if the Court should be of opinion that the action cannot be maintained. But if the Court should be of a different opinion, the verdict was to be set aside, a default entered, and judgment rendered thereon for the $250,00.

Fuller argued for the plaintiff, citing 9 Greenl. 62; 3 Fairf. 373; 16 Maine R. 60; 6 Pick. 178; 3 Fairf. 478.

F. Allen and *Hobbs*, argued for the defendant, and cited 13 Ves. 103; Paley on Agency, 33; Story's Agency, 196, 207; 6 Cranch, 148; 1 Mason, 341; 14 Ves. 199; 12 Mass. R. 329; 13 Mass. R. 241; 1 Greenl. 348.

The opinion of the Court was drawn up by

Shepley J. — The fifth section of the statute, c. 62, must be considered in connexion with the first section of the statute c. 47. The actual possession named in the former for the term of six years or more before entry, is such a possession, as

the tenant holds by virtue of a possession and improvement under the latter. And that is in substance a re-enactment of the statute of Massachusetts passed in the year 1807, c. 75, which received a construction in the case of *Knox* v. *Hook*, 12 Mass. R. 329. In that case it is said, that the intention of the statute manifestly was, "to provide for those settlers upon land, who had entered against the will, or without the knowledge of the proprietors." And that construction was approved in the case of the *Proprietors of the Kennebec Purchase* v. *Kavanagh*, 1 Greenl. 348. The present case states, "that the plaintiff was the general agent of the trustees of the Belfast Academy to take care of their interests upon the half township." As such it was his duty to protect and preserve their estate and its title, and to watch over and secure all their rights, and to keep them informed of his acts and proceedings. And whatever he did on their lands thus committed to his care, the law considers as done for their benefit. Nor did he enter upon the lands against their will or without their consent. He was authorized to enter upon them and did so with their knowledge and approbation. His entries and acts may be considered as made and performed by his principals acting through him as their agent. And he cannot be permitted to deny that agency as to one particular lot or part of a lot, and to assert that he was acting contrary to his duty, against their will, and to the injury of their title. It is said that the trustees did not intend to convey his improvements to the defendant, who obtained a conveyance from them surreptitiously without their knowledge of the existence of such improvements. If so, it exhibits an instance of neglect of duty on the part of the plaintiff, who should have informed them of his proceedings on their lands; and then, if they had conveyed the fruits of his industry to another, he might have had just cause of complaint; and might perhaps have obtained from them a just compensation for them. If they are now lost both to him and the trustees, that loss may be imputed to his neglect to communicate the proper information to his principals.

Judgment on the verdict.

SILAS PIERCE *versus* JOSEPH WHITNEY.

An instruction to the jury, that an agreement by an indorsee of a note to give time of payment to the maker, in order to discharge the indorser from his liability, must be such, "*that the maker of said note could sustain an action against the indorsee, if he violates it*, is incorrect. The rule seems to be, that if the holder, by an agreement with the maker, has incapacitated himself to proceed against him, the indorser will be discharged.

An instruction to the jury inapplicable to the facts of the case, and calculated to have an influence on the verdict, although correct when applied to other facts, is an error sufficient to cause the verdict to be set aside.

ASSUMPSIT against the defendant as indorser of a note of which this is a copy.

"3378,62. Boston, May 18, 1837.

"Six months from date, value received, I promise to pay to the order of Joseph Whitney three thousand three hundred and seventy-eight dollars and sixty-two cents.

"Luther C. White."

Although dated at Boston, the note was made and indorsed at Calais.

It appeared from the protest of a notary, that he was informed that Whitney, the indorser, had been notified to pay the note at the Commonwealth Bank in Boston; that he went to that Bank on the day the note fell due, and demanded payment, which was refused because the parties to the note had no funds there; that he made inquiries for them and could not find them or any dwelling or place of business of theirs within the city; and that therefore he made a demand on the maker, and gave notice of non-payment to the indorser, by putting notices, directed to them respectively at Calais, Maine, in the first mail.

By some accident the *report* of the case did not come into the hands of the Reporter, and the facts and instructions of the Judge presiding at the trial, cannot be here stated. They are believed to be sufficiently made known in the opinion of the Court.

Vance argued for the defendant, and cited, *Blanchard* v. *Hilliard*, 11 Mass. R. 85; 9 Wheat. 581; *Maine Bank* v.

Smith, 18 Maine R. 99; *Hutchinson* v. *Moody*, ib. 395; *Whittier* v. *Graffam*, 3 Greenl. 82; *Fabens* v. *Mercantile Bank*, 23 Pick. 330; *Williams* v. *Wade*, 1 Metc. 82; *Coffin* v. *Herrick*, 10 Maine R. 121; *Springer* v. *Bowdoinham*, 7 Maine R. 445; *Copeland* v. *Wadleigh*, ib. 143; *Barney* v. *Norton*, 11 Maine R. 353; *Miller* v. *Lancaster*, 4 Maine R. 161; *Steward* v. *Riggs*, 10 Maine R. 172; *Thorn* v. *Rice*, 15 Maine R. 263; *Leach* v. *Perkins*, 17 Maine R. 462.

Bridges argued for the plaintiff, and cited *Whitwell* v. *Johnson*, 17 Mass. R. 449; *Blanchard* v. *Hilliard*, 11 Mass. R. 85; Story's Conf. of Laws, 225; 3 Dane, 550; *Thorn* v. *Rice*, 15 Maine R. 263; 9 Wheat. 598; 3 Ohio R. 319; 4 McCord, 583; 6 Mass. R. 449.

The opinion of the Court was prepared by

WHITMAN C. J. — It is difficult to understand, from the report of the Judge, upon what he predicated his instruction to to the jury, "that if they found said Whitney was acquainted with the usage of said banks he was bound by the same;" and that, "the notice by mail to the maker was sufficient to hold the indorser." The proof, if any there was, of any usage of the banks, variant from the law merchant, is not stated. And if the usage were proved, that notice to the maker, by mail at Calais, from the plaintiff or his agents, the banks in Boston, was a sufficient demand upon the maker to render the indorser liable, upon notice to him of non-payment; still it would remain to be proved, that the indorser was conusant of such usage; without which he could not be considered as having made his contract with reference to it, so as to render it obligatory upon him. Was there any such proof in this case? The report says only, that "Whitney had, through his agent, Charles E. Bowers, negotiated paper at several of the banks in Boston; which was made payable at said banks." It appears to have been upon this evidence, that the Judge instructed the jury, "that if they found said Whitney was acquainted with the usage of said banks, he was bound by the same; and the notice by mail to the maker was a sufficient demand of pay-

ment on him to hold the indorser." The proof of the defendant's knowledge of usage was only as to his knowledge of their usage, in reference to notes *payable* at the banks; and it does not appear how that could have varied from the law merchant. In such case it was not even necessary to send notice to the maker. A demand at a bank there, and notice by mail to the indorser, was all that was necessary in such cases, without regard to any usage of the banks. The word Boston, preceding the date of the note, could have no effect upon the transaction, other than to lead a holder, who had no knowledge of the places of residence of the parties, which was not the case here, to suppose that the maker and indorser might be found there. The instruction, therefore, upon the facts as reported, was erroneous. The jury were not authorized to infer from such facts, that the defendant was apprised of any such usage as would be indispensable to the maintenance of this action.

As to whether the day of payment was extended, by agreement between the maker and the plaintiff, it seems to us, that the instruction to the jury was not what the facts demanded. There was, manifestly, an understanding between the parties, to extend the day of payment. It was, as reported, to the effect, that, if the maker would deposite, as collateral security, in the hands of Messrs. Bridges and Abbot, for the benefit of the plaintiff, securities to the amount of the note in question, that further time should be given for payment; and it does not appear that the defendant had notice of, or was consenting to it. The case finds, that, in pursuance of the agreement, the securities were furnished; and measures taken to collect them; and that the proceeds, when collected, were paid over to the plaintiff. We think the instruction, that the agreement must be such "that the maker of said note could sustain an action against the plaintiff if he violated it," was incorrect. This would imply that an action at law must be maintainable against the plaintiff if he violated his agreement. Surely if the agreement between the maker and payee were such as might be enforced in equity, by injunction or otherwise, the indorser would be discharged. The rule, as laid down, seems to be, that

if the holder, by an agreement with the maker, has incapacitated himself to proceed against him, the indorser will be discharged. *Bank of the United States* v. *Hatch*, 6 Peters, 250; *Leavitt* v. *Savage*, 16 Maine R. 72; *Greely* v. *Dow*, 2 Met. 176; *Gifford* v. *Allen & al.* 3 Met. 255.

The verdict therefore must be set aside and a new trial be granted.

JACOB AMEE *versus* GOWEN WILSON *& al.*

Where there is no rule of Court requiring the clerk to enclose a commission to take depositions to the commissioner under seal, and where the commission contains no directions that the interrogatories should not be seen by the deponent; if they are shown to him before the commission is delivered to the commissioner, this furnishes no legal impediment to the admission of the deposition.

In an action to recover the price of sails and rigging, where the plaintiff offers in evidence his original books of entry with his own suppletory oath, it is not competent for him to testify, that he was directed by the defendant to deliver the sails and rigging on board another vessel and that he did so deliver them.

The creditor is not entitled to recover interest on the amount of articles charged on account after the expiration of six months from the time of their delivery, by proof, "*that the usual term of credit on the purchase,*" *of such articles* at the place of the sale, "*was six months with interest after.*" The plaintiff would be entitled to such interest, only by proof of an agreement to pay it, or by proof of a demand of payment anterior to the date of the writ.

ASSUMPSIT against the defendants as owners of the brig George Henry, to recover the value of sails and other articles alleged to have been furnished by the plaintiff for said brig.

The general issue was pleaded and the defendants filed a brief statement of the statute of limitations. The writ bore date August 3, 1837. The declaration originally had but one count on the account annexed to the writ, in which the plaintiff alleges that the defendants promised to pay the principal sum on demand with interest thereon after six months from August 3d, 1827, the date of the first charge in the account, the date

of the last charge being August 8, 1831. The plaintiff, under leave to amend, added two other counts, in one of which the promise is alleged to be, to pay the same in six months from said third day of August; and in the other the promise is alleged to be, to pay the same on demand, with an averment of a demand of payment on said third day of August.

The plaintiff offered the deposition of G. W. Thacher to which the defendants' counsel objected; but it was admitted by WESTON C. J. presiding at the trial. The deposition was taken by a Judge of a court of record in New York, under a commission upon interrogatories. Before the commission was issued, the defendants' counsel requested the clerk in writing, annexed to the cross-interrogatories filed by him, that the interrogatories might be sent to the commissioner under seal of the clerk; and the defendants' counsel, in a cross-interrogatory, asked the witness whether the interrogatories were first submitted to him by any one, and by whom, before they were put by the commissioner? To this question, the witness replied, that the interrogatories were first shown to him on the 3d of July, 1841, by James O. Ward, and it appears by the return of the Commissioner that the deposition of the witness was taken on the 6th of July, 1841. The commission and deposition were referred to in the report of the case, but did not appear in the copies.

The plaintiff offered his book of original entries and tendered his suppletory oath, to which the defendants' counsel objected, on the ground that the charges in the plaintiff's account showed that his workmen were competent witnesses and afforded better evidence of the work performed, materials furnished and articles delivered, than the plaintiff's account book and suppletory oath; but he was permitted to testify, and said that the original entry was made against the brig George Henry of East Machias, Me., Gowen Wilson, John Bucknam and Eben Otis, owners; that the articles charged were furnished to the brig, and had not been paid for, and that the prices were usual and fair prices.

On cross-examination he testified, that he employed two hands and a boy in making the sails; that he delivered the articles to captain Longfellow on board schooner Superior of Machias; and that one of his men was present at the time and assisted him in making such delivery. On re-examination by his attorney, the plaintiff said, the defendants' counsel objecting, that Otis and Wilson originally applied to him for the sails and directed him to deliver them on board schooner Superior. The plaintiff introduced evidence to prove that the usual term of credit on the purchase of sails and rigging in Boston, was six months with interest after, and that they were sometimes sold by agreement on a credit of twelve months with interest after six. If the deposition of Thacher was properly admitted, and if the plaintiff was rightly admitted to his supplementary oath to substantiate his charges, under the circumstances of the case, and to testify to the original application and direction of the defendants, Wilson and Otis; and if on the original declaration the plaintiff is entitled to recover interest, or if the additional counts were rightly added, and interest is recoverable upon either of the counts upon the evidence in the case, judgment was to be rendered on the verdict; otherwise it was to be set aside and a new trial granted.

Hobbs contended that a new trial should be granted on either of these grounds.

1. The amendment of the declaration was improperly permitted, as it added a new cause of action.

2. Thacher's deposition ought not to have been admitted in evidence. The commission, with the cross-interrogatories, was shown to the witness by the plaintiff's agent before it was delivered to the commissioner, and the deponent was thereby informed of the questions he would be required to answer, and was enabled to frame his answers in anticipation of these inquiries. This course destroys the benefit of a cross-examination. It was the plaintiff's own fault, and it should exclude the deposition.

3. It was not competent for the plaintiff to prove the delivery of the articles by his supplementary oath. The articles

could not have been delivered without the intervention of third persons, and besides third persons were actually present at the time, and might have been produced to testify. It is only from the necessity of the case, that the plaintiff can be a witness in his own favor.

4. But if the plaintiff could be admitted to testify for some purpose, it was not competent for him to testify that he delivered the articles to captain Longfellow by the direction of the defendants. Longfellow was a competent witness. Nor should the plaintiff have been allowed to testify to the ownership of the vessel.

Porter, for the plaintiff.

The amendment was rightly allowed. It was merely a different form of declaring for the identical articles. *Bishop* v. *Baker*, 19 Pick. 517.

There is no rule, that a commission to take a deposition should be sent to the commissioner under seal. There is no evidence that the plaintiff, or any agent of his, caused or permitted the commission to be shown to the deponent.

This is a sailmaker's account and was entered on his books. It could not be expected that he would keep a clerk any more than any other mechanic, nor that the hands at work in the shop would see to the delivery of the articles, or know where or to whom they went. The books are the best evidence to be expected from the nature of the plaintiff's employment. The evidence is admissible as part of the *res gesta*. Greenl. Ev. 137, 138, and cases cited; 3 Dane, 321; *Prince* v. *Smith*, 4 Mass. R. 455; *Clark* v. *Perry*, 17 Maine R. 175; *Leighton* v. *Manson*, 14 Maine R. 208. This last case shows, that frequently it is mere matter of discretion in the presiding Judge, whether to admit the plaintiff's oath or refuse it. The Judge acted legally in admitting the testimony.

The plaintiff did not testify who were owners of the vessel, but merely to whom the charges were made on the books, at the time, as owners of the vessel. It was only on cross-examination by the defendants, and in answer to their inquiries, that the plaintiff stated to whom the articles were delivered

and by whose direction. They cannot therefore make that objection. But if the objection was open to them, there is nothing in it. It was admissible from the necessity of the case. He could state to whom the delivery was made; and that the person was the servant or agent of the defendants would come from other sources.

The opinion of the Court was drawn up by

Shepley J. — The amendments appear to have been for the same cause of action, and they might well be permitted. The witness, who was examined under a commission on interrogatories filed, was permitted to see the interrogatories before he was examined. It does not appear, that the commission contained any direction to the commissioner not to permit it, or that the clerk violated any order or rule of the Court in neglecting to enclose the commission under seal. There was no legal impediment to the reception of the testimony. It may be very proper for the Court, by rule or otherwise, to order, that commissions should be so issued as to prevent the evils supposed to arise from the execution of them as in this case.

If the charges of the plaintiff were for labor performed and materials found in making the sails, it might be proper to permit his books, accompanied by his oath, to be introduced to prove the items. But the plaintiff appears to have been permitted to testify to facts not entering into any items of charge as found in the books. That he was directed to deliver the sails on board of another vessel, the schooner Superior, and that he did so deliver them. And it appears also, that other persons assisted, both in making and delivering them. And the plaintiff appears to have been permitted to recover interest after six months upon proof, that the usual term of credit on the purchase of sails and rigging in Boston was six months with interest after. One is entitled to have his rights determined by his own contract or by the law; and he cannot without proof be considered as agreeing to any usual time of credit. The plaintiff would be entitled to such interest only by proof

of an agreement to pay it; or by proof of a demand of payment, anterior to the date of the writ.

The verdict is set aside,

and a new trial granted.

SETH TURNER *versus* RENDOL WHIDDEN.

Where one contracted with another, that his wife should, within six months, convey and release to the other party her right of dower in certain land then conveyed to him; if the deed, within the six months, was executed and delivered to one authorized by the grantee to receive it, or to one not so authorized, but who was afterwards authorized by him to retain it for his use, it would operate as an affectual conveyance within the six months; and the contracting party would have performed the condition of his contract.

Where the plaintiff had conveyed to the defendant certain land, and as part of the consideration therefor the defendant had contracted in writing to pay a certain sum then due from the plaintiff to a third person, on condition that the wife of the plaintiff should within six months release to the defendant her right to dower in the premises, there is sufficient consideration for the contract, even if the parties were in error in supposing that she had a right to dower.

And where the defendant contracts to pay, "a claim of S. D. of about one hundred and fifty dollars," he must pay the amount due to S. D. although it may amount to fifty dollars more than the sum mentioned.

THE action was brought on a contract, signed by the defendant, bearing date May 24, 1839. The material facts in the case are stated in the opinion of the Court.

At the trial before WESTON C. J., then holding the Court, the counsel for the defendant requested the Judge to instruct the jury, that the execution and delivery by the plaintiff to the defendant of the deed of release of dower was a condition precedent to his claiming performance on the part of the defendant; that by the contract, the plaintiff was bound to execute and deliver such deed within six months from May 24, 1839, to the defendant, or some one for his use, and give notice thereof to him; and that executing such deed within the time and sending it to McAllister, and McAllister's informing the defendant that he had received the deed and left it at

home, and defendant's replying, "very well, bring it out," was not sufficient performance of the contract on the part of the plaintiff, and that a tender of the deed after the expiration of the six months was too late, if the jury were satisfied that the defendant refused to receive it.

But the presiding Judge did not so instruct the jury, and did instruct them, that if they believed the testimony of McAllister, the deed being sent to him by the plaintiff within the six months for the use of the defendant, was a sufficient compliance with the contract on this point.

The verdict was for the plaintiff, but was to be set aside, if the requested instruction should have been given, or if that given was erroneous.

When the jury came into Court, they returned their verdict for the plaintiff, assessing the damages at $250. Before the verdict was affirmed, the Judge inquired of them, how they came to that result. The answer was, that they had no evidence as to the amount of damages, and took it from the declaration. It had been, however, in evidence, that Turner was liable to Dunn on a judgment for $156,34, debt, and $39,66, costs. The claim of Dunn was thus stated in the contract: "A claim of Samuel Dunn for about one hundred and fifty dollars."

The Judge informed the jury, that the amount returned was manifestly too large, and that the right sum would be $196,00, and interest from the date of the writ. The jury retired, and returned with a verdict for the plaintiff for $207,75.

J. Granger argued for the defendant, and cited, 10 Mass. R. 456, and 20 Johns. R. 418.

Fuller argued for the plaintiff, citing 2 Mass. R. 447; 9 Mass. R. 307; 12 Johns. R. 536; 20 Johns. R. 187; 6 Cowen, 617; 15 Wend. 556; 4 Day, 56.

The opinion of the Court was prepared by

Shepley J. — The plaintiff being the owner of part of lot numbered seven in Calais, on April 23, 1836, conveyed the same in mortgage to William Spring; and on March 6, 1838,

conveyed the equity to Manly B. Townsend in trust to secure the payment of debts or claims, for which he was liable to Hall and Duren, Abner Sawyer, and Samuel Dunn. The claim of Dunn arose from his becoming surety for the plaintiff on a bond payable to Heywood and Lovejoy. On May 24, 1839, the plaintiff conveyed the premises to the defendant, and received from him a contract to settle and pay the claims secured by the deed to Townsend on condition, that the wife of the plaintiff should within six months release to the defendant her right of dower in lot numbered seven. The defendant introduced a deed from Luther Brackett, as sheriff, bearing date on May 23, 1838, purporting to convey the equity to George S. Smith as the purchaser of it on a sale at auction. This sale must have been known to the defendant before he purchased of the plaintiff, for he had the day before purchased the title under it from Mr. Bradbury, to whom Smith had conveyed it. The plaintiff was not married to his wife until after the sale of the equity by the sheriff; and it is now said, that the defendant could receive no benefit from a release of the wife's dower. It appears from the dates of the conveyances, that the arrangements for a sale to the defendant must have been made at or about the time, when the plaintiff's right to redeem would be extinguished; and when, by redeeming from all the incumbrances, her right of dower would have become perfect. And even if the parties were in error in supposing, that she had a right of dower, it would seem, that in estimating the price to be paid by the defendant that right was esteemed to be a valuable one. The defence however rests principally upon the fact, that the deed releasing the dower was not delivered to the defendant within six months. McAlister, who had acted as the attorney of the plaintiff in making the conveyance to the defendant, testifies, that in the course of the summer the defendant inquired of him, if the deed releasing the dower had come, and was anxious, that he should get the deed. It appears, that the deed was duly executed on November 11, 1839, and was sent to McAllister, who soon after saw the defendant at Calais, and who being inquired of by him

if he had got the deed, answered, that he had received it, but had forgotten to bring it out. To this the defendant replied, well, bring it out. McAllister also testifies, that he carried the deed to the house of the defendant before the expiration of the six months, who was not at home; and that a few days after the expiration of the six months he offered him the deed, and he refused to receive it; and it appears from other testimony, that he did so, because, as he said, it was too late, and he should not accept it. If the deed within the six months was delivered to one authorized by the defendant to receive it, or to one not so authorized, but who was afterwards authorized by him to retain it for his use, it would operate as an effectual conveyance within the six months; and the plaintiff would have performed the condition of the contract. McAllister making no objection, when the defendant desired him to get the deed, and when he desired him after it was in his hands to bring it out, may be considered as consenting to hold the deed for the use of the defendant. And the defendant, when informed that McAllister had the deed, making no intimation, that he wished him to bring it to him within any particular time, may be considered as assenting, that he should thus hold it until it should be convenient for him to present it or forward it. If the defendant, after the expiration of the six months, had demanded the deed of him, and he had refused to deliver it, such testimony in addition to that before stated and connected with the fact, that he had carried it to the defendant's house for delivery would have authorized a jury to find, that he had consented to receive it for the defendant and to deliver it to him. And the defendant might have maintained trover for it. There does not therefore appear to be any substantial objection to the instructions of the presiding Judge.

In the contract the claim of Dunn is stated to be "for about one hundred and fifty dollars." But this is only a part of the description of the claim, and the intention is clear, that the defendant should relieve the plaintiff from it, whatever might prove to be the amount of it. The testimony, that Dunn had agreed to receive his own note for one hundred and

ten dollars in discharge of that claim, not being executed, could not destroy the right of the plaintiff, secured by the contract, to be relieved from all liability on account of it.

Judgment on the verdict.

JOHN H. BECKWITH *& al. versus* NOAH SMITH, JR.

To charge the drawer of a bill of exchange by putting a notice of non-payment into the mail, when he resides in a different State from that in which the demand on the acceptor was made, and when there is a town of the same name in at least two States, the direction of the notice should not only name the town in which the drawer resides, but also the State.

There should be proof, on the part of the plaintiff, that the letter giving notice to the drawer was placed in the postoffice in season to be carried by the mail of the next day after the bill was dishonored.

Proof that the notice was put into the postoffice at nine o'clock in the forenoon of the next day after the demand, merely, without showing that it was in season to be carried by the mail of that day, is not sufficient.

ASSUMPSIT against Smith as the drawer of a bill of exchange of which a copy follows: —

"$1000. Calais, June 12, 1839.

"Ninety days after sight, value received, pay to the order of Duncan Barber & Co. one thousand dollars, and place the same to my account, as per advice. Noah Smith, Jr.

"Isaac Clapp, Esq. Boston."

The bill was accepted by Clapp and indorsed by Duncan Barber & Co., and by the plaintiffs, and "on account of the Commercial Bank, of New Brunswick. A. Ballock, Cashier."

To prove a demand on the acceptor, and notice to the defendant, the plaintiffs offered in evidence the protest of a notary public in Boston, Massachusetts, wherein he stated that on Oct. 11, 1839, he carried the bill to the counting room of Clapp, the acceptor, in the city of Boston, and demanded payment, which was refused, saying, we have received no funds to pay it; and that he thereupon protested the bill for non-payment, and on the same day left notice of the default of payment with an indorser named, "and next morning, 9 o'clock, A. M. put like notice into postoffice, directed to Noah Smith,

Jr. Calais, and to A. Ballock, cashier, St. John, N. B. and enclosed like to Thomas Bailie."

The defendant then proved "that there is a post-town in the county of Washington in the State of Vermont called Calais." The defendant was described in the writ as of Calais in the county of Washington and State of Maine.

A default was entered by consent, and judgment was to be rendered thereon, "if in the opinion of the Court a jury could, from the evidence, infer legal notice to the defendant;" otherwise the default was to be taken off.

J. Granger, for the defendant, contended that there was no sufficient evidence of notice to the defendant of the non-payment of the bill. The notice was not directed to Calais in Maine, and would have been as likely to have been sent to Calais in Vermont, or any other Calais, as to the one where the defendant resided. Bayley on Bills, 510; 1 Ry. & M. 149.

The law requires, that if notice is sent by mail, the letter should be put into the postoffice on the same day of the demand, or in season to go by the first mail of the succeeding day. The plaintiff must prove the fact affirmatively, and not leave it to mere conjecture. Here there was no evidence, either in the protest or in any other way, that the letter was put into the office sufficiently early to go by the mail of the next day. *Goodman v. Norton*, 17 Maine R. 381.

Bridges, for the plaintiffs, said that it was sufficient to direct the letter to the same place mentioned in the bill, and the like certainty is sufficient. Chitty on Bills, 137; Ry. & M. 246; 2 B. & Ald. 456. The direction on the letter was the same as that on the bill.

It is enough, and all the law requires, if the notice is sent by the next practicable, convenient mail. Nine o'clock in the morning is before the banks are open for business, and as early as could be reasonably expected. If the defendant intended to have made that a point, he should have gone to the jury, and they would have been justified in returning, that it was put in seasonably for the first mail. The Courts have not yet

decided, that it must go by the first mail of the next day, but only by the first convenient one. 2 Stark. Ev. in 2 vols. 158, 159, 160, and notes; *Whitwell* v. *Johnson*, 17 Mass. R. 449.

The opinion of the Court was drawn up by

SHEPLEY J. — It appearing, that the notary knew, that the bill came from a bank in the province of New Brunswick, and that he directed a notice to the cashier at St. John, the jury might have inferred, that he would be informed, that the residence of the drawer was at Calais adjoining that province. But there is nothing authorizing the inference, that the notary did not direct his notice to the drawer precisely as stated in the protest without any designation of the State, in which the town is situated. And if so directed it might be mailed for delivery at a town of the same name in another State. In the case of *Walter* v. *Haynes*, Ry. & M. 149, it was held, that the letter giving notice should be fully and particularly directed to the person at his place of residence, and put into the post-office to make it equivalent to proof of delivery to him.

The case presents another difficulty. There should be proof, that the letter giving notice to the drawer was placed in the postoffice in season to be carried by the mail of the next day after the bill was dishonored. The protest states, that it was put into the postoffice the next morning at nine o'clock in the forenoon, but not that it was in season to be carried by the mail of that day. Nor is there any testimony tending to prove the time of the departure of the mail from Boston on that day. And a jury would not be authorized to infer it without any testimony.

The default must be taken off and the case stand for trial.

JOSEPH GRANGER, Adm'r. *versus* JOSEPH N. CLARK.

A judgment of a court of record within the State, of general jurisdiction, and proceeding according to the course of the common law, where a want of jurisdiction is not apparent on the record, cannot be impeached by the parties to it, so long as it remains unreversed.

If in such case fraud, or want of jurisdiction actually existed, it must be made to appear in the appropriate process to obtain a reversal of the judgment; and until such process has been resorted to, and has proved effectual, the judgment is conclusive between the parties to it.

But when judgments are collusively procured between the parties, with a view to defraud some third person, the latter is not estopped to show the fraud.

DEBT on a judgment recovered by G. I. Galvin, on whose estate the plaintiff as administrator, at the C. C. Pleas for this county, Sept. Term, 1837, against the defendant.

In this action the defendant pleaded *nul tiel record*, and by brief statement averred, "that he never was served with any process, or had any notice whatever of the original process, upon which the supposed judgment was rendered, or appeared to or in the same, or authorized any one to appear for him; that he never was an inhabitant or resident of the State of Maine; that the said judgment was obtained against him by fraud; that the names of the supposed trustees in the original process were collusively inserted therein for the purpose in that way of making or effecting a service on the defendant, and bringing the cause within the jurisdiction of the Court here; that the said supposed trustees never had any goods or effects of the said Clark in their hands or possession; and that the said Clark did not owe the said Galvin the sum sued for in the said original writ, or any part thereof."

The plaintiff adduced in evidence the judgment declared on, and proved by the record, that the trustees summoned in the original suit were defaulted.

The trial was before WESTON C. J., who ruled that the matters set forth in the brief statement, if shown to be true, constituted no defence to this action. The defendant was thereupon defaulted. The default was to be taken off, if the matters contained in the brief statement, if proved, would, in

the opinion of the Court, be available in defence of this action.

Bridges argued for the defendant.

The positions taken in the defence are stated in the opinion of the Court. The counsel cited, Story's Con. of Laws, 508; 6 Pick. 232; 9 Mass. R. 462; 1 Fairf. 278; 2 Fairf. 89; 6 Com. Dig. Estoppel, 1 and 3; 14 Maine R. 351; 3 Johns. R. 256; 1 Stark. Ev. (in 2 Vol.) 253; 15 Mass. R. 207; 19 Johns. R. 164.

J. Granger, pro se.

This judgment appears regular on its face, and was rendered in a court of general and competent jurisdiction, within this State. It is conclusive until reversed by writ of error, or review. 11 Mass. R. 597; 13 Mass. R. 264; 1 Pick. 435; 4 Mass. R. 382; 6 Mass. R. 328; 7 Mass. R. 399; 9 Mass. R. 124; ib. 143; 11 Mass. R. 227; 15 Mass. R. 185; 1 Stark. Ev. 208; 18 Pick. 393; 17 Mass. R. 237; 6 Pick. 422; 3 Pick. 33; 13 Pick. 53; 9 Mass. R. 462; 1 Fairf. 278; 3 Shepl. 73.

The opinion of the Court was prepared by

WHITMAN C. J.—The opinion given in this case, by the late Chief Justice of this Court, we presume, was upon the ground, that a judgment of a Court of record, proceeding according to the course of the common law, could not be impeached by either of those appearing of record to be parties thereto, so long as it remained unreversed. The counsel for the defendant contends, that, if a judgment be obtained by fraud, or if rendered by a Court not having jurisdiction, it may be treated, by the party injuriously affected by it, as a nullity; and that it is competent for a defendant to show, by evidence *aliunde*, that he was not amenable to the jurisdiction of the Court; and that, in such case, he may defend himself against a judgment recovered against him without showing it to have been reversed. And there are *dicta* which may seem to tend to fortify these positions. It is commonly said, that fraud

vitiates every thing, and that a judgment rendered by a Court, without jurisdiction, is a nullity.

But fraud and want of jurisdiction must be made apparent. The want of jurisdiction is sometimes apparent upon the face of the record, as in the case of tribunals of a limited jurisdiction. If, on looking at the subject matter of the judgment, it can be clearly seen to be not within the jurisdiction of the Court rendering it, it may be treated as a nullity without a reversal. But where a want of jurisdiction actually exists in a domestic tribunal of general jurisdiction, and is not apparent upon the record, there must be some appropriate mode of ascertaining it. This mode is by writ of error. And until such appropriate mode has been resorted to, and has proved effectual, the judgment must be considered as conclusive, and as importing absolute verity. The same may be said with regard to fraud in obtaining a judgment. This is never apparent upon the face of the record. Domestic judgments therefore, if fraudulently obtained, must be considered as conclusive until reversed. *Peck* v. *Woodbridge*, 3 Day, 30; *Simms* v. *Slackum*, 3 Cranch, 300; *Cook* v. *Darling*, 18 Pick. 393.

There are cases, such as are cited by the counsel for the defendant, of foreign judgments, and judgments rendered in the other States of the Union, in reference to which a different doctrine, when they come in question here, necessarily prevails. And when judgments are collusively procured between parties, with a view to defraud some third person, not a party thereto, the latter is not estopped to show the fraud. But these are very distinguishable from the case before us.

Judgment must be entered on the default.

GEORGE WELLS *versus* SEWALL WATERHOUSE.

If the defendant represented himself to be an agent for the owners of a tract of land, when in fact he was not, and by such representation the plaintiff was deceived, and induced to pay him for trespasses committed thereon, an action may be supported to recover back the amount so paid.

But if the plaintiff has sustained no loss by reason of the false representations, he cannot recover.

ASSUMPSIT to recover back a sum of money alleged to have been paid by the plaintiff to the defendant for timber cut on No. 43, on the Bingham Penobscot Purchase, on the representation of the defendant, that he was agent of the owners of that tract, when in truth he was not.

WESTON C. J. presiding at the trial, instructed the jury, that if they were satisfied from the evidence, that the defendant represented himself to the plaintiff as agent of No. 43, when in fact he was not, and received payment for timber cut thereon, the plaintiff was entitled to recover back the amount so paid. The verdict was for the plaintiff, and was to be set aside, if the instruction was erroneous.

There was a motion for a new trial, because the verdict was against evidence, as the law was given to the jury on the trial.

J. Granger and *Bridges*, for the defendant.

Fuller, for the plaintiff.

The opinion of the Court was drawn up by

WHITMAN C. J. — In this case we see no ground to question the correctness of the Judge's instruction to the jury. If the defendant represented himself to be an agent for the owners of township No. 43, when in fact he was not, and, by such representation, the plaintiff was deceived, and induced to pay him for a trespass committed thereon, this action might well be supported to recover back the amount paid.

But on looking into the evidence as reported, we are inclined to think, that justice has not been done by the verdict. The evidence, it is true, tends strongly to show, that the defendant pretended to be the agent of the owners of No. 43.

If however, he did not receive satisfaction for any trespass other than upon No. 42, for the owners of which he was agent, the plaintiff has sustained no loss by reason of the false representation of the defendant; and in such case can have no foundation for a claim against him; and the motion for a new trial ought to prevail. There is no reason for supposing, that more than one settlement for trespass on the townships No. 42 and 43, or either of them, ever took place. That settlement was made about the second day of June, 1838. Jenkins testifies that the plaintiff on that day, said he and the defendant had made a full settlement for the trespass committed, and that he had agreed to pay therefor, including all charges for exploring, surveying, &c. $750 in boards. James P. Vance testified, that early in the summer, in the year in which the logs came down, the parties, in his office, agreed upon a settlement for trespass committed on No. 42; that he does not recollect to have heard 43 mentioned in the course of their conversation; that the parties differed, for sometime, about the quantity to be accounted for; the defendant insisting that it should be for 200 M. as stated in Palmer's survey, and the plaintiff insisting that both that, and another survey by Powers & Knights, which the defendant had also caused to be made, whose bills of their respective surveys were then presented, were both too high. But that finally it was agreed between them, that half the difference between the two surveys should be added to the lowest, that of Powers and Knights; and that the settlement should be made accordingly. This made the quantity to be settled for about 178 M. feet, which was to be paid for in boards, estimating the timber taken at $3,50 per M. feet, which would amount to $623,00. And Jenkins testifies, that the plaintiff told him, he had agreed to pay also all the expenses of exploring up river to ascertain the quantity cut. And it appears reasonable to believe, from the statement of the witnesses, that the expenses might well amount to the residue of the $750,00, deducting the $623,00. On turning to the testimony of Palmer, Powers and Knights, it clearly appears, that, in their bills, no timber was included, except what

was cut on No. 42. James Sargent testifies, that he was agent for the proprietors of No. 43; and that in ascertaining what the plaintiff cut on that lot, he found it to amount to 200 M. feet; and that as near as he could estimate it, the plaintiff cut the same winter, on No. 42, about 150 M. and that the plaintiff paid him for the 200 M. feet he cut on No. 43. Hence it seems to be evident that the plaintiff cut on No. 42 from 150 to 200 M. feet, and also on No. 43, 200 M. feet. Now if he had settled with the defendant for what he cut on both lots, the amount would have been double the amount, or nearly so, of what he did actually pay.

On a review of the evidence, it seems manifest that the plaintiff has never paid the defendant any thing for timber cut on No. 43.

The verdict, therefore, for the plaintiff, is clearly against evidence, and must be set aside, and a new trial be granted.

IRA P. ALLEN & *al. versus* INHABITANTS OF COOPER.

If a committee be chosen by a town "to lay out and let the remainder of said road to the lowest bidder," their agency does not extend farther than to the making of a contract to make the road; and they have no authority to accept the work, in behalf of the town, as a road made according to the contract, or to waive performance of the contract according to its terms.

And if a committee of three had the power, one of them, without authority from the others, cannot waive the performance of any of the terms of the contract.

If there was an agreement in the first instance as to the time within which a contract was to be performed, and there has been no waiver of it, time is of the essence of the contract.

ASSUMPSIT for labor performed by the plaintiffs in making a road in the town of Cooper.

At a meeting of the inhabitants of the town of Cooper, on Oct. 1, 1838, the following vote was passed. "Voted, that a committee be chosen to lay out and let the remainder of said road to the lowest bidder. Nathaniel Sawyer, Warren Gilman and James Tyler were chosen said committee." This vote

conferred on the committee all the power they had to act for the town. All the committee acted in letting out the making of the road. One of the number was never notified of any meeting of the committee afterwards, and never in any way acted after that time. Before any thing further was done, or pretended to be done, one of the other two members of the committee had ceased to be an inhabitant of Cooper, and had been set off to another town. The facts in the case, and the rulings and instructions of the Judge, presiding at the trial, are found in the opinion of the Court.

Thatcher, for the defendants, among other grounds, contended, that the committee had no authority whatever from the town, but merely to let out the making of the road. It was not competent for the whole of them to bind the town by any act after that was done. They had nothing to do with the making of the road. There was no pretence that the road was made according to the stipulations in the contract, and the committee could not waive the performance of it, according to the agreement. A waiver could only be made by the town. *Keyes* v. *Westford*, 17 Pick. 273.

But if the committee had authority to act further than merely letting out the making of the road, they did not act legally. All three should have concurred, and certainly all should have been notified, in order to make their acts binding on the town. *Damon* v. *Granby*, 2 Pick. 345. But one of them had ceased to be a member, and a majority did not act.

Where an act is to be performed within a time fixed by the parties, it is of the essence of the contract.

Bridges, for the defendant, contended that the fact that one of the committee had been set off to another town, did not impair his right to act for the town, so long as they continued him their agent. It is not necessary that an agent should reside within the town.

They were chosen officers of the town for a certain purpose, and it is always competent for such officers, or agents, to act by a majority.

The road was accepted by the committee of the town, and

that was a waiver of performance at the day. There was nothing in the vote of the town requiring the road to be finished on any given day. The committee fixed a day, and they had power to extend the time and fix another day.

The inhabitants of the town had seen the work progress, and had seen the plaintiffs expend their labor and their money, and they had used the road, when made. Time is not so the essence of the contract, that the town can let the plaintiffs go on and finish the road, and then use it, and have the full benefit of it, without paying any thing. *Hill* v. *Sch. Dis.* 2, *in Milburn*, 17 Maine R. 316; *Norris* v. *Sch. Dis.* 1, *in Windsor*, 3 Fairf. 293.

The opinion of the Court was drawn up by

WHITMAN C. J. — The suit of the plaintiffs, against the defendants, is for work and labor performed in making a road in the defendants' town. The evidence tended to show, that in the fall of 1838, the inhabitants of Cooper, at a legal meeting for the purpose, chose a committee of three to make a contract, with some one, to construct the road on which the work was done; and that the committee, so chosen, agreed with the plaintiffs to perform the service, in the course of that, and the next year.

There was no pretence that the plaintiffs fulfilled their contract, within the time agreed upon, if at all. The plaintiffs produced one of the committee, who testified that he thought the road was made about as well as it was expected it should be; and the plaintiffs, thereupon, offered a certificate signed by him, and another member of the committee, signifying their acceptance of the work, as being according to contract; to the introduction of which the defendants objected; because the witness had, before signing it, ceased to be an inhabitant of Cooper, and because the committee were not authorized by the defendants to determine, whether the road had been made according to contract or not.

But the Judge, presiding at the trial, overruled the objection, and admitted the certificate. If this ruling was incorrect, ac-

cording to the Judge's report, the verdict, which was for the plaintiffs, is to be set aside, and a new trial is to be granted.

We do not find in the case any evidence of authority, delegated by the defendants to the committee, to make and deliver to the plaintiffs any such certificate, or to determine whether the road had been well made.

All the authority, which appears to have been conferred upon the committee, by the defendants, was simply that of making a contract. Having made the contract with the plaintiffs, they were *functus officio*, and do not seem to have been clothed with any further powers. The certificate, therefore, should not have been admitted.

A request was made, by the counsel for the defendants, that the Judge should instruct the jury, that the non-performance of the contract, within the time stipulated, was of the essence of the contract, and therefore upon that ground, the plaintiffs ought not to recover.

This the Judge declined doing; and instructed the jury that, "as the committee were not limited by the vote, and as the plaintiffs had completed the work under the supervision of one of them, and no objection was interposed by the others, time was not so far of the essence of the contract as to deprive the plaintiffs of their remedy." What the precise import of the instruction, thus given, was understood by the jury to be, it may be difficult to comprehend. Time was or was not of the essence of the contract. If there was no agreement, as to the time within which the labor was to be performed, or if there was, by any person competent to the purpose, a waiver of the part of the contract, as to the time of performance, then, whether time was of the essence of the contract or not, was out of the case. But if there was an agreement, in the first instance, as to the time within which the contract was to be performed, and no waiver of it, then, at law, time was of the essence of the contract, and could not be dispensed with in deciding the case. *Norris* v. *Sch. Dis. in Windsor*, 12 Maine R. 293.

If the Judge meant to say to the jury, that the supervision of one of the committee was a waiver of the time prescribed for the fulfilment of the contract, he does not seem to have instructed the jury in a manner that could have been distinctly intelligible to them; and if such were his meaning, and it could have been so understood by the jury; we think the facts set forth would not authorize any such instruction. Any one of the committee, without authority from the others, even if they were authorized to dispense with any of the terms of the contract, which we think they were not, surely could not properly be considered as having authority for such purpose.

We think therefore that the Judge should have instructed the jury explicitly, as requested, that time was of the essence of the contract; or if it was not, that he should have stated why it was not, or why it was not applicable to this particular case. Not having done so we cannot deem the instruction to have been well given. The verdict therefore must be set aside, and a new trial be granted.

GEORGE MCKENZIE *versus* PETER I. NEVIUS *& al.*

By the usage of trade agents and factors acting for persons resident in a foreign country, are held personally liable for contracts made by them for their employers, although they fully disclose at the time the character in which they act.

As a general rule, insurance brokers have a lien upon all policies in their hands, procured by them for their principals, for the payment of the sums due to them for commissions, disbursements, advances and services, in and about the same.

It is also a general rule, that where agents employ sub-agents in the business of the agency, the latter are clothed with the same rights, and incur the same obligations, and are bound to the same duties in regard to their immediate employers, as if they were the sole and real principals.

But in such case neither the agent, nor the sub-agent, has a lien upon the policy of insurance for the payment of the balance of his general account, embracing items wholly disconnected with the business of the agency.

The mere fact, however, of intermixing the charges of the agent in that business with other items in general account, does not destroy his lien.

Where frequent settlements of accounts, with debt and credit, are made between the parties, and balances carried forward to new account, and no appropriations have been expressly made by the parties, the law will appropriate the credits to the extinguishment of the oldest charges.

If a foreigner has employed an agent to procure insurance on his vessel, and the agent has employed a sub-agent for the purpose, and any lien he had has been removed by payment, the owner may bring his action directly against the sub-agent, and recover money received by him on account of the policy.

THE plaintiff, an inhabitant of the Province of New Brunswick, built the brig Thistle, within that province, in 1834, and has since been her sole owner. While the brig was on the stocks, the plaintiff requested Buck & Tinkham, merchants residing at Eastport in this State, and doing business there in partnership, to procure her to be insured; and on the 4th of December, 1834, they wrote to the defendants, merchants in the city of New York, doing business there in co-partnership, in the name of Peter I. Nevius & Son, requesting them to have the insurance effected. Insurance was obtained by them on the brig in the same month, the risk commencing Dec. 1, 1834, for one year, the policy stating that, "Peter I. Nevius & Son, on account of whom it may concern, do make insur-

ance," &c.; and the insurance was renewed in the same way in 1835. In 1836 the partnership of Buck & Tinkham was dissolved, and Buck continued the business on his own account, and had the same authority from the plaintiff. The policy was renewed, in the same manner, in 1836, 1837, and 1838. In the first, and in all subsequent letters from Buck & Tinkham, and from Buck to the defendants, requesting them to effect the insurance, the defendants were informed that the plaintiff was owner of the brig, and throughout the transactions, it was understood, that the insurance was procured for the benefit of the owner. In November, 1838, being prior to the last renewal of the policy, the brig sustained a partial loss upon the coast of Ireland, and the fact came to the plaintiff's knowledge in Feb. 1839, when he requested Buck to act as his agent in adjusting the loss with the insurers, and Buck corresponded with the defendants on the subject, stating that the plaintiff had requested him so to act. Buck died Oct. 16, 1839, before any adjustment of the loss had been made with the company, and it appeared, that his estate was insolvent. On October 22, 1839, the plaintiff, being indebted to the Frontier Bank at Eastport, assigned the proceeds of the insurance to the bank, and drew on the insurers in favor of the administrator of Buck, which order was forwarded by him to the defendants for collection, and they were directed to place the amount received in the Merchants' Bank to the credit of the Frontier Bank. The defendants acknowledged the receipt of this order, Oct. 29, 1839. The loss was adjusted, and in December, 1839, the insurers paid to the defendants on that account, $3997,89, and they then sent an account to the administrator of Buck, wherein they credited the sum of $2840,04 to Buck's estate, being the balance of their general account against him, and accounting for the balance as, "cash deposited in Merchants' Bank, N. Y. to credit of Frontier Bank, Eastport, per order of J. C. Noyes," the administrator of Buck. On receiving the account, the administrator notified the defendants, that he objected to this course. At the time of Buck's death, the plaintiff was indebted to him on general

account in the sum of $3658,84, and the Frontier Bank held the plaintiff's note, indorsed by Buck & Tinkham for $4000, and the note of Buck, indorsed by the plaintiff, for $3550,00. On January 7, 1840, the plaintiff settled his account with the administrator of Buck, and gave his negotiable note for the balance. This action was commenced January 23, 1840, to recover the $2840,04, which the defendants had retained, and passed to the credit of Buck's estate, and is prosecuted for the benefit of the Frontier Bank. Prior to the loss, the plaintiff had no direct communication with the defendants. The premiums were charged by the defendants to Buck & Tinkham and to Buck in general account, and the return premiums and receipts for losses credited in the same way. On July 15, 1839, while negotiations were pending for the adjustment of the loss with the insurers, Buck stated to the defendants, that the money to be received for this loss was to go to them, and they on that account extended a further credit to Buck, he having shortly before sustained a heavy loss by fire in Eastport. In October, 1839, the plaintiff saw a paper wherein it was stated that the defendants intended to balance their account against Buck out of this money, and it did not appear that he notified them of any objection thereto. The amount charged and credited by the defendants to Buck, for premiums paid and sums received for return premiums, were by him, up to the time of his death, charged and credited to the plaintiff in general account, to which he made no objection.

The letters, accounts, depositions and admissions, from which the facts are obtained, are quite voluminous, but it is believed, that the state of the accounts at particular times will be sufficiently understood from the opinion of the Court.

D. T. Granger argued for the plaintiff, and among other positions, contended for the following.

The defendants have no lien upon this fund.

They acted at the request of Buck for the use of the plaintiff, and carried their charges into general account with Buck, and with his assent. They chose to trust to the personal credit of Buck, and cannot now retract.

If however, they had a lien, it could only be to the extent of the advances made on account of the insurance of this brig, which have all been paid. Story on Agency, § 390, 397. Where there is no particular appropriation made at the time, and balances of general account are carried forward from time to time, the law appropriates payments to the satisfaction of items first due. 8 Taunt. 149; 1 Metc. 166; 9 Wheat. 720; 4 Mason, 333; 3 Sumn. 99.

The defendants had no lien on this fund for their balance of general account against Buck, nor had Buck any such against the plaintiff. Story's Ag. § 366, 377, 389; Livermore's Ag. 242.

The sub-agent can avail himself of the lien only when the agent could do so, when, as in this case, the sub-agents knew that Buck was but an agent of the plaintiff; 7 B. & Cr. 517; Story's Ag. 377; 2 Campb. 218; 2 Johns. C. R. 327; 1 East, 335; 1 Bingh. 20. Long before this money was received, Buck's debt against the plaintiff had been assigned to the Frontier Bank, to secure a debt where Buck was liable, and the plaintiff had given his negotiable note to his administrator for the balance.

The direction of Buck to the defendants to place the amount to be received for the loss to his credit, could give them no rights. He had no power to pledge the plaintiff's property to pay his debts. Story's Ag. 219, 372; Paley's Ag. 214, 340; Liv. Ag. 129, 149. Besides, Buck died before the money was received, and if any power was given previously, it was revoked by his death.

It does not appear that the plaintiff noticed the intention of the defendants to apply this money, when received, to pay any debt from Buck to them. He certainly did not assent to it. But if he had, it would have given the defendants no rights, as they knew he had before that time assigned the fund to the Frontier Bank.

There is sufficient privity of contract to enable the plaintiff to maintain this action. The defendants knew that the insurance was made for his benefit, and that he was the owner of

the vessel, and Buck merely his agent. The plaintiff could have maintained an action against the insurers on this policy. Story's Ag. 405; 1 Metc. 166; Liv. 200. And he may follow the money wherever it is. 8 Taunt. 159; 17 Mass. R. 560; 17 Pick. 159.

Hayden argued for the defendants, making the following, among other objections to a recovery by the plaintiff.

The action cannot be maintained, because there was no privity between the parties to this suit.

The plaintiff being a foreigner, the defendants were personally liable to the insurers. Buck & Tinkham, and Buck, were liable as principals to the defendants, and they alone were liable to the plaintiff. The plaintiff assented to the exclusive dealings between the defendants and Buck throughout, and this appears by the mode of keeping the accounts between all the parties. Had he not been already paid, the plaintiff's remedy was on Buck alone, and he can maintain no suit against the defendants. Story's Ag. 88, 255, 208, 426 and note, 290; *Paterson* v. *Gandasequi*, 15 East, 62; *DeGaillon* v. *L'Aigle*, 1 B. & P. 368; *Thompson* v. *Davenport*, 9 B. & Cr. 338; *Stephen* v. *Badcock*, 3 B. & Adol. 354; *Pinto* v. *Santos*, 5 Taunt. 447.

If the plaintiff was in a position to maintain a suit against these defendants, he has no ground of action. The defendants, as sub-agents, had a lien upon this policy, and upon the money to be received upon it, for their complete indemnity. They had so by the usage and practice between all the parties, shown by their accounts and dealings. 4 Burr. 2214; Story's Ag. § 386; 2 Kent, 4th Ed. 613. They had by the act of Buck, the authorized agent of the plaintiff, in directing the money to be received for the loss to be passed to Buck's credit, and obtaining a further credit from the defendants on that account. This money was appropriated by Buck to pay his debt to the defendants. It was equivalent to a payment by them to Buck, which would have discharged all claim of the plaintiff. Story's Ag. 399; 4 Campb. 349; 17 Pick. 159.

The direction of Buck to the defendants to credit the

amount received to him, and his statement to them that the same should go in payment of the debt then due, amounted at least to an assignment to them of Buck's rights against the plaintiff. Buck had the right to appropriate this money to pay the balance of his account against the plaintiff. Buck was his general agent, and as such had a right to retain it.

Buck had also an interest in the policy, and a lien upon it, and had a right to have the money come into his hands, and on this ground also could appropriate it to the payment of his debt to the defendants.

No acts of the administrator of Buck could change the state of affairs existing at the time of his death. It was not in his power to take this fund from the defendants, and transfer it to the bank.

Hobbs, for the plaintiff, replied.

The opinion of the Court was drawn up by

TENNEY J. — The plaintiff being an inhabitant of New Brunswick, and having from time to time employed his agents residing here, to cause an insurance to be made upon his brig, which insurance was effected by the defendants, at the request of these agents, a question is presented, whether the principal or the agents were liable to the defendants, for the expenses incurred and services done by them.

By the usage of trade, a rule may be considered as established, that agents or factors acting for merchants resident in a foreign country, are held personally liable for contracts made by them for their employers, notwithstanding they fully disclose at the time the character in which they act. This arises from the consideration, that the merchant abroad and his ability to discharge his obligations may be unknown to those, who assume pecuniary responsibility, or make advances or perform services on his account; the presumption is, that the credit is given exclusively to the foreigner's agent, unless rebutted by an agreement express or implied; and that the party dealing with the agent intends to trust one, who is known to him and resides in the same country and subject to the same laws, as

himself, rather than trust to one, who if known cannot from his residence in a foreign country, be amenable to those laws, and whose ability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies. Story's Agency, § 268, 290, 400.

The facts in the case at bar show that all parties conformed to this principle, that the defendants made their charges exclusively to the plaintiff's agents, and did not seek to hold him responsible. These charges were acknowledged by those against whom they were made, by being put upon their account against the plaintiff, who on his part treated them as matters between him and his agents. It may be considered, that although the defendants effected the insurance for the benefit of the plaintiff, it was on the account and credit of Buck & Tinkham, until that firm was dissolved, and of Jonathan Buck afterwards. The latter were considered by themselves and the plaintiff, judging from their acts, as the contracting parties to the fullest extent of the object, for which they were employed by him.

2. Had the defendants, for their indemnity, a lien on the policy, by virtue of which they received the money in question?

From the usage of trade, agents have often a right to retain a thing of which they have possession, until some charge upon it is removed or satisfied. Common carriers, wharfingers and artificers have this right upon goods, committed to their custody, until some expense incurred, or some service done upon them is paid for. Such are particular liens and are favored in law, inasmuch as they are founded in equity and general convenience in trade and commerce. Story's Ag. § 354. The delivery of a policy of insurance will give a lien thereon. Ibid § 361. But this lien is confined to the cases, where the debt or demand is due from the very person for whose benefit the party is acting, and not from a third person, although the article on which the lien is asserted be claimed through him. Ibid § 361.

It is now incontrovertibly established as matter of law de-

rived from long usage, and admitted without proofs, that factors have a general lien upon every portion of the goods of their principal, in their possession. Insurance brokers have now by general usage a lien upon policies of insurance in their hands, procured by them for their principals, and also upon the moneys received by them upon such policies. In cases of agency there generally exists a particular right of lien in the agent for all his commissions, expenditures, advances and services, in and about the property or thing intrusted to his agency, whenever they were proper or necessary or incident thereto. Story's Ag. § 373, 376, 379.

"Where agents employ sub-agents, in the business of the agency, the latter are clothed with precisely the same rights and incur precisely the same obligations, and are bound to the same duties in regard to their immediate employers, as if they were the sole and real principals." Story's Ag. § 386. "A sub-agent employed by an agent, to do a particular act of agency without the privity or consent of the principal may acquire also, a lien upon the property thus coming into his possession against the principal, for his commissions, advances, disbursements and liabilities thereon, if the principal adopts his acts, or seeks to avail himself of the property or proceeds acquired in the usual course of his sub-agency. He will be at liberty to avail himself of his general lien against the principal to the extent of the lien, particular or general, which the agent himself has against the principal, by way of substitution to the rights of the agent." Ib. § 389.

When these principles are applied to the facts in this case, there can be no doubt, that the defendants held a lien upon the policy. If it had been obtained by the plaintiff's immediate agent, from his means, and running to him, it would have created a lien in his favor. We have seen, that the contract was between their agent and the defendants, who were to look exclusively to their direct employers, and were not obliged or allowed, in the absence of a special agreement, to seek for remuneration beyond him. All the security which the law gives to the immediate agent, must extend to the sub-agents, in this

case, so far as the latter have a right for their indemnity, to look to the former as their principal. It appears unreasonable, that they, who render services and make advances for those whom they trust as principals, in order to escape exposure to the expense and risk of seeking payment of foreigners, should be deprived of the important and additional security of a lien, which attaches to the article, belonging to a fellow citizen, who is the direct employer. In this transaction, so far as the plaintiff's agents were authorized by him, they hold the same relation to the defendants, which they would have done, had the property insured been that of the agents; the defendants were their creditors for obtaining the several policies, and upon them they had a lien for their security.

If the defendants effected this insurance without the privity or consent of the owner, he is now seeking the benefit obtained by their means, and thereby has adopted their acts and their agency; and this secures to them a lien for their commissions, advances and disbursements. The policy was made to them for whom it might concern; this must have been by the owner's implied knowledge and consent. Several insurances had been previously effected by their agency on the same property, under some of which losses had happened. Accounts were rendered by the defendants to his agents, and by them to him of all matters touching the insurance; a long time had elapsed between the execution of the first and the last policies, and there had been no call for them by the plaintiff. If the delivery of a policy of insurance will give a lien thereon, one must attach, when, by the consent of the owner, it is running to the agent, and suffered to be retained by him. The owner's immediate agents would have a lien upon the policy, which they had obtained, and the defendants could avail themselves of this lien by way of substitution against the plaintiff.

This case is distinguished from that of *Reed* v. *Pac. In. Co.* 1 Metc. 166, for there the insurance was made by the plaintiff in pursuance of a specific order, by which he was requested to procure the insurance and forward the policy. The Court say, "that by undertaking to execute the order, he is bound to com-

ply with the terms, and forward the policy, and this precludes the supposition, that he was to have any lien upon it or interest in it."

3. Has the lien been in any manner waived?

It is insisted that the charge of the premiums in the general account with Buck & Tinkham and Jonathan Buck had this effect. If there was any act of the defendants, inconsistent with the existence of a lien, such act would be evidence of a waiver thereof. We have considered, that relations existed which gave to the defendants the same claim, which they would have had if the agents of the plaintiff had been the exclusive and entire owners, so far as their acts were authorized. The principal is still liable to the agent personally in a suit *in personam*, for the amount of the same claims. For by the general rule of law, an agent in such cases trusts both to the fund and to the person of his principal. *Burrill* v. *Phillips*, 1 Gallison, 360; *Peisch* v. *Dickson*, 1 Mason, 9.

If the plaintiff's agents had been in truth the owners, would the lien, which otherwise would have continued in full force, be waived, because the premiums should be charged to them in a general merchandize account? Would there be any relinquishment of the lien by a charge to the owner instead of the brig? Or would it have been less affected by keeping a distinct and separate account? When one individual, or one firm, is the sole owner of the property, is it material in what manner the account, intended to exhibit the debts and the credits for settlement, is made? There are rules, by which it can be determined, whether general credits are to be applied to the discharge of a lien or not, as well where the claim secured thereby is part of an account embracing other matters, as where the charges are entirely separate. If the lien would not be waived in the case supposed, by the mode adopted in this instance, it is not perceived how the same course could change the security, or take from either party the rights which would otherwise attach, because the ownership is qualified, limited or constructive. We are not aware of any reason or authority sufficient to induce us to come to the conclusion, that the lien was waived.

4. Has the defendants' lien upon the policy been discharged? It is contended by the plaintiff's counsel that it has been discharged by actual payment of all the claims, which the defendants had for effecting insurance on the brig Thistle.

The subject of appropriation of payments to the discharge of one debt or another, when none has been made by either party at the time of such payments, has undergone much discussion, and the opinions entertained by Courts have not been uniform. The principles of the civil law, which are in this respect founded in the clearest equity, have been gradually incorporated into our common law. "Money is to be appropriated to pay a debt for which a debtor has given pawns or mortgages, rather than to a debt due by a simple bond or contract." 1 Vern. 24. "To an old debt, rather than to a new one." 1 Meriv. 608. In the *United States* v. *Kirkpatrick*, 9 Wheat. 720, Mr. Justice Story in delivering the opinion of the Court says, "the general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it the creditor may make it; if both omit it, the law will apply the payments, according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, *a fortiori*, at the time of trial. In cases like the present, of long running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion, that payments ought to be applied to extinguish the debts, according to priority of time, so that the credits are to be deemed payments *pro tanto*, of the debts antecedently due." *Gass* v. *Stinson*, 3 Sumn. 99.

Frequent settlements took place between the defendants and Buck & Tinkham, and the defendants and Buck, after the dissolution of the firm. Their dealings had been extensive and various, embracing large amounts. On the first of January, 1839, there was due from Buck to the defendants the sum of $590,03. The balance of $23,65, due from Buck & Tinkham, January, 1837, was credited to them and charged in the

account, to Buck, and must have been paid before January, 1839, or embraced in the balance then due. All accounts, including the charges and expenses of causing insurance on the brig Thistle prior to that time, have been paid, excepting that sum, and the commissions and brokerage on the premium paid Dec. 4, 1838, or that was all which the defendants can claim on every account, as being due at that time. The defendants have credited against the charge of $1001,25 for causing the insurance of Dec. 4, 1838, which did not attach, the brig having been previously lost, the sum of $960. If then the balance due on the first of January, 1839, and the commissions, &c. on the last premium were subsequently paid, the lien on account of the insurance was discharged; for on no principle could the lien exist, where nothing was due to support it. The amount due to the defendants on the first of January, 1839, was the oldest claim, because it was the only one. There is a charge against Buck, on the 9th of January, 1839, of over $1300, and before the 15th of July, a very considerable amount is added; but before May, there is credited between $1700 and $1800; and it is insisted by the plaintiff's counsel, and we think with legal propriety, that as it does not appear, that the credits were to be applied to the payment of any particular item, either by Buck or the defendants, it must first be appropriated to extinguish the oldest charge, especially if that is considered to have been secured by a lien; and this credit was more than sufficient for that purpose.

But the defendant's counsel contends for the proposition, that it was their right to apply the money received by them of the underwriters to their account against Buck for other and distinct matters, than the disbursements and services in causing the insurance; and they withhold sufficient, to cancel the whole balance of their account against him. This is insisted upon, 1st: Because they hold directly a general lien upon the policy in their own right, sufficiently broad, to include this balance; 2nd: Because they represent Buck, who, it is said, had such a lien, if they had not.

"A general lien is a right to retain a thing, not only for charges specifically arising out of, or connected with that identical thing, but also for a general balance of accounts between the parties, in respect to other dealings of the like nature. It is less favored, and construed somewhat more strictly by Courts of law, than a particular lien; although the tendency of late years, in the commercial community, has been rather to expand than to restrict the cases, in which it is to be implied by the usage of trade." Story's Ag. § 354.

In *Jarvis, Admr.* v. *Rogers*, 15 Mass. R. 389, the Court say, "Courts in modern times have leaned much in favor of liens, considering them as founded on principles of natural justice, and as tending to the security and encouragement of commerce. But hitherto the adjudged cases have not transcended the limits of equity and sound policy, and within those limits, it is the duty of Courts in all cases to confine themselves."

"It is believed, where no agreement has been made, that the lien cannot embrace accounts of a different nature from the transaction, which creates it. The depositary cannot indeed oppose to the restitution of the deposit, a compensation of the credits, which he has against the person, who intrusted him with it, when these credits arise on other accounts." Pothier on Oblig. note 589, Evans' Ed.; Story's Ag. § 358. "So the debt or demand, if claimed for a general balance of accounts, must be a balance, arising from transactions of a similar nature with that, upon which the particular lien arises. As for example, if the particular lien is for factorage, the general lien must be for factorage transactions, and cannot be applied to transactions of a totally dissimilar nature. It does not extend to other independent debts contracted before or without reference to the agency." Story's Ag. § 365, 376.

"Insurance brokers have a general lien upon policies of insurance in their hands, procured by them for their principals, as also for moneys received by them upon such policies, not only for the amount of their commissions and premiums for the particular policies, but also for the balance of their general

insurance account with their employers. But the lien does not extend to cover any balance due upon business foreign to that of effecting insurances, as the usage does not extend to such a claim." Story's Ag. § 379. "Where it is known to the broker, that the party acts for another, then his lien is strictly confined to his commissions and premiums and charges on that very policy." Ib. § 379. "To create a valid lien, it is essential, that the party through whom or by whom it is acquired, should himself either have the absolute ownership of the property or at least a right to vest it. If therefore he is not the rightful owner of the property, or if he has no power to dispose of the same or to create a lien, or if he exceeds his authority, or if he be a wrongdoer, or if his possession be tortious, in these and the like cases, it is obvious, he cannot ordinarily create a lien or confer it on others." Ib. § 389.

The case of *Maans* v. *Henderson & al.* 1 East, 335, was where the plaintiff, a foreigner, consigned his ship to one Jennings, residing in Liverpool, with orders to charter with salt, on the plaintiff's account, and to effect an insurance thereon. Jennings opened the policy in the usual way in his own name with the defendants, who were brokers residing in Liverpool, with whom he had before been in the habit of effecting insurances on account of others, as well as himself. The policy was warranted neutral. Jennings failed, being indebted to the defendants on general balance of accounts for premiums on this and other insurances, to a greater amount, than the average loss in demand in that action, and the question was, whether there was a lien on the policy for such general balance as between them and Jennings. Lord Kenyon C. J. in delivering the opinion of the Court says, "if the agent disclose his principal at the time, it is clear, he cannot pledge the property of such principal, to another with whom he is dealing, for his own private debts. Supposing the agent had said to the defendants, "it is true I am the agent of the foreigner, but nevertheless, you may retain the money due to him for my debt," could such a transaction be sustained? All therefore, which the de-

fendants can retain for is the amount of the premium due on this policy on the part of the plaintiff."

It cannot, we apprehend, be contended, that the defendants are more to be favored in this respect, than insurance brokers. The accounts of the defendants against Buck & Tinkham and Jonathan Buck embrace charges for causing insurance on the brig Thistle, but on no other vessel or cargo after the first application was made in 1834. Their accounts in every other particular, are for matters foreign to the business of insurance, and we know of no case, where a lien attaches by operation of law to a policy for the security of such accounts.

The defendants were applied to by the letter of Buck & Tinkham of the first of December, 1834, to effect insurance on the brig Thistle, owned by George McKenzie of New Brunswick. By letter from the same firm of Nov. 17, 1835, they were requested to cause a renewal of the insurance on the brig owned by the same man. November 26, 1836, Buck wrote to them to have $8000 insured for another year on the brig, owned by the same man. Dec. 4, 1837, Buck again wrote to them, "I have to-day received orders from the owner to get $8000 insured for another year on the brig Thistle, and annexed was an affidavit of the plaintiff, that the brig had not been engaged, the previous season, in the West India trade. It is admitted by the defendants, that the brig was owned by the plaintiff alone from the time she was built, in 1834, till she was lost. The policy obtained under the instructions in the letter last referred to, is the one, by virtue of which the money in controversy was received by the defendants; and these letters show clearly that they were fully informed, that the plaintiff was the owner, and that Buck & Tinkham and Jonathan Buck acted in obedience to his special instructions.

After the loss of the brig, on the second of March, 1839, Buck wrote to the defendants and informed them, that the owner wished him to act for him, the plaintiff, and requested them to take measures to obtain whatever might be due upon the policy. On the 15th of July, 1839, Buck informed them of his loss by fire, and advised them on the subject of the loss

of the brig and the claim upon the underwriters and said, that "the amount, whatever it is, is going to my credit." In all these communications Buck was acting professedly as the plaintiff's agent, and there is no evidence, that he had authority to pledge the plaintiff's interest in the policy for his own benefit. The dealings of Buck with the defendants had not the least apparent connexion with, or relation to the commercial intercourse between the plaintiff and Buck, excepting the insurance of the brig, and after her loss, the effort to obtain the money due upon the policy. The agency of Buck was special from the beginning, and so the defendants must have understood it. The statement in the letter of July 15th, 1839, that the amount was to go to Buck's credit, was not even an assertion on the part of Buck, that he had authority so to dispose of it; he might suppose that he could by some arrangement with the plaintiff, be able so to apply the avails of the policy, but it does not thereby appear, that he intended to say, the power had then been given him. If he had distinctly written, that the plaintiff had authorized him to dispose of the money in that manner, the owner is not to be prejudiced by the act or the contract of the agent, when they transcended his powers, and the defendants were fully apprised of the scope of the agency. Would it comport with notions of equity and justice, that one selected for the purpose of doing certain specific duties, his authority limited to the performance thereof, entrusted with no property, should have the legal right to pledge for his own private debts, past as well as future, the whole of that, which was secured by certain prescribed acts of his for the owner, to those, who had perfect knowledge of the extent of that authority? The law, we have seen, does not require those, who have expended money and incurred liability for the benefit of a foreigner, through a domestic agent, to look beyond the latter. But where they are thus secured, they must be satisfied. They cannot hold the funds of the foreigner to indemnify them for credits, which they have given to the agents on other accounts. To give them the rights contended for would confer privileges, which they could not enjoy in trans-

actions purely domestic in their character. By such a construction, they would have the power to appropriate the property of the foreigner to debts, having no connexion with his affairs, without being subject to the risk of losing, by the inability of the agent, the outlays intended for the owner's benefit. While they are secured by a claim against a fellow citizen, to whom they voluntarily gave the credit, for the expenses of the insurance, and by a lien upon the policy, the one, who is the sole owner of the property insured, who caused the transaction entirely for his own better security, would be exposed to have wealth to an unlimited extent pass from his own possession, into the hands of strangers, without consent or knowledge, and he left to the feeble consolation of looking to the personal credit of his agent.

Had Buck any lien upon the policy, which the defendants had not, and to which they can succeed by representing him? If the intercourse between Buck and the plaintiff was in matters foreign to the business of insurance, the former could have no lien upon this policy, for the security of any balance of the general account, which might be due from the latter to the former, though he would have the security for the advances made by him on account of the insurance. In looking at the accounts between them, they are for merchandize, cash, and business having no connexion with insurance. And the defendants have received every thing, which, when unpaid, created a lien in their favor upon the policy, and they can derive no benefit in taking the place of Buck to obtain that, which, whatever might be his rights, they could not again receive.

But if Buck had a lien on the policy on the 15th of July, 1839, he could assign whatever interest he had therein to the defendants in payment or security for any claim, which they had against him, so far as it would extend. Such assignment would in nowise prejudice the rights of the plaintiff. And if Buck did assign any claim in the policy belonging to him to the defendants, he could not afterwards withdraw it. On that day he wrote to them, saying the amount to be received would go to his credit. This claim against the underwriters was then

fixed; every thing had occurred to render them liable, though the sum was not liquidated. It was an assignable interest. It was to be received on a contract in the defendants' hands and to which they were a party, and who had the power to receive it. This claim against the insurers was appropriated by Buck to the defendants to be applied to a debt due to them, so far as he had interest in or power over it.

Had Buck an interest in the policy? He had caused it to be underwritten, at his own exclusive expense. He had a lien upon it, as security for that expense, as we have already seen; and though he had discharged the lien, which the defendants had directly upon the policy, yet as *he* had freed it from that incumbrance, the right which they had had, would exist in him. And if his lien, thus acquired, was not discharged, it was transferred to the defendants on the 15th of July, 1839. If however the state of the accounts between Buck and the plaintiff on that day, were such, that the charge for the expense of the insurance was extinguished, the lien ceased to exist and nothing was assigned.

The premium for the policy under which the money was received, is charged by Buck to the plaintiff in Dec. 1837; and the balance of his account against the plaintiff to the time of that charge, inclusive, is $7986,04. He was credited as having paid, after his last balance was struck, in June, 1837, and by the last of February following, the sum of $5762,22, leaving a balance unpaid of $2223,82 against the plaintiff; between February and the end of June, 1838, the sum of $6042,23, is credited by Buck as paid, which must have more than discharged that balance; and by the rules of appropriation, these payments must be considered as applied to the oldest claims.

There is however a charge to the plaintiff by Buck, for effecting the insurance for the year commencing Dec. 1, 1838. This policy did not attach, but the expense was incurred by the plaintiff's order and for his benefit; and this being for the same species of business, with that which caused the indebtedness of the underwriters, we see no reason why Buck would not have a lien upon the policy of the preceding year to

secure this charge. The defendants have in their account applied the premium returned in payment of their charge for the insurance effected Dec. 4, 1838. Buck was alone liable to the defendants for this last expense, so far as there was any personal claim, at the time it was paid by the defendants; and he would have a lien upon the policy of 1837, as security from the time his liability commenced until it was discharged; and we are to look and ascertain, whether it was so discharged prior to July 15, 1839.

In June, 1839, Buck gave credit to the plaintiff for the return premium, which was about the same time of its receipt by the defendants. Will that credit discharge the account of Buck against the plaintiff for that premium, or must it be applied to the account generally? If the sole liability of Buck to the defendants created a lien, we do not perceive why the return of the premium to Buck, for such it was in effect, does not in the absence of proof that there was a different appropriation by one party or the other, or both by agreement, express, implied or presumed, discharge it. The rules to which we have before adverted, would seem to embrace this case, and so direct this item in the credit.

But if we look into the state of the accounts between the plaintiff and Buck, this sum is paid on another ground, and thus the lien would be discharged. In the month of March, 1839, the whole amount due to Buck was $5303,95, and of this sum $1127,51, at least, had accrued subsequently to his liability for the last premium, which was Dec. 4, 1838, and embraced in the balance of $5303,95; and this would reduce that balance to $4176,44, as the sum due to Buck on the 4th of Dec. 1838. That was the earliest debt existing in his favor against the plaintiff, and before July, 1839, there is credited to the plaintiff, as paid, the sum of $4737,49, which is more than sufficient to cancel that balance.

It is true, Buck had at his death a claim against the plaintiff more than sufficient in amount to meet that of the defendants against him, and it was competent for all parties to have made an agreement, by which the defendants should have been per-

mitted to retain the money received by the underwriters, to discharge their balance against Buck, and Buck to allow the same on his balance against the plaintiff; but no such contract was made, and there was not such a connexion and privity between the defendants and the plaintiff, as would justify in law such a substitution, inasmuch as the accounts between Buck and the plaintiff were entirely foreign to the dealings between Buck and the defendants, excepting the items for insurance of the brig. The balance due the latter had no relation to the policy, and any other creditor of Buck could as well claim to represent him as they. He chose to make the appropriation to the Frontier Bank, of the money due from the insurers; of this the defendants had notice in October 1839, from the administrator on Buck's estate, before they had received any portion of the money. This appropriation, they recognize, so far as to pay for the use of the Frontier Bank, the balance remaining after satisfying their own claims. If Buck had any lien upon the policy or its avails at the time of his death, his representative did not insist upon enforcing it, but took the earliest measures to put the Frontier Bank in possession of the funds, so appropriated to them; and we see no reason, why it was not competent for Buck, and his administrator to do all this; and the latter confirms his first act by taking the plaintiff's note for the balance due to the estate.

Again, it is said, there is no privity between the plaintiff and the defendants. If the latter have no right to retain in their hands the money, which they would apply in discharge of their balance against Buck, can this action be maintained in the name of the plaintiff against them? It is insisted by the defendants' counsel, that this sum is in their hands by virtue of a contract between Buck alone and them, and by that contract only can it be recovered.

"Where, by the usage of trade or the express or implied agreement of the parties, a sub-agent is to be employed, there a privity is deemed to exist between the principal and the sub-agent; and the latter may, under such circumstances, well maintain his claim for such compensation both against the

principal and the immediate employer, unless exclusive credit is given to one of them, and if it is, then his remedy is limited to that party." Story's Ag. § 387.

The defendants' claim for effecting the insurance was against the plaintiff's agents, for the reasons, which are obvious, and which have been before examined. But where the reason ceases, the law no longer applies. Where, from its own notions of justice, the law so far favors the sub-agents of a foreign merchant, that he is at liberty to look to his immediate employer, who is a fellow citizen, it does not allow him to retain moneys, which he well knew belonged to a foreigner, and which never was the property of his employer. We cannot doubt, that when the policy on which the money was received, was executed, the plaintiff understood that Buck would employ a sub-agent. It had been uniformly so before, and on the 4th of Dec. 1837, the agent informed the defendants, that the owner had ordered him to have the policy renewed; and we think there was an expectation, on the part of the plaintiff, and when Buck undertook to execute the order, an implied agreement between him and them, that it would be effected as it had been before.

"Where an exclusive credit is given to and by the agent, the principal cannot be treated as in any manner whatsoever a party to the contract, although he may have authorized it, or be entitled to the benefit of it. Thus a foreign factor, buying or selling goods, is treated as between himself and the other party, as the sole contracting party, and the real principal cannot sue or be sued on the contract." Story's Ag. § 423.

But we must distinguish between the contract, and the ultimate object of it, the obligations of the parties thereto and the benefit sought. The first contract between the plaintiff's agents and the defendants,was that insurance should be effected by the latter, and that having been done, the former should compensate them therefor, and the owner of the property insured, being a foreigner, they could regard his agents as their principal, to the extent of the contract. After the loss, they were again employed by the plaintiff's agent to take measures

to obtain the damages, and for this too, they were entitled to recompense; and had a lien in the first contract upon the policy, and in the last on the money received, for the same. These contracts were between the plaintiff's agent, and the defendants. After the latter undertook the performance of these services, any want of fidelity in them would have been cause of complaint or for damages with the other contracting party, and this same party alone would have been answerable to the defendants for a breach on their part; these were the particular duties, which it was expected they would do, for these were all they were requested to undertake by Buck; these too they did perform, to the satisfaction of all interested, and were permitted to retain therefor, their full compensation.

But the fruits of these contracts, these expenditures, these services belonged to the plaintiff; they were never intended to be relinquished or diminished in the smallest degree. He paid the defendants indirectly the consideration, which brought them into being, and to make them available to him the several agencies were employed. The product of these measures, which he took, and for which he has paid, are now moneys, a part of which are in the defendants' hands. Every contract, which was entered into, to effect this result, has been faithfully executed; and so far as the plaintiff gave authority to bring it about, the obligations on one side and the other are discharged. The avails of all this are now in the defendants' hands, excepting what they have paid. This is charged with no lien, and we know of no reason why it should not be recovered by the plaintiff for the benefit of the bank to which he assigned it.

It was in the plaintiff's power, as well as the defendants, to have prosecuted a suit in his own name upon this policy against the underwriters, it not being under seal. *Sargeant* v. *Morris*, 3 B. & Ald. 277, 280; Story's Ag. § 394. After the defendants' lien was removed, which they had directly or through the plaintiff's agent, the policy was the property of the plaintiff, and on request, they would have been obliged to deliver it, if the same had not been discharged by payment from the underwriters. And since the money has been re-

ceived by the defendants, they are equally liable for that in the name of the plaintiff. *Maans* v. *Henderson & al.*, 1 East, 335.

Verdict set aside and default to be entered.

CALVIN WASHBURN *& al. versus* WILLIAM G. MOSELY *& al.*

The statute providing that brief statements may be filed with the general issue, must be regarded as requiring a specification of matter relied upon in defence, aside from such as would come under the general issue, to be certain and precise to a common intent, as much so as if inserted in a special plea; and no proof is admissible, except in support thereof, or of the defence under the general issue.

Where the general issue is pleaded, and performance of the condition of the deed declared upon alone is specified in the brief statement as the defence relied upon, evidence to show an excuse for non-performance is inadmissible.

Where a poor debtor's bond had been given, and the debtor appeared at the town wherein the jail was situated to surrender himself to the jailer on the last day of the six months, and the creditor then agreed in writing, that if the debtor would surrender himself at a certain subsequent day, every thing should be considered the same as if the surrender had then been made, and that all matters and things in regard to the bond should be done on the latter day, as if the bond had expired on that day, and have the same effect; *it was held*, that the agreement, without performance on the part of the debtor, or offer to perform, furnished no defence to an action on the bond.

DEBT on a poor debtor's bond. The material facts appear in the opinion of the Court. The case states, that it did not appear on the trial, that Mosely had surrendered himself, or had offered to do so, after Jan. 12, 1839.

Herbert, for the plaintiff, contended that where the general issue is pleaded, and a brief statement of the special matter relied on in defence is filed, the defendant cannot give in evidence any special matter, which is not distinctly stated in the brief statement. It is but a substitute for special pleading. *Chase* v. *Fish*, 4 Shepl. 132; *Williams College* v. *Mallett*, ib. 84; *Brickett* v. *Davis*, 21 Pick. 404; *Shepherd* v. *Merrill*, 13 Johns. R. 475.

As the condition of the bond was in the alternative, the plea, or brief statement, should state by which the performance was made. Story's Pl. (Oliver's Ed.) 293; *Bailey* v. *Rogers*, 1 Greenl. 186.

The special matter of the defence must be confined to what is contained in the brief statement. And under a plea for performance, it is not competent to give in evidence an excuse for non-performance. *Chase* v. *Fish*, 4 Shepl. 132; 10 Peters, 343; 3 Wash. C. C. R. 140; 1 Peters, 67; *Worcester* v. *Eaton*, 13 Mass. R. 371; *Coffin* v. *Jones*, 11 Pick. 45; *Fullam* v. *Valentine*, Ib. 156.

If the paper, bearing date Jan. 12, 1839, is admissible, and discloses any binding agreement between the parties, it is not performance, but excuse for non-performance.

A mere extension of time of performance, not injurious to the sureties, does not discharge them in law or in equity. 1 Story's Eq. 321. But here was a mere conditional extension, and the condition was never performed.

There is no pretence that the principal is discharged by the delay given him. The defendants have joined in their pleadings, and thereby the sureties have abandoned any separate defence, had any existed. 1 Chitty's Pl. 59; 3 Mass. R. 310; 16 Johns. R. 217.

The paper is a mere proposition, not binding on the defendant, and which he might accept or refuse, and it could not discharge an obligation entered into by a sealed instrument. 10 Wheat. 554; 4 Greenl. 421. Without performance on his part, the writing cannot avail the defendants.

If the paper had been executed by the parties, it would not have been binding upon them for want of consideration. 12 Wheat. 551; Maine R. 458; ib. 72; 12 Johns. R. 190; 19 Johns. R. 205; 17 Mass. R. 129.

C. Burbank argued for the defendants, and contended, that Mosely's going home for the accommodation of the attorney of the plaintiffs without surrendering himself, was a sufficient

consideration. It was a benefit to the plaintiffs, and a disadvantage to the defendant in agreeing to come again.

Here was an offer to perform, and actual performance was prevented by the act of the plaintiffs. This is equivalent to actual performance, and will excuse the sureties, if not the principal.

When this paper was signed, and Mosely went home, and by its terms was not to appear again until after the time of performance had elapsed, the bond was discharged, and rendered wholly inoperative and void.

An action cannot be maintained upon a void instrument. It therefore becomes unnecessary to go into a discussion with respect to the rules of special pleading.

Hobbs replied for the plaintiffs.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of debt on a bond, to which *non est factum* was pleaded, accompanied by brief statement, that the condition of the bond had been performed. Although the issue of *non est factum* had been pleaded and joined, proof of the execution of the bond would seem to have been waived. The bond appears to have been given by the defendant, Mosely, as principal, and by the other defendants as his sureties; and was conditioned that Mosely, who had been arrested for debt, among other alternatives should surrender himself to the keeper of the jail in the county of Hancock, within a specified time. The defence set up was, that he had performed this alternative. To prove it, the defendants offered in evidence a writing in the following terms; viz. "William G. Mosely of Sullivan, having appeared here in Ellsworth to surrender himself to the jailer, on a bond, *Calvin Washburn & Co.* v. *Mosely* and *Curtiss*, whose said bond expires this day, and being unable to attend to the same on the part of the creditors, on account of indisposition, it is hereby agreed, that, if the said Mosely appears at the jail in Ellsworth, on the fourth day of February next, unless said business shall be sooner adjusted between the parties, every

thing shall, on said fourth day of February, be considered the same as if said Mosely surrendered himself this day, and all matters and things be then done in regard to the said bond as if the said bond expired on said fourth day of February. It is understood by the foregoing, that, if said Mosely surrender himself on said fourth day of February to the jailer in Ellsworth, then the sureties on said bond are to be entirely released from all liability on said bond. (Signed) Calvin Washburn & Co. by George Herbert."

It was admitted at the argument, that in said writing the names "Mosely and Curtiss" were inserted by mistake, in lieu of Mosely and Hodgkins, and it was agreed that no advantage was to be taken on account thereof.

The then Chief Justice, who presided at the trial, reports that the case, which would seem to have been taken from the jury by consent, was submitted to the Court under an agreement, that, if the action should be considered as maintained, the defendants are to be defaulted; otherwise that a nonsuit shall be entered.

The statute providing that brief statements may be filed with the general issue must be regarded as requiring a specification of matters relied upon in defence, aside from such as would come under the general issue, to be certain and precise to a common intent, as much so as if inserted in a special plea; and no proof is admissible, except in support thereof, or of the defence under the general issue. *Chase* v. *Fish*, 16 Maine R. 132; *Brickett* v. *Davis*, 21 Pick. 404; *Shepard* v. *Merrill*, 13 Johns. R. 475.

Performance having been alone specified in the brief statement, as the defence relied upon, we must look into the evidence, and see if it be made out. It is contended by the counsel for the defendants, that by the writing aforesaid, it appears that Mosely offered to perform, and by the plaintiffs was prevented from performing, the alternative before named; and that this was virtually a performance of it. But to us it seems to be at most but an excuse for non-performance, which, if it could avail the defendants, should have been set out

specifically as the ground of defence in the brief statement. *Coffin* v. *Jones*, 11 Pick. 45.

But the agreement on the part of the plaintiffs, if at all binding upon them, was conditional. It was, if Mosely should appear at a future day and surrender himself, &c., but Mosely never did so appear. This cannot, therefore, be deemed an executed contract, the condition never having been performed. It is therefore unnecessary to consider whether, in the event of performance, it could have had any binding efficacy upon the plaintiffs.

A default must be entered.

THOMAS SKOFIELD *versus* ZIBA HALEY.

Cases of completed guaranty of existing demands are scarcely to be assimilated to those of indorsers, under the mercantile law of bills of exchange and promissory notes, in any of the rules as to demand and notice. Such guarantor may be, and generally is, liable without either, and is in many respects in the condition of a surety.

If the debtor was insolvent at the time the debt guarantied became payable, neither demand on him, nor notice to the guarantor would be necessary to charge the latter.

Where the defendant was liable to the plaintiff on a note, and by an agreement between them, made *bona fide*, the defendant was discharged from his liability on the note by giving to the plaintiff an order, drawn and accepted by others and guarantied by the defendant, *it was held*, that the amount of the order, thus guarantied, might be recovered, although somewhat greater than the original liability on the note.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

This was an action of assumpsit upon a guaranty by the defendant of an order by one Nelson on Brooks & Waldron, by them accepted payable in boards, in favor of one N. H. Mooney, for $41,55. The consideration for the defendant's guaranty was his being discharged by the plaintiff from his liability for the balance of $50 due on note of $100, by

Haley & Mooney, to the plaintiff, which balance it belonged exclusively to the defendant to pay. The guaranty was made several days before the order became due, and was in these words — "I guaranty the within order in boards.

"Ziba Haley."

The exceptions state, "that the defendant contended that he was not liable on the guaranty, because there was no proof of demand of payment of the order on Brooks & Waldron when it became due, nor of any notice at any time, till this suit was commenced, of its non-payment. A second ground of defence was, that this order and guaranty having with other property, been delivered to the plaintiff in discharge of the defendant's liability from the balance of said $100 note, he was there at the same time told by the defendant that he had a bond *vs.* Brooks & Waldron and Woodbury, he had received of Mooney in Chase & Fuller's Office, which, if plaintiff should elect, he might take in lieu of said order; and in that event the guaranty was to be null and of no effect; and the plaintiff, after consultation, concluded to take the guaranty, and not the bond, yet he never notified the defendant that he had elected not to take the bond or to take the guaranty."

The defendant further contended, that inasmuch as there was but $20 due the plaintiff on the note, he was not entitled to recover the full amount of the order, but only so much as was equal to the balance due on the note of $100.

The plaintiff contended, that Brooks & Waldron, the acceptors, were insolvent at the time the acceptance became due, and that their insolvency excused the plaintiff from any obligation to demand the payment of it from them, or to give defendant notice of its non-payment. And the presiding Justice instructed the jury that such was the law in case of the acceptor's insolvency on that day, and that the defendant would be liable on his guaranty without any such demand or notice.

The said Justice further instructed the jury, that upon the contract as stated in the defendant's second ground of defence, the defendant was not entitled to any notice of the plaintiff's election, as stated above; and that the plaintiff, if entitled

to any thing, was entitled to the full amount due on said acceptance.

The jury returned a verdict for the plaintiff for the full amount of the acceptance; and found it to be a fact, that the acceptors were insolvent on the day the order became payable, and that the agreement between the plaintiff and the defendant was as is stated in the defendant's second ground of defence. No further facts are found in the exceptions.

To the foregoing instructions and opinions the defendant excepted.

B. Bradbury, for the defendant, said, that as the jury had found, that the acceptors of the order were insolvent at the time it became due, he should not insist on the first ground of exception.

The plaintiff had an election between the order and the bond, and notice should have been given of which alternative he chose to avail himself. The instruction in this respect is erroneous.

If the plaintiff was entitled to recover, it should have been only for the amount due, twenty dollars. *French* v. *Grindle,* 15 Maine R. 163.

Fuller, for the plaintiff, said that a contract was made and executed between the parties. An offer was made by the defendant to the plaintiff to take a bond instead of the order. If the bond had been taken, the order was to have been given up. It was a mere offer to change securities, which was not accepted.

Here was no fraud pretended, and the Court will hold the parties to their agreements, when fairly made. This was one contract, and cannot be apportioned.

The opinion of the Court was drawn up by

WHITMAN C. J. — Cases of guaranty are scarcely to be assimilated to those of indorsers, under the mercantile law of bills of exchange and promissory notes, in any of the rules, as to demand and notice. *Clark & al.* v. *Burditt,* 2 Hall, 197; 1 Story's R. 22; *Lee* v. *Dick,* 10 Peters, 482. A guarantor

may be, and generally is, liable without either; and is, in many respects, in the condition of a surety, obligating himself jointly and severally with the principal. If the holder of the obligation lays by, after the debt becomes due, for a great length of time, without making efforts to collect his demand, and, in the mean time, the debtor becomes insolvent, according to some authorities, it would seem, that the guarantor, would in a Court of equity, if not of law, be held to be absolved from his liability. But if the debtor were insolvent, when the debt became due, as was the case here, neither demand on him, or notice to the guarantor would be necessary to charge him. *Reynolds & al.* v. *Douglas & al.* 12 Peters, 497.

As to the offer of a bond, &c. in lieu of the guaranty, in this case it was but a proposition on one side, not acceded to on the other, and could not affect the rights of the plaintiff under the guaranty.

As to the third ground relied upon in the defence, against a portion of the plaintiff's claim, we are of opinion that it cannot prevail. The order was sold to the plaintiffs by the defendant *bona fide* and absolutely *in toto*. The property in it therefore became wholly the plaintiff's. It was the intention, for aught that appears, that he should avail himself of the whole amount due of the drawees; and if he could not, that the defendant should be responsible for it. And this view of the point, if authority were necessary to sustain it, is fully borne out by the case of *Oakley* v. *Boorman*, 21 Wend. 588.

Exceptions overruled and judgment on the verdict.

JAMES ACKLEY, 2d. *versus* JOSHUA DENNISON.

In an action of debt to recover the penalty for "setting a net for the purpose of taking herring in any river, stream, harbor, creek or cove in the county of Washington," contrary to the provisions of the statute, an averment which limits the prior general language of the declaration to some one harbor or cove, is necessarily descriptive. And if such restrictive averment might have been omitted, yet being a part of the declaration, it becomes necessary to prove it as laid, and it cannot be rejected as surplusage.

EXCEPTIONS from the Eastern District Court, CHANDLER J. presiding.

Debt for the penalty prescribed for taking herring in the county of Washington, contrary to the provisions of the statute on that subject. The declaration commenced thus. "In a plea of debt, for that the said defendant, at said Cutler, on the fifteenth day of September, A. D. 1840, a certain net for the purpose of taking herring, and with an intent to take herring not for bait only, in a certain harbor or cove commonly called Little Machias Bay, in said county, did set and place, contrary to the form of the statute."

The plaintiff proved, that in the early part of September, 1840, the defendant had set three nets at one time to take herring in a cove in said county, called Great Holway's Cove, and that the defendant had admitted, that the nets were not set for the purpose of taking bait only. The defendant introduced testimony tending to show, that Great Holway's Cove was not in, and was no part of Little Machias Bay. And the plaintiff introduced testimony to show that the cove was in, and was a part of that bay.

The plaintiff contended, that if the cove was not a part of the bay, still, as it was within the county of Washington, it was under this declaration and the phraseology of the statutes on this subject sufficient, and that the adding of the words, in Little Machias Bay, was surplusage, and might be rejected.

The presiding Judge instructed the jury, that it was incumbent on the plaintiff to satisfy them, that the defendant had set his net for that purpose in Little Machias Bay; and that it was

not sufficient to prove, that he had set it in a bay, cove or harbor in said county, but out of Little Machias Bay.

The verdict was for the defendant, and the plaintiff filed exceptions.

Thacher, for the plaintiff, argued in support of the ground taken at the District Court; and cited 3 Stark. Ev. 1569, 1570, 1575; 4 T. R. 561; Greenl. Ev. 58, 59, 68, 74.

Lowell and *Dunn*, for the defendant, contended that the words "Little Machias Bay," were essential parts of the description. The venue is laid at Cutler, and the bay was to distinguish this from other bodies of water within the town of Cutler. Every essential part of the description must be proved, or the action must fail. 4 Bl. Com. 306; 1 Stark. Ev. 386; Greenl. Ev. 65, 72; *The State* v. *Godfrey*, 3 Fairf. 368; 1 Chitty's Pl. 252; *Ewell* v. *Gilles*, 14 Maine R. 72; *The State* v. *Noble*, 15 Maine R. 476.

But if the plaintiff was right in rejecting these words as surplusage, his declaration would be wholly insufficient, and his action could not be supported.

The opinion of the Court was drawn up by

SHEPLEY J. — The act of 1824, c. 255, provided, "that no person whatever shall be allowed to place or set any net for the purpose of taking herring in any river, stream, harbor, creek, or cove, in the county of Washington," except for the purpose of taking bait. The declaration alleges, that the defendant, being an inhabitant of Cutler, in that county, "at said Cutler on the fifteenth day of September, 1840, a certain net for the purpose of taking herring, and with intent to take herring not for bait only, in a certain harbor or cove commonly called Little Machias Bay, in said county, did set and place contrary to the form of the statute." It is contended, that the declaration would have been sufficient without the words, "commonly called Little Machias Bay," and that they may be considered as introduced for the purpose of venue, or may be rejected as surplusage.

In the case of the *Company of Navigation* v. *Douglas*, 2 East, 497, which was an action on the case for obstructing the navigation of the river Irwell, it was held, that when it was doubtful, whether the place of injury was laid in the declaration as venue, or as local description, it should be referred merely to venue. Lord Ellenborough states in that case, that "a plaintiff in such an action may indeed make it necessary to prove the gravamen in a particular place by giving it a specific local description." The same Judge says, in *Purcell* v. *Macnamara*, 9 East, 157, "there are two sorts of allegations; the one matter of substance, which must be substantially proved, the other of description, which must be literally proved." This distinction was affirmed in *Phillips* v. *Shaw*, 4 B. & A. 435, and in *Stoddart* v. *Palmer*, 3 B. & C. 2.

It cannot be doubtful in this case for what purpose the language before alluded to was introduced. The venue had before been laid in due form at Cutler in that county; and the particular harbor or cove in which the net was placed was intended to be designated. An averment, which limits the general language to some one harbor or cove, is necessarily descriptive. If the restrictive averment might have been omitted, being a part of the declaration, it became necessary to prove it as laid, and it could not be rejected as surplusage.

Exceptions overruled.

The State *versus* James D. Grant.

In an indictment for larceny wherein the property charged to have been stolen was alleged to have been, "the property of one Eusebius Emerson of Addison," and the proof was, that there were, in that town, two men of that name, father and son, and that the property belonged to the son, who had usually written his name with *junior* attached to it; *it was held*, that *junior* was no part of the name, and that the ownership, as alleged in the indictment, was sufficiently proved.

On the trial of an indictment, to exclude confessions of guilt of the accused on the ground of their not having been voluntarily made, there must appear to have been held out some fear of personal injury, or hope of personal benefit of a temporal nature, unless the collateral inducement be so strong as to make it reasonable to believe, that it might have produced an untrue statement as a confession.

Where one has received money for himself and for another, for whom he acted as agent, and to whom he had given credit for his share, it is well alleged in the indictment for larceny that the money was the property of the person receiving it.

Exceptions from the Eastern District Court, Chandler J. presiding.

The indictment against Grant was for larceny, wherein he was charged with having stolen a trunk and money, "the property of one Eusebius Emerson of Addison in the county of Washington." To prove the allegations in the indictment, a witness was called, who testified, that his name was Eusebius Emerson; that he resided in Addison; that he was the son of Eusebius Emerson, who also was residing in the same town; that he, the witness, used formerly to sign his name without the addition of junior, but that for some years, since he had resided in the same town with his father, and been in business for himself, he had written his name, "Eusebius Emerson, Jr.," in order to distinguish his name from his father's. The witness stated that the trunk and money was his property; that part of the money was received in the ordinary course of his business, and that the residue was received as the earnings of a vessel belonging to himself and his wife's mother in equal shares, and that he was the vessel's agent, and had given her credit on his books for her part of the earnings.

The counsel for Grant then contended, that the allegation

as to ownership of the property, was not sustained by the proof, inasmuch as a part of the property was shown to have been the property of Eusebius Emerson, Jr. and the residue to have belonged to him and his wife's mother. The presiding Judge overruled the objection, and instructed the jury, that junior was no part of a name, and that if the witness was believed, he had such property or interest in the articles stolen, or such possession thereof, as sustained the allegation of ownership.

To prove the taking of the property by Grant, the attorney for the State called one Jacobs, who testified to certain confessions of the accused. The witness stated, that he, knowing that J. D. Grant and an older brother, Calvin Grant, were charged with having stolen the property, and, as Calvin had a wife and family, feeling desirous to get Calvin clear, before the confessions were made, he had an interview with James and Calvin for that purpose; that Calvin appeared cast down and was crying; that he told James, that he thought he, James, was more guilty than his brother; that it was a pity for both of them to go to jail; that his brother had a wife, and that James had better confess and save Calvin; but that he held out no inducements, that James would fare any better for it; and that thereupon the confessions were made.

The counsel for the accused objected to the admission of this testimony of confessions thus made, as they were not free and voluntary, but were made under an appeal in behalf of his brother, and under the influence of the advice of the witness for the purpose of saving his brother. The Judge overruled the objection, and admitted the testimony.

The verdict was guilty, and the accused filed exceptions.

Lowell and *Dunn*, for Grant, argued in support of the positions taken at the trial.

On the first point, that there was a fatal variance between the allegations in the indictment and the proof, both as to the name of the owner of part of the property, and as to ownership of the residue, they cited, 3 Stark. Ev. 1576, 1578; 1 Peters, 139; 1 Salk. 7; *Boyden* v. *Hastings*, 17 Pick. 200.

And to the point, that the confessions should have been ex-

cluded, *Comm.* v. *Knapp*, 9 Pick. 496 and 10 Pick. 490; 2 Stark. Ev. 49; 2 Leach, 636; Greenl. Ev. 248, 254.

Bridges, Attorney General, for the State, said that junior was no part of the name of the owner of the goods, and was inserted merely to describe the person. The identity of person may be shown by evidence, as it was here. This word was no part of the description of the offence. Roscoe's Crim. Ev. 597.

As to the property, the money was received as Emerson's, and he was liable over to the other part owner for the amount. And that is sufficient. Roscoe's Crim. Ev. 583.

To exclude the confessions, there must have been a promise of favor, or a threat of injury, to the person making the confessions. Here was neither the one nor the other. Ros. Cr. Ev. 38, 39.

The opinion of the Court was prepared by

Shepley J. — The trunk, which was stolen, is alleged in the indictment to be the property of Eusebius Emerson of Addison. The proof is, that there were in that town two persons of that name, father and son; and that the trunk was the property of the son, who had usually written his name with junior attached to it. Junior is no part of the name. It is only descriptive of the person.

In *Lepiot* v. *Browne*, 1 Salk. 7, and in *Sweeting* v. *Fowler*, 1 Stark. R. 106, it was held, that when there are two, father and son, of the same name, the presumption is, that the father is meant. But this presumption is removed by any proof, that the son was intended. In *Boyden* v. *Hastings*, 17 Pick. 200, the declaration set forth a judgment in favor of Samuel Boyden. The judgment produced was in favor of Samuel Boyden, Jr. The Court say, "as the pleadings now stand, we cannot presume, that Samuel Boyden, Jr. and Samuel Boyden are the same person." In *Rex* v. *Peace*, 3 B. & A. 579, the indictment alleged an assault and battery on Elizabeth Edwards. It appeared in evidence, that there were two of that name, mother and daughter; and that the assault was committed upon the

daughter. The like objection was taken, as in this case, and overruled. The Court say, "the question here is not, whether the party assaulted has been rightly described; but who the party is, who is described in the indictment as having been assaulted. Here that has been sufficiently proved. The objection therefore is not sustained." Excepting the difference in the crimes, that language is applicable to this case.

It is next objected, that the testimony stating the confessions of the accused was illegally received. There can be no doubt, that an inducement was held out to him to make a confession to "save his brother." And there is reason to believe, that he made it under that influence. It would seem to be excluded by the rule laid down by Eyre, C. B. in Warickshall's case, 1 Leach, 298, where he says, "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." This rule appears to have been limited by subsequent cases, so that there must appear to be some fear of personal injury, or hope of personal benefit of a temporal nature, to exclude the confession; unless the collateral inducement be so strong as to make it reasonable to believe, that it might have produced an untrue statement as a confession. Roscoe's Cr. Ev. 30; Greenl. Ev. 266; 9 Pick. 503. In this case the inducement was but the advice of one not pretending to have or to speak by any authority. There was no promise or other ground of confidence, that his brother would escape, if he confessed. And under such circumstances the Court cannot conclude that the motive was sufficiently strong to influence him to make a false statement.

The proof of property was sufficient for the purposes of the indictment.

Exceptions overruled.

HALL J. HOWE & *al. versus* WILLIAM NICKELS.

Where there is a guaranty of payment for goods, to be afterwards purchased by a third person, until otherwise ordered, the amount not to exceed a certain sum, the guarantor, to be made liable, must be apprised of the acceptance of the proposed guaranty; and must within a reasonable time be notified of the amount which may have been advanced, and of demand of payment, without effect, of the principal debtor.

No definite rule, as to what constitutes reasonable time, seems to have been distinctly prescribed in such cases of guaranty; but if the want of notice, or the delay to give notice, has operated injuriously to the guarantor, he is to be relieved of his liability *pro tanto*, of such loss.

And if the debtor has become insolvent during the time the creditor had it in his power to have enforced payment against him, it is *prima facie* evidence of a loss *in toto*.

THE parties, in this case, agreed to submit it to the decision of the Court upon a statement of facts, and papers referred to as part thereof; "the Court to consider such of the facts as are relevant, and to draw such inferences therefrom as a jury might."

The following was found in the statement. "The action is assumpsit upon the annexed guaranty, not dated, but made in October or November, 1834."

The facts upon which the decision was made are found in the opinion of the Court.

Moulton argued for the plaintiffs, and cited *Seaver* v. *Bradley*, 6 Greenl. 60; *True* v. *Harding*, 3 Fairf. 195; *Norton* v. *Eastman*, 4 Greenl. 525; *Bent* v. *Hartshorn*, 1 Metc. 24.

C. Burbank argued for the defendant, and cited *Babcock* v. *Bryant*, 12 Pick. 133; *Norton* v. *Eastman*, 4 Greenl. 521; 2 Stark. Ev. 649; *Tucker* v. *French*, 7 Greenl. 115; *Cremer* v. *Higginson*, 1 Mason, 323.

The opinion of the Court was drawn up by

WHITMAN C. J. — This action is founded on a claim for advances, made by the plaintiffs, to one Robert S. Nickels, under a guaranty in writing, signed by the defendant and one Alexander Nickels, in substance as follows, viz. In considera-

tion of one dollar the subscribers agree, jointly and severally, to guarantee to the plaintiffs payment for all goods, which may be purchased of them by Robert S. Nickels, after the 21st of Oct. 1834, till otherwise ordered, the amount, not exceeding $1000, to include a bill before purchased. The bill named has been paid, and is not therefore in question. To the guaranty there is no date. By a letter in the case, however, from the defendant to the plaintiffs, it is manifest, that it was given in 1834, and prior to the sale of the goods, for which payment is sought to be recovered. For the amount due for these goods, being short of the amount intended or offered to be guarantied, a note was taken, signed by Robert S. Nickels, payable on demand, with interest, bearing date Sept. 15, 1835; for the payment of which the plaintiffs had often called upon him, without obtaining any thing, except a few small sums, indorsed on the note, until the 14th of October, 1837; when the plaintiffs, for the first time, by letter addressed to the defendant and Alexander Nickels, the signers of the guaranty, reminded them of it, and stated the amount due from Robert S. Nickels, and solicited payment. To which the defendant replied, expressing his surprise, that he had not been more seasonably notified; and stating that he had been informed, and had supposed the plaintiffs had been fully paid.

Two general principles may be considered as fully established in cases of this kind. The first is, that the guarantor must be apprised of the acceptance of the proposed guaranty. The other, that he must, within a reasonable time, be notified of the amount, which may have been advanced, and of demand of payment, without effect, of the principal debtor. The former of these is essential to constitute the contract, between the parties; for it is only upon the ground of a contract, between the parties, that any liability can arise; and a contract cannot be said to exist till each party is apprised of the assent of the other to it.

With regard to the other principle, that there must be reasonable notice of the amount advanced, and of non-payment by the principal debtor, although it be a general rule, in such

cases, still, much embarrassment often occurs in the application of it. What is reasonable notice? It is said to be a question of law, to be decided by the Court. It cannot be such, however, till the facts are ascertained; and the facts, in cases arising under guaranties of this kind, are often almost infinite in variety and shades of character. In every such case it becomes necessary to refer the decision to the jury, with instructions as to what would or would not be considered reasonable notice, under any state of facts, which the case would warrant the jury in finding to exist.

Although the facts may be ascertained, the result to which they may tend, by way of proving reasonable notice, is unascertained. Here the difficulty is twofold. First, the train of circumstances and facts, in reference to the question, often, and indeed usually, are not only numerous and complicated, but dissimilar to those, which have occurred in any previous case; so much so as to preclude, in a good measure, a resort to any precedent to aid in forming a decisive opinion; and, secondly, the impression, as to what state of facts should be deemed to amount to reasonable notice, will not be uniform in different minds. Hence, notwithstanding, that what is to be deemed reasonable notice, is a question of law; yet in most cases it must be almost as unsettled, and as far removed from any thing, that can be recognized as a known rule of action, as if no decision had ever before been made on the subject.

There are many cases occurring in the administration of justice, where certain general propositions can be laid down; but which, when they come to be applied, must be met by a variety of incidents, unforeseen, and never before contemplated; and in reference to which no general rule has or could have been prescribed beforehand. The Court, in every such case, must be expected to exercise its best discretion and judgment in determining what the law must be deemed to be as applicable thereto. This must necessarily give rise to some uncertainty as to what will be the decision in any given case; but this is the inevitable result of human frailty, and the imperfection of all things depending upon human foresight and sagacity.

In the present case we may fairly conclude, from the tenor of the guaranty, which acknowledges the receipt of a pecuniary consideration for entering into it, that it had been concluded upon between the parties, both at the time interchanging their assents to it; and hence, that the contract was complete between them; and that therefore no further notice could be necessary, that the contract of guaranty had been accepted; and more especially as the defendant, in his letter, before referred to, makes no complaint of the want of such notice; while he does complain of the want of notice that the debt had not been paid. We may therefore consider that fact as established.

The defence, then, must rest upon the ground of which the defendant did complain. He was entitled to reasonable notice of the amount claimed, and of the demand upon the principal debtor, and of non-payment by him. The debt was incurred in Sept. 1835. Although the note given for it was on demand, it was for goods sold in the mercantile line; and a credit, from the known usage in such cases, may be presumed to have been in the contemplation of the parties. The first payment made on the note was in the February following, something over four months from the date of the note. Whether the contemplated credit had then expired or not, does not appear. This was about twenty months before the defendant was notified of the existence of the debt, and of the non-payment of it. In this time the principal debtor had closed his business, where he was, when the credit was given, and had removed to another town, and there formed a connexion in business with another person, which had proved unfortunate, and left him insolvent. During the same time, repeated attempts had been, unsuccessfully, made by the plaintiffs to induce the principal debtor to make payment. Not until after all these occurrences was there any notice of the existence of this demand forwarded to the defendant.

The cases referred to by the counsel for the defendant, tend very strongly to show, that such notice cannot be regarded as having been seasonably given. And the cases of *Douglas* v. *Raynolds*, 7 Peters, 113; and *Lee* v. *Dick*, 10 ib. 482, are

still more explicit and pointed to the same effect. In the first of these two cases, which the Court held to be a continuing guaranty, similar to the one before us, it was laid down, that although it would not be necessary to give notice of each successive advancement, going to make up the amount, to which the limit extended; yet, when all the transactions under the guaranty were closed, notice of the amount, for which the guarantors were responsible, should, within a reasonable time afterwards, be communicated to them, demand having first been made upon the debtor; without which, they say, the *casus foederis* would not be made out. Here we still have the period of time, which would come within the description of reasonable time, undefined. Against drawers and indorsers of bills of exchange, mercantile usage and the decision of Courts have distinctly prescribed what shall constitute reasonable notice; but in the cases of guaranties of this kind no such definite rule has been established. It has however been considered, where the creditor had become insolvent before the debt became due, that no demand upon the debtor, or notice to the guarantor, would be required in order to charge him; but, if the debtor did not become insolvent till after the debt became due, it would be otherwise. The question in general, is, did the want of notice, or the delay to give notice, operate injuriously to the guarantor. If it did, he is to be relieved from his liability *pro tanto* of such loss. If the debtor has become insolvent, during the time the creditor had it in his power to enforce payment against him, it is *prima facie* evidence of a loss *in toto*. *Welds & al.* v. *Savage*, 1 Story's R. 22. In the case here, it seems, from the agreed statement of facts, that the creditors, the plaintiffs, had it in their power to have enforced payment against the principal debtor, after the expiration of any reasonable term of credit, which could have been in contemplation between them, and that the notice was not given to the guarantors, of the existence of this debt, till many months afterwards. We think, therefore, under the circumstances presented by this case, that we are warranted in coming to a conclusion, that reasonable notice had not been given of the claim made by the plaintiffs under the guaranty.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK,

ARGUED AT JULY TERM, 1842.

SAMUEL F. MORSE *& al. versus* STEPHEN HOLT and Trustee.

Where the demandant in a writ of entry had recovered judgment, and had elected to pay to the tenant the amount of betterments allowed to him, and a person who had been one of the attorneys of the tenant had been appointed by the Court under the provisions of the betterment act, to receive the money; and the amount in bills was afterwards offered to him in his office, and left on his table, he protesting at the time that he had no right to receive the money, that it should be paid to the clerk, and that he had nothing to do with it; and immediately a process was served upon him as trustee of the party entitled to the betterments, and after the service the money was taken care of by him; the person summoned as trustee was adjudged to be chargeable.

THE question in this case was, whether the trustee was to be charged on his disclosure.

Bishop had brought a writ of entry against Holt, the present defendant, and had recovered judgment, but the jury had awarded a sum of money to the defendant as betterments. The demandant, Bishop, elected to pay these betterments, and an order of Court was passed, that the balance above the costs, should be paid to Hezekiah Williams, Esq. who is summoned as trustee in this suit, and who was one of the counsel for Holt in Bishop's suit. This balance amounted to 209,66. C. J. Abbott, Esq. had been one of the counsel of Bishop, in his suit

against Holt. The after transactions are thus stated by the trustee.

"On July 19, 1841, C. J. Abbott, Esq. came into my office with a paper and some bank bills in his hand, and said he had money to the amount of the betterments allowed by the jury at the last S. J. Court in the case *Bishop* v. *Stephen Holt.* I replied that I had nothing to do with it; that the amount allowed for betterments in that case should have been paid to the clerk. He said the Court had ordered it to be paid to me, and that the bills amounted to two hundred and ten dollars. I remarked, that I believed that was not the amount of betterments in that case. He said the costs had been deducted, and asked me to sign a receipt for the amount, which I declined doing, adding that I knew nothing about it; that the money should have been paid over to the clerk; and that I had nothing to do with it. Mr. Abbott left the bills on my table, and went out, and the officer came in immediately and served the writ on me before I had taken the bills into my hands or possession. I was not authorized or directed by the defendant to receive the amount of said betterments. The bills left in my office by Mr. Abbott, as above described, amounted to two hundred and ten dollars. I was so far discharged as the attorney of Holt, in the land suit, as attorneys usually are, when a case is determined and ended in Court as this was, but I never had any special discharge. I knew that Holt expected the money would be paid to the clerk, if the plaintiff elected to pay the betterments, and so I expected."

Allen, District Judge, ordered the trustee to be discharged, and the plaintiffs filed exceptions.

C. J. Abbott, for the plaintiffs, contended that the trustee ought to be charged. The money was rightfully in his hands as the attorney of the defendant. The Revised Statutes, c. 119, § 63, makes seven cases of exception. This does not come within any one of them. The payment of the betterments was not made to any public officer, but to a private individual, the attorney of the party entitled to them. A person receiving bills may be holden as trustee, and the character

of attorney does not protect him. Wherever the property is in the custody of the person summoned as trustee, he must be holden. *Staples* v. *Staples & tr.* 4 Greenl. 532; *Morrill* v. *Brown*, 15 Pick. 173; *Lane* v. *Nowell*, 15 Maine R. 86.

Williams, pro se, said the Revised Statutes could not influence this case, as the process was served upon the trustee before those statutes were in force.

The trustee cannot be charged, because he had not, at the time he was summoned, any money in his hands. Bills were laid down upon his table, but they had not been touched by him, and he had disclaimed having any thing to do with them. His taking them up after the service, and holding them for whom it might concern, could not make him liable.

If he were the right person to whom the payment was to be made, as he refused to take the money, it remained the property of the person offering it.

But the tender amounted to nothing, as the trustee did nothing to excuse a legal tender.

If the money had been paid as betterments, and received by the trustee as such, still he could not have been holden, because it would have been received by him as an officer of the law. He had no power to receive the money as attorney, and he disclaimed such power at the time. It could make no difference in that respect, whether the money was paid to the clerk or to any person duly appointed to receive the money. Besides, the offer was made to him as an officer of the Court, and not as attorney. He stood in the same situation as an administrator, sheriff or county treasurer. 7 Mass. R. 438; 9 Mass. R. 537; 4 Greenl. 532; 3 Mass. R. 289; 7 Mass. R. 259; 8 Mass. R. 246; 2 Fairf. 185.

The opinion of the Court, TENNEY J. having been employed in holding the jury Term in the County of Washington at the time of the argument, and taking no part in the decision of this or of the next case, was drawn up by

WHITMAN C. J. — The trustee in this case claims to be discharged because, at the time of the service of the writ upon

him, he had not, as he contends, any goods, effects or credits entrusted to or deposited with him belonging to the debtor. But in whose possession or under whose dominion and control was the money tendered to, and left with him, in his office, on his table, and in his sight, after Mr. Abbot left his, the trustee's office, as stated in the disclosure? It had been ordered by the Court, in pursuance of a provision in the statute, that it should be paid to him, he being the attorney of record of the debtor in the suit, in which the order was passed. At whose risk was the money after being so tendered, and left with the trustee? Would Bishop & al., Mr. Abbot's clients, be thereafter answerable for it? Did not the tender, and leaving of the money with Mr. Williams, the trustee and attorney of the defendant, operate as a complete discharge of Bishop & al.? Could the trustee, as such attorney, refuse to take care of it for his client? If he had allowed it to be lost, or had thrown it after Mr. Abbot, would he not, if the latter had refused to take charge of it, have been accountable for it to his principal? Was not the tender a lawful one? And if a lawful tender be made, and the money tendered be left with the person to whom tendered, or under his control, is not the person making the tender, thereby absolved from any after claim for the same? The person tendering may, if he will, if the tender of money be refused, take it away, and keep it till demanded of him. But is he obliged to do so? The trustee, however, in this case did finally take charge of the money. No objection was ever made that it was in bank bills. But the trustee says, that he protested against receiving the amount tendered, and disclaimed all authority to receive it; and that the process in this case was served upon him, after Mr. Abbot had left his office, and before he had taken the bills into his hands and possession. But in whose custody, and under whose control were they at that moment? Certainly not in Mr. Abbot's or his client's. The money was where the Court had ordered that it should be. Finally, the taking of the money at last into his hands, if such an act were essential for the purpose, must be regarded as a waiver of the former

protestation and disclaimer of authority to accept the tender. It was an admission of the rightfulness of it and an abandonment of the ground upon which it was at first refused. The judgment, therefore, in the Court below must be reversed, and the trustee must be adjudged to be chargeable.

HENRY DARLING *versus* LEONARD MARCH, EX'R.

In an action by the indorsee against the indorser of a note for the accommodation of the maker, the latter, being released by the defendant from all claim for costs, is a competent witness for him.

The rule that the maker of a negotiable note shall not be permitted to show illegality in its consideration by his testimony, does not apply to a case, where the note first became a valid contract in the hands of the plaintiff, an indorsee, and with whom the illegal and usurious contract was made.

If the witness called has a balance of interest against the party calling him, he is competent to testify.

Where the plaintiff knew at the time that one of the partners indorsed the partnership name on the note in suit as security for the maker, it is, according to the decisions in this country, incumbent on him to rebut the presumption created by law, that he recieved the firm name as surety for another in fraud of the partnership.

Such presumption, however, may be rebutted by proof of frequent interchanges of the partnership names between the makers and indorsers for a long time, without direct proof of the assent of each member.

If a note has been indorsed by partners in the name of their firm, a waiver of demand and notice, being but the modification of an existing liability by dispensing with certain testimony which would otherwise be required, may be made by one partner, after the dissolution of the firm and before the note became payable.

Where a note for three thousand dollars which included usury was paid by the note in suit, of two thousand dollars, and by a note of one thousand dollars, paid before the commencement of the action; and where it did not appear on the trial that the illegal interest was separated from the principal and wholly included in either of the two last mentioned notes; and where twelve per cent. interest had been paid on the $2000 note; *it was held*, that under the Statute of this State, the illegal interest reserved in, and taken upon, the note in suit, should be deducted from the amount of it, and that the plaintiff should recover the balance, without costs, and should pay costs to the defendant.

THIS case came before the Court on a statement of facts signed by the counsel for the parties.

Assumpsit on a note dated Nov. 13, 1837, for two thousand dollars, signed by Lincoln, Foster & Co. payable to Willis Patten & Co. "at either bank in Bangor," six months after date, and indorsed Willis Patten & Co. Over the indorsement was written "holden without notice or demand," and no demand was proved, the plaintiff relying on the waiver.

It was admitted, or satisfactorily proved, at the trial, that Amos Patten, the defendant's testator, Willis Patten & Moses Patten, Jr. constituted the firm of Willis Patten & Co. prior to the first day of October, A. D. 1837; that on the eighteenth day of January, 1838, and for more than three weeks subsequently, notice that the firm had been dissolved on the preceding first day of October, and that Amos Patten had retired, and that a new firm under the same name, had been formed by Willis Patten & Moses Patten, Jr. was published in the Daily Whig and Courier, printed at Bangor; that the note about the time it fell due in May, 1838, was left in the Kenduskeag Bank for collection; that the officers of the bank had knowledge of the dissolution of the old firm at the time notice was published; that about the time the note fell due, the words "holden without notice or demand" were written on the note by Moses Patten, Jr.

It was proved on the part of the defendant by the deposition of Ephraim Lincoln, of the house of Lincoln, Foster & Co. that this was an accommodation note, known as such to the plaintiff; that it was the last of several renewals, growing out of a loan made by plaintiff to Lincoln, Foster & Co. on the security of Willis Patten & Co's name as indorsers; that after this note fell due, the plaintiff asked for payment, said he was a borrower of money, and if it was not paid he must have twelve per cent. interest; that up to August, 1839, the amount due on the note might have been secured at any time by attachment on the property of Lincoln, Foster & Co.; that, at that time they failed, and it has been impossible to secure it thus ever since; and that prior to giving his deposition, Lincoln was released by defendant, from all liability for costs, in

this suit. This deposition was objected to and admitted subject to exceptions.

It was further proved on the part of the defendant, by Moses Patten, Jr. whose testimony was objected to, and admitted subject to exceptions, he too testifying under a release from costs, that the old firm of Willis Patten & Co. was dissolved, or expired by limitation, on the first day of October, 1837, as stated in the published notice; that the waiver of demand or notice was written upon the note by himself the day before it fell due at the request of the cashier of the Kenduskeag Bank, who handed it to him for that purpose; that it was an accommodation note; that plaintiff first called upon him for payment, and gave notice of non-payment, in August, 1839, though previous to that, he had learned from Lincoln, Foster & Co. that it was not paid, but was informed by them that they were making payments; and that he, the witness, was residuary legatee of one eighth part of the estate of Amos Patten.

The foregoing facts and testimony being out, the case was, by agreement, taken from the jury, to be submitted to the Court, who are to order a nonsuit or default as the facts and law may warrant.

And if the Court shall be of opinion that the defendant is liable, they are to settle the principles on which the amount of liability is to be ascertained, upon the following facts: —

It appears by the deposition of Lincoln that his house paid to the plaintiff, for more than twenty months, interest on the original loan at the rate of 18 per cent. per annum, and for a year after that at the rate of 12 per cent. per annum, a portion of which was paid on this note. Said deposition is to be referred to for the facts on this point.

Upon these facts the defendant contends, that the excess over legal interest thus paid, should be allowed, so far as he is concerned, as payments towards the principal, and that he is liable only for so much as may remain due of the original loan and interest after making such deductions.

If the Court shall be of opinion that said claim of defendant is just and legal the note and Lincoln's deposition are to

be submitted to some competent person to ascertain, under the instructions of the Court, the amount due; and if they shall be of opinion, that it cannot be allowed, judgment is to go for what appears to be due on the note, principal and interest. The contents of Foster's deposition is sufficiently noticed in the opinion of the Court.

W. Abbott argued for the plaintiff; and cited Story on Partnership, 189, 161; 10 B. & Cr. 128; 2 B. & Ald. 795; Collyer on Part. 220; 15 Mass. R. 331; 7 East, 210; 2 Shepl. 271; 2 Esp. R. 731; 13 East, 175; 4 Shepl. 416, 419; 15 Wend. 364; 17 Mass. R. 94; 4 Mass. R. 156; 5 Greenl. 374; 4 Taunt. 466; 11 Ves. 5; Gow on Part. 335; Story on Part. 252; Collyer on Part. 311; 1 Gallis. 655; 6 Johns. R. 267; 10 Mass. R. 121; 8 Mass. R. 256.

Rowe argued for the defendant; and cited 7 T. R. 601; Peake's Ev. 117; 16 Johns. R. 70; 13 Maine R. 202; Bayl. on B. (P. & S. Ed.) 373; 16 Mass. R. 118; 5 Taunt. 464; 10 Johns. R. 270; 18 Johns. R. 167; 17 Johns. R. 176; 10 Johns. R. 231; 20 Johns. R. 287; 7 Mass. R. 470; 9 Mass. R. 55; 1 Wend. 529; 3 Kent, 47; Gow on Part. 72; 3 Pick. 5; 4 Maine R. 84; Story on Part. 190 to 211, and cases cited; 14 Maine R. 225; Story on Part. 458 to 462; 3 Kent, 63; 1 Stark. Ev. 375; 2 Johns. R. 300; 1 Hill, 572; 1 Peters, 351; 15 Johns. R. 424; 9 Cowen, 420.

The opinion of the Court was drawn up by

SHEPLEY J. — It may be proper to consider in the first place, whether Lincoln and Patten were competent witnesses. Lincoln, as one of the makers of the note, was liable to pay it in any event. If the defendant is obliged to pay it, he must repay him; and if not, he must pay to the plaintiff. And if the amount, which the plaintiff should recover in this suit, be reduced by his testimony, he will still be liable for the whole balance to the plaintiff. He is not therefore interested in the event of this suit beyond the costs, from which he has been released. *Freeman's Bank* v. *Rollins*, 1 Shepl. 202. It is objected, that he was not competent to testify, that it was an

usurious loan. This rule does not apply to a case, where the note becomes first a valid contract in the hands of the plaintiff, with whom the usurious loan was contracted. *Van Schaack* v. *Stafford*, 12 Pick. 565.

Moses Patten, Jr. knew, that the indorsement of the name of Willis Patten & Co. was made for the accommodation of the makers, if he did not make it, and made a written waiver of demand and notice upon it; and is therefore legally liable to pay it. If the defendant is compelled to pay it, he will be relieved from the payment of one sixth part of it, and will lose one eighth part only as a legatee of Amos Patten. Having been released from the costs, he is interested against the party, who called him.

The next question is, whether Amos Patten was bound by the indorsement of the name of the firm made on this note by one of the other partners as surety for the makers. There is no direct and positive testimony to prove, that he knew, that it was thus used. And there is testimony to prove, that the plaintiff knew it. Under such circumstances it is, according to the decisions in this country, incumbent on the plaintiff to rebut the presumption created by law, that he received the firm name as surety for another in fraud of the partnership. This may be done, and the consent of Amos Patten to such a use of the firm name may be inferred, from the habit and course of business. And when, from this course of business, it appears that the firm has received a valuable consideration for the use of the firm name on accommodation paper, by receiving the indorsement of another firm for its accommodation, the presumption of fraud will be effectually rebutted; unless it can be concluded, that one member of the firm, both made and received such indorsements, without the knowledge of the other partners. When such interchanges have been frequent and have been continued for sometime, it cannot be supposed, that a single member of the firm only had knowledge of it without charging the other members with gross neglect. And in such case they could have little cause to complain, that their own culpable negligence had occasioned losses. It would be

more reasonable to conclude, that they knew for what purposes the firm name had been used, than it would, that they were for a long time so inattentive to their own business as to be ignorant of the condition of their negotiable paper. It has accordingly been held, that such a course or habit of business is evidence of authority from all the members of the firm for such use of it. *Duncan* v. *Lowndes*, 3 Campb. 478; *Gansevoort* v. *Williams*, 14 Wend. 133. In the latter case, Nelson C. J. says, "But if it should appear, that a house was in the habit of indorsing at the bank or elsewhere for another, such general course of dealing, would be sufficient evidence of authority from all the members of the firm, and such use of it would bind all." It appears from the testimony in this case, that the firm name was used for the accommodation of the makers of the note in procuring the original loan in September, 1836, and again on the renewal of that note in March, 1837, and again on two notes to pay that in November, 1837. And Lincoln says, "at the time the original loan was made the two firms were not regular indorsers for each other, but indorsed for each other whenever asked occasionally, but not often; when the present note was given the firms indorsed for each other only to renew." The fair conclusion from this testimony is, that this indorsement was not a singular or unusual transaction; that the firms were in the habit of making and of receiving such indorsements; that the practice had been continued for more than a year, and for renewals of like paper after this note was made for what would have been considered a renewal. Such a habit of using the firm name could not have existed for such a length of time without the knowledge of each partner, without supposing that they kept no account of their liabilities, and that they were ignorant of the condition of their negotiable paper. It is but a just inference, that the testator knew and consented, that the name of the firm should be used for the accommodation of the makers occasionally, as they might desire it, and that this note originated from that use of the name.

The next question is, whether one member of the firm could

bind the other members, after its dissolution, by a waiver of demand and notice on paper existing before the dissolution. The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay, those before created. For these purposes, each member has the same power as before the dissolution. If an account, existing before the dissolution, be presented to one of the former partners, he may decide, whether it should be paid or not, even though it be a disputed claim. He may decide, whether due notice had been given on negotiable paper, and may make or refuse payment accordingly. The waiver of demand and notice is but the modification of an existing liability, by dispensing with certain testimony, which would otherwise be required. If one of the former partners could not dispense with the proofs, which might be required at the time of the dissolution, he could not liquidate the accounts and agree upon balances. To waive demand and notice, and to settle accounts, is but to arrange the terms upon which an existing liability shall become perfect without further proof. In doing this he does not make a new contract, but acts within the scope of a continuing authority.

Another question submitted is, whether this must be considered an usurious contract.

There can be no doubt, that the note for $3000, bearing date on the fifth of March, 1837, included a considerable amount of illegal interest. And that note, or one made in renewal of it, was paid by the note now in suit for $2000, and by a note for $1000, which has been paid. There is no indication, that the illegal interest was separated from the principal and wholly included in either of these last notes. It would seem, therefore, that the note in suit must include two thirds of it. And there is proof, that interest at the rate of twelve per cent. per annum, has been paid upon this note. By the law of this State the illegal interest reserved in the note, and taken upon it, is to be deducted from the amount of it. The plaintiff will be entitled to recover the amount after deducting such interest, without costs; and the defendant will recover his costs against the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO,

ARGUED AT JULY TERM, 1842.

MEM. — TENNEY J. having been employed in the trial of issues to the jury in the County of Washington, did not attend at this term.

NATHANIEL CHAPMAN *versus* JOHN BUTLER *& al.*

The St. 1821, c. 62, § 5, in relation to the recovery of *betterments by action*, provides only for the case of one who is entitled to the improvements, and upon whom, while in possession, an entry has been made by the owner of the land, and the actual possession taken and withheld from the proprietor of such betterments. An action, therefore, founded merely on a possessory title, brought by one who had become such only by purchase, and who had never been in the actual possession, cannot be maintained.

A Court of Equity will give full effect to the statute of limitations, as well as throw out stale demands and claims. But when it perceives, that the party complaining has equitable rights, and that the remedy at law, might have proved to be insufficient; that the answer admits, that they have never been relinquished, or compensation made for them, and that they still exist; and alleges that no resistance has been made to the enjoyment of them up to the time of filing the answer; it will not refuse to give relief, being a case proper for it, although the claim has been outstanding for a long time.

Where it appeared that the improvements upon a tract of land had been conveyed by the defendant to the plaintiff in equity in the year 1818, and that an agreement had been then made between them, whereby the defendant was to retain the possession for two years, "and then quietly leave the possession, and put the plaintiff into possession of the same;" and where, before the expiration of the two years, the defendant held the possession under a title from the proprietor of the land, and within three years of the filing of the bill, procured a conveyance of the land to himself, and refused to relinquish the possession to the plaintiff; *it was held*, that the statute of limitations was not a bar to the relief sought for by the bill in equity.

Although in such case the defendant might legally purchase in the title of the owner of the land, yet if he makes use of it to defeat his own prior conveyance of the improvements, he does so in fraud of the rights of the plaintiff, and it is but just to prevent his making such use of that title.

Although an action might have been maintained upon the agreement, on the refusal of the defendant to give up the possession to the plaintiff, this remedy cannot be considered as adequate or perfect, when he could not have recovered the improvements which had been conveyed to him, and might only have recovered for excluding him from the possession for the term of time before the action was brought. Such remedy at law is not sufficient to prevent the maintenance of a suit in equity.

And if the defendant has made a conveyance of the land, which was made and received with a knowledge of the plaintiff's claim and in fraud of it, and without a valuable consideration paid, the grantee may be considered as designing to aid his grantor in preventing the plaintiff from obtaining possession of the improvements, or any compensation for them; and may with propriety be made a party to the bill, and to such decree as might appropriately have been rendered against the grantor.

BILL in equity. The facts in the case appear in the opinion of the Court, as do also the material parts of the bill and answers.

F. Allen, for the plaintiff, said that the claim of the plaintiff was originally limited to the possessory title, extending over the whole lot. The defendant has since that time united the legal and possessory title. If the sale of one half be *bona fide*, the sale of the other half is clearly fraudulent, and compensation should be made from that as far as it will go.

The statute of limitations cannot bar our claim, for we could not assert our right against the defendant until he purchased in the legal title, which was within six years. The statute of limitations is not pleaded, nor relied upon in the answer, and therefore cannot be urged in the argument. And the statute is no bar, because the defendants were guilty of a fraud which prevented the plaintiff from prosecuting his claim at an earlier period. It is no bar, because the defendant says that "he has never refused to deliver up said possession and betterments before the filing of this bill." And the possession of the land is demanded, and not the payment of money, unless in consequence of the defendant's own recent acts. It is no personal

contract between the parties, to be barred by the limitation of personal actions.

W. G. Crosby, for the defendants, contended that the claim of the plaintiff was not entitled to much consideration from the circumstance, that it is based upon a transaction of more than twenty years standing. Equity always discountenances neglect. 1 Story's Eq. 73; 1 Mad. Ch. 99; 2 Mad. Ch. 309.

The defendants set up in their defence the statute of limitations. It is said, that they are precluded from relying upon it, because it is not specially pleaded. It is embraced in their several answers, and that is sufficient. Rule of Court, 14, in 9 Greenl. 102.

The purchase in of the legal title of Gardiner, could not affect the rights of the plaintiff. That title might as well be holden by Butler as by Gardiner. This purchase then could not be considered as a fraud upon the plaintiff.

The plaintiff has a plain and adequate remedy at law, unless he has lost it by his own neglect. He might have taken possession, or have maintained an action against Butler, if he resisted, or have brought his action to recover the betterments under the statute, after Butler had taken possession, or he might have maintained an action upon the written agreement; and have recovered damages.

The bill cannot be maintained, because the plaintiff had never demanded possession, prior to the filing of the bill.

The part of the premises conveyed to John Butler, Jr. was free from all pretence of fraud, and without notice of any claim of the plaintiff and he is entitled to hold it.

It can be of no importance to the plaintiff, whether the legal title is held by Gardiner or by Jairus Butler. He has never hindered or obstructed the plaintiff in the enjoyment of any of his rights. How can the bill then be maintained against him? What greater reason is there for it, than to have brought the bill against Gardiner, had he continued the owner?

The opinion of the Court was prepared by

Shepley J. — The plaintiff, in the month of July, 1840,

filed his bill against John Butler to obtain possession of the improvements, or compensation for them, made on a lot of land and conveyed to him by Butler. The answer and a general replication were filed, and testimony was taken. By an amendment subsequently made, John Butler, Jr. and Jairus Butler, sons of the former defendant, were made parties; and they have filed their answers, and additional testimony has been taken. John Butler, Sen., has since died, on the 12th of April, 1842.

It may be considered as admitted, or proved, that some time prior to the year 1816, one Dudley Watson had been in possession of lot No. 79, in the town of Mount Vernon, and claimed to be the owner of the improvements made on it. That, during that year, Butler, Sen. obtained from the plaintiff promissory notes payable to Watson for three hundred dollars to purchase those improvements; and made his own notes to the plaintiff for the like sum; and entered into possession of that lot of land. On the tenth day of August, 1818, these parties agreed, that there remained of these last notes then unpaid the sum of $229,68; and to secure the payment of it in two years from the last of September then next, Butler conveyed the improvements to the plaintiff by a deed of quitclaim, and received his notes, which were surrendered to him as thereby paid. A written agreement, then made between the parties, and the deed were lodged with Samuel Thing to remain until the last of September, 1820, when they were to be delivered to Butler, if he paid the amount due by that time, and if not, they were to be delivered to the plaintiff. The money was not paid, and these papers were delivered to the plaintiff. On the 28th day of February, 1820, and before the time for payment had expired, Butler purchased from Robert H. Gardiner and received from him a conveyance of the lot of land in fee; and at the same time re-conveyed the same to Mr. Gardiner in mortgage to secure the purchase money. Butler continued in possession of the lot until his decease. He neglected to pay Mr. Gardiner, who made an entry to foreclose the mortgage on the sixth day of April, 1822. On

the fourth day of November, 1825, he consented however, and did, at Butler's request, and it would seem for his benefit, convey the same to Noah Greely, Jr. who on the third day of August, 1837, conveyed the same to Butler.

When the plaintiff, on the first day of October, 1820, was entitled to take possession of the improvements conveyed to him, Butler was in possession under a title from the owner and could resist and prevent his entry. If he would have voluntarily yielded the possession to the plaintiff, when in possession, the plaintiff might have protected his interests against the title derived from the owner. And Butler in his answer says, that the plaintiff called on him with the deed and agreement in October, November, or December, 1820, and that he offered to let him have exclusive possession of the improved part of the lot, and that the plaintiff refused, unless he would give him up the deed from Mr. Gardiner. And that he never refused to give up to the plaintiff the possession and improvements before the filing of the bill. He does not profess to have offered to relinquish possession of the whole lot to the plaintiff, but only what he considered the improved part of it. And this part of the case is explained by the testimony. Ithiel Gordon in his testimony states, that Butler informed him, that he had told the plaintiff, "he might go on and go to work, if he dared to; and show his title, if it was better than his;" and that, "Chapman had got his fingers into a trap, and he might get them out if he could." It is contended in the defence, that the plaintiff had an adequate remedy at law; that he might, in a real action, have recovered possession of the improvements; or he might, in a personal action, have recovered the value of them under the provisions of the statute; or have recovered damages in an action upon the written agreement. And that having neglected for so long a time to avail himself of these remedies the statutes of limitation are a bar to the present suit. When the plaintiff on the first day of October, 1820, became entitled to take possession of the improvements conveyed to him, Butler was in possession under a title from the proprietor, and could successfully resist and prevent his

entry; and by pleading and proving that title, could have defeated any action founded merely on a possessory title and brought by one, who had never been in the actual possession of the premises. The same difficulty has continued to exist. The statute of 1821, c. 62, § 5, provides only for the case of one, who is entitled to the improvements, and upon whom while in possession an entry is made, and that possession is withholden from him. The plaintiff could not make out a case within its provisions. He had never been in the actual possession, and no entry had been made upon him. The agreement of the tenth of August, 1818, says, "and the said Butler is to improve the said farm for the above space, and if the money is not paid, he agrees on his part to quietly leave the possession, and put the said Chapman in possession of the same."

In case of refusal the plaintiff might have maintained an action on this clause of the agreement, and have recovered damages for a breach of it. But his remedy can hardly be considered as adequate or perfect, when he could not by it have recovered the improvements, which had been conveyed to him; and might have recovered damages only for excluding him from the possession for the term of time before the action was brought. A Court of equity will give full effect to the statutes of limitation as well as throw out stale demands and claims. But when it perceives, that the party complaining has equitable rights, and that the remedy at law might have proved to be insufficient; that the answer admits, that they have never been relinquished or compensation made for them, and that they still exist, and alleges that no resistance has been made to the enjoyment of them up to the time of filing the answer; it will not refuse to give relief in a case proper for it, although the claim may have been outstanding for a long time. And no suit at law or in equity could have been maintained for the recovery of the improvements, until the superior title in other persons had been extinguished by the conveyance of Greely to Butler in the year 1837. And although Butler might legally purchase in the title, yet when he made use of it to defeat the

effect of his own prior conveyance of the improvements, he did so in fraud of the rights of the plaintiff, and it would have been but just to prevent his making such use of that title.

The surviving defendants allege, that they have purchased the estate *bona fide* and for a valuable consideration, and assert their right to hold it exempt from any equitable claims, which the plaintiff might have had upon it before such purchase. There may be reason for doubt, whether John Butler, Jr. is fairly entitled to be considered as an innocent purchaser for value. But as it is quite certain, that Jairus cannot be so considered, it is not necessary to decide upon the rights of John. The conveyance to Jairus appears to have been made and received with a knowledge of the plaintiff's claim, and in fraud of it, and without a valuable consideration paid. And he may be considered as designing to aid his father in preventing the plaintiff from obtaining possession of the improvements, or any compensation for them. And he may with propriety be made a party to such a decree as would have been appropriate, if the father had survived and retained the title. The more appropriate decree, according to the course of equity proceedings, would then seem to have been to have enjoined him from setting up the title since acquired against the rights of the plaintiff for any other purpose, than to enable him to receive the benefit of it subject to the improvements. And thus have placed the parties in a condition to adjust their rights according to the provisions of the statute, when a suit is brought by the owner against one in possession, who is entitled to his improvements. But such a decree must be productive of new and further litigation. Although the plaintiff, not having been in possession, does not come within the provisions of the statute authorizing one, who has been deprived of the possession by the owner, to maintain an action against him to recover for the value of his improvements in money, yet he is equitably entitled to a like redress. And Jairus may be considered as taking and holding the title fraudulently, and to prevent the plaintiff from obtaining possession of the improvements, and therefore as responsible for their value. And to

prevent further litigation, and in analogy to the statute provision, he may be required to make such compensation, if the testimony already taken will enable the Court to come to a satisfactory conclusion. The farm is found to be of about the value of $850, and that part of it conveyed to Jairus of the value of $450 or $500. Mr. Gardiner states, that he contracted to sell the fee for $480, but afterwards conveyed it for $400, that sum being less in his judgment, than the value of the land in a state of nature. From this and the other testimony in the case, the present value of the improvements cannot vary much from $400. These have been made partly by the father and sons since the conveyance to the plaintiff, and they have during that time received the income derived from the former improvements, and this may be considered as paying them for the improvements since made. The plaintiff, upon these principles of adjustment, will be entitled to recover the sum of four hundred dollars as the value of the improvements from Jairus Butler, with costs since he was made a party to the suit. The bill as to John Butler, Jr. is to be dismissed without costs. And a decree is to be made accordingly.

CHARLES STUDLEY *versus* LEWIS HALL.

Jurors are not permitted by their testimony to disclose their deliberations and proceedings, while consulting together in their private room; but the rule does not extend to their conduct at other times and in other places.

Where one of the jurors to whom a cause was committed had entertained personal hostility towards the party against whom the verdict was returned, and had previously, on hearing but a part of the evidence on a former trial of the same action, expressed an opinion in favor of the other party, and on being interrogated at the commencement of the present trial, had declared himself to be impartial; and had during this trial been drinking with the party in whose favor the verdict was returned, on his invitation and at his expense; the verdict was set aside, and a new trial granted.

THIS case came before the Court on motion for a new trial for the alleged misconduct of one of the jurors who returned the verdict, filed by the defendant against whom the

verdict was. The specifications of misconduct are found in substance at the commencement of the opinion of the Court.

The action was replevin for a quantity of clapboards, attached by the defendant, as an officer, as the property of one Morse. The defendant also filed a motion for a new trial because the verdict was against evidence, and because he had discovered, since the trial, new and material evidence.

A new trial was granted on account of the misconduct of the juror, without entering into an examination of the other causes; and so the evidence and arguments in relation to them have become immaterial here.

H. C. Lowell argued for the defendant, contending that the verdict ought to be set aside for the causes assigned in the motion. The following legal grounds were taken.

1. The personal enmity of the foreman of the jury is a sufficient cause for setting aside the verdict. 2 Dev. R. 120. It is sufficient also, that the juror had previously formed and expressed an opinion. 14 Mass. R. 205; 3 Cowen, 355; 2 Cowen, 589; 1 Gall. 360; 5 Cowen, 283. These objections against the juror were not waived, and are available on this motion. Howe's Practice, 507; 14 Mass. R. 205.

2. The conversation of the juror in the presence of the plaintiff during the trial, and his statement that the verdict was "sealed in the plaintiff's favor," are causes for granting a new trial. Cro. Eliz. 778; 4 Cowen, 26; 7 Cowen, 562; Howe's Pr. 504; 14 Serg. & R. 292; 3 Leigh, 785; 3 Verm. R. 578.

3. The third cause assigned is fully proved, and that alone is sufficient to vitiate the verdict. 1 Hill, 207; 6 Grif. R. 379; 17 Maine R. 303; 12 Pick. 517; Rev. St. c. 158, § 13.

4. The jurors themselves are incompetent witnesses in this matter. 1 Durn. & East, 11; 4 Binney, 150; 14 Mass. R. 245.

W. H. Codman argued for the plaintiff, admitting that if the plaintiff had attempted to influence a juror, or if the juror had misconducted himself, in the manner stated in the motion for a new trial, that there was cause for granting one. He did

not contest the legal grounds, but argued that upon a fair examination of the facts, neither misconduct of the plaintiff nor of the juror was proved. There is more evidence of the existence of some animosity on the part of the juror towards the defendant in interest, than of any of the other charges brought forward. If this had been made out in proof, the same testimony shows that it was known to the real defendant and to his counsel before the trial. They cannot lay by, and when the verdict is against them, seize upon that to escape from the consequences of it.

The opinion of the Court was drawn up by

SHEPLEY J. — This motion for a new trial alleges in substance, that the foreman of the jury, which found the verdict, was guilty of misconduct. 1. In not disclosing, when challenged, that he was hostile to the party defendant in interest; and that he had a year before heard part of the testimony and expressed an opinion on the merits. 2. By becoming a party to conversations and expressions of opinion on the merits during the trial. 3. By drinking with the plaintiff and at his expense during the trial. The motion also alleges, that the verdict was against the weight of evidence, and that new and material testimony has been since discovered.

Portions of the testimony presented in depositions, both in support of the motion and in opposition to it, are clearly illegal and suited only to attempt to create a prejudice on the mind. It is much to be regretted, that counsel should entertain an opinion so erroneous as to believe, that the introduction of such testimony can have any other influence, than to create a feeling of disapprobation [not to use a stronger term] suited to injure the party introducing it, and to make it alike the duty of the Court to be watchful against its influence and against the feelings occasioned by its introduction. Sargent's second deposition is objected to by the counsel for the defendant, as having been improperly taken more than an hour after the time appointed for that purpose had elapsed. But as the caption is regular, and the testimony to disprove it was taken *ex parte* and without notice, it has been received. He also objects to

the testimony of the juror on the ground, that his testimony cannot be legally admitted. Jurors cannot be permitted to disclose their deliberations and proceedings while consulting together in their private room; but the rule does not extend to their conduct at other times and in other places.

It appears, that the juror was challenged at the proper time, and that on examination his answers were such, that he was adjudged to be impartial. The proof now is, that he had been before that time openly hostile to the defendant in interest. And there is no difference in the testimony respecting it. The counsel for the plaintiff insists, that as no allegation of personal hostility was specifically made at the time, it cannot now be admitted to affect the verdict. The allegation, that he had formed and expressed an opinion and that he was not impartial, was suited to elicit an answer respecting any bias or prejudice, that being the effect, which such feelings are suited to produce. It is difficult to believe, that a juror should not know, whether he had entertained and openly indulged such feelings toward a party; and if sensible of it, it does not exhibit a favorable state of mind for the performance of his duty to find him answering as he did, that he was insensible of any bias. And it appears from the testimony of Joseph Burns, that he had a year before expressed an opinion on the merits. The juror testifies, that he has no recollection of having expressed such an opinion. This however does not contradict the testimony of Burns. And it is not suited to weaken its force materially, when it is considered, that the juror admits, that he was present at that trial and heard part of the testimony, and that he was in the habit, from what evidence he might pick up, of giving an opinion upon the merits of a case on trial. Such habits of expressing opinions respecting causes on trial in the hearing of those in the court house, formed from scraps of testimony, are pernicious; and but little indicative of a state of mind fitted for an impartial and deliberate consideration of a cause.

The second allegation made in the motion does not appear

to be sustained by the proof. There is the testimony of one witness to the facts, but it is opposed to the testimony of the juror, who is much supported and corroborated on this point by the testimony of another juror.

The third allegation is supported by the testimony of three witnesses, Robert Hawes, William Bowley, Jr. and James Briggs. Sargent, in whose shop it is said they drank, in his first deposition says, that a person called Andrews, who was said to be one of the jury to try a cause, in which the plaintiff was a party, was treated by the plaintiff a number of times at his shop. He describes the man as having a dark complexion, a red face and a bald head. In his second deposition he says, that Joseph Andrews, who was then present and pointed out to him by the clerk of the Courts as the foreman of the jury, before which the cause was tried, was not the person, who drank with the plaintiff in his shop. But he does not say, nor does any other witness, that his former description of the man did not properly apply to the juror. The counsel for the plaintiff argues, that some person, who drank, was palmed off upon Sargent as Andrews, the juror. It is not easy to discover the motive for such conduct before any difficulty was apprehended. And if it were so, it must have been done by the plaintiff or in his presence. Why did he not produce that person to Sargent, or take his testimony, if such a person could be found, that the deception, if any, might be explained? A motive for such an attempt at a later time may be discovered. William Bowley, Jr. states, that Ephraim Bowley and Isaac Caswell were at a certain time present when the juror drank with the plaintiff; and he thinks it was at or before the adjournment of the Court in the middle of the day on Saturday. The plaintiff has introduced the testimony of Ephraim Bowley, who states, that on that Saturday he went from the court house with the plaintiff and Caswell before the Court adjourned, and that they called at Sargent's shop and drank, and that the juror was not with them. William Bowley, Jr. does not testify with any confidence, that it was at that time, that he saw them drinking with the juror; and Ephraim Bowley does not state

positively, that he did not drink with the plaintiff and the juror at any other time during the trial. Experience teaches, that the time, when an event occurred, is much less satisfactorily established by testimony, than the event itself. The juror positively denies, that he drank any liquor during that session of the Court with the plaintiff or with any other person. This testimony is opposed by that of the three witnesses before named; and upon a consideration of the whole of the testimony on the point, it is not found to be favorable to the juror. The plaintiff was put upon diligent exertion to free himself and the juror from blame by explaining every thing in any manner connected with the transaction, and has certainly failed to explain satisfactorily his own conduct at Sargent's shop. These are some of the considerations, upon which the Court has come to the conclusion, that the verdict must be set aside and a new trial granted.

ROBERT TREAT *versus* JAMES N. COOPER.

A note for value received and for a sum certain, payable to a person named or to his order at a fixed time and place, is a negotiable note, although the words, "the contents of this note to be appropriated to the payment of R. M. N. S. (a third person,) mortgage to the payee," were written upon the back thereof; and an action may be maintained thereon in the name of an indorsee.

ASSUMPSIT by the plaintiff as indorsee against the defendant as maker of two promissory notes, each dated June 15, 1833, payable in two years, the one to William Emerson, or order, and by him indorsed, and the other to W. & J. Coburn, or order, and by them indorsed, and both were also indorsed by W. T. & H. Pierce & Co. On the back of the first were written, but not signed by any one, these words, "The contents of this note to be appropriated to the payment of R. M. N. Smyth's mortgage to Wm. Emerson." And on the other were written these words, "The contents of this note are to

be appropriated to the payment of R. M. N. Smyth's mortgage to W. & J. Coburn."

When the cause came on for trial, the plaintiff read the notes, and offered to prove, that R. M. N. Smyth purchased of the payees of the notes a parcel of land, in payment for which he gave notes secured by mortgages of the same land; that afterwards Smyth sold the same land to the defendant and A. Cooper, who were then partners, and took the notes in suit and others in payment therefor; that afterwards, and before the notes described in the mortgages became due, Smyth paid those notes and took them up, and the mortgages were both discharged; that thereupon he had the notes indorsed to W. T. & H. Pierce & Co. by whom they were indorsed to the plaintiff for a valuable consideration; and that the defendant was notified, that the mortgages were discharged before this suit was brought. In this stage of the proceedings the parties agreed that a nonsuit should be entered, subject to the opinion of the Court. If the Court should be of opinion, that the action in this form can be sustained, the case was to stand for trial; and if not, the nonsuit was to stand.

W. Kelley, for the plaintiff, insisted that as these notes were made payable to order, in money, at all events, for a definite amount, and at a certain time, they were negotiable, and the suit might be maintained by the indorsee in his own name. The indorsee might be compelled to appropriate the proceeds of the notes to the payment of the mortgages, if the payees could be. They stand alike in that respect. The memorandum however was no part of the note, and could not alter its terms or effect. Bay. on Bills, (Ph. & S. Ed.) 14, 34, 106, and cases cited, and notes.

W. G. Crosby, for the defendant, contended that the words written upon the backs of the notes were to be considered parts of them. This is the natural presumption, and such are the decisions. *Jones* v. *Fales*, 4 Mass. R. 245; *Makepeace* v. *Harvard College*, 10 Pick. 303. It is then payable for a particular purpose, and restricted to that alone. Merely putting in the words or order, does not make a note negotiable, if

from any cause it does not come within the spirit of the definitions of a negotiable note. If the payees could transfer the note, the object of it would be entirely defeated. The very nature of a negotiable paper is, that the entire and absolute right to the sum mentioned therein should be transferred by the indorsement. If it was not negotiable when made, no after transactions could make it so. *Hayward* v. *Perrin*, 10 Pick. 228.

The opinion of the Court was drawn up by

WHITMAN C. J. — The question submitted is, were the notes declared on negotiable? and this depends upon the effect of a writing indorsed on each of them. The writing on one is, "the contents of this note are to be appropriated to the payment of R. M. N. Smyth's mortgage to William & Jeremiah Coburn;" they being the original promisees in that note; on the other, it is in the same form, but to a different payee, and to the holder of a different mortgage from said Smyth. The notes, upon their face, purport to be for the payment of money absolutely, in one and two years from their dates, with interest annually; and the promise in each is to the payee, or to the order of each respectively.

Upon what principle can the writings on the back of each of the notes be considered as in restraint of their negotiability? Can they be considered as making the notes conditional? Or did they amount to nothing more than a designation of what was to be done with the money, when received by the payees? If the notes were not intended to be paid absolutely, but only in case of their being needed to discharge the mortgages, would they not have been so expressed, and with a proviso to that effect? and not have been left to an inference, to say the least of it, very obscurely and inartificially indicated, if indicated at all? If the mortgages were otherwise discharged as the case shows they were, is it reasonable that the agreement between the parties should be understood to be, that the notes were not to be paid? Neither in the statement of the case, nor in the arguments of counsel, is it intimated, that it was

ever understood, that the notes were not intended to be absolutely payable to the promisees; and, from the face of the notes themselves, we think it must be believed the parties understood it to be their agreement, that they should be so. If it were not so intended, why were the words, "or order," inserted, as is usual in notes intended to be absolutely payable and negotiable? and would those words have been inserted if it had been otherwise designed and intended?

The object of the parties was, manifestly, that the money, when received for the notes, should go in discharge of the mortgages, if then uncancelled; and in that event to be a discharge thereof *pro tanto*. And, in such case, the agreement by the payees, by accepting the notes with the memorandums on them, would have secured the giving of credit accordingly.

But, in the forms in which these appear, we cannot hesitate to come to the conclusion, that it must have been intended, that the payees should have a right to avail themselves of the money promised, from the promisors, if they should have occasion therefor, indirectly through indorsees. It could make no difference to the payers whether it was so received or not. The destination and object of the payment would be the same in either case; and equally well adapted to answer the purpose of the payers. We cannot, therefore, come to any other result, than that the negotiability of the notes was not affected, or intended to be affected by the writings on the back of them. And the action must, according to the agreement of the parties, stand for trial upon other grounds of defence, if any there be.

JOHN RUSS *versus* JOHN WILSON.

The Court has not equity jurisdiction, under our statutes, where the plaintiff in equity sets forth in his bill, that he had left with the defendant, an attorney at law, certain demands against a number of individuals for collection, under an agreement that the defendants should apply the proceeds, when collected, to the payment of a note of hand held at the time by the defendant against the plaintiff, and should account for the surplus, and avers, that more than sufficient had been collected to pay the note, but that the plaintiff had neglected and refused to apply the same to the payment thereof or to account for the same, there being a plain and adequate remedy at law.

A discovery, in equity, can be claimed rightfully only in cases within the equity jurisdiction of the Court.

It is only when the plaintiff in equity has exercised due precaution to prevent an injury, that he can be relieved by an injunction.

THIS was a bill in equity, instituted in July, 1841, wherein the plaintiff alleges that on Feb. 28, 1822, he gave his note to the defendant, Wilson, and his then partner, Z. Porter, since deceased, for $120, payable in six months with interest, and on the day next following he left with them, they being attorneys at law, a large amount of notes and accounts in his favor against different persons to pay this note, and that they agreed to collect the demands, pay the note from the money, and account to Russ for the balance; that he supposed the note to have been paid until a suit was brought against him by Wilson, as surviving partner, upon the note at the March Term of the C. C. Pleas, 1828; that this suit was refered and kept in Court until March Term, 1839, when the reference was discharged, "and such further proceedings were had thereon that at December term of this Court, 1839, a verdict was recovered for said Wilson for the whole amount of the note including interest thereon, without any allowance or deduction therefrom on account of said demands, which said action is now pending in this Court;" that an amount had been collected on these demands more than sufficient to pay the note; that a few days before the commencement of the equity process Wilson had been requested to render an account of the col-

lections, and had promised so to do, but did not, "thus keeping the plaintiff in ignorance of the true state and condition of his affairs entrusted to the care of said firm, to the great injury of said Russ, whereby he became wholly discharged from his legal liability; and that "the attempt of said Wilson to compel him to pay said note and interest is illegal, oppressive and unjust;" and prays, "that unless said Wilson shall consent to have said collections applied to the payment of said note, that he be forever enjoined from and against further prosecuting his said action in this Court, and from recovering judgment on the verdict."

The answer was in the form of the general issue, and of one special plea, by leave of Court, of the statute of limitations, (as in a suit at law,) and another denying that he ever received money enough to pay the costs on said demands, and averring his belief that his partner in his lifetime had not received sufficient for that purpose, and that the only notice he ever had of the plaintiff's claim on account of those demands was, "in his attempting to show payment of said note to the satisfaction of the jury or juries who tried the action in the two Courts, or unless the action commenced by said Russ against said Wilson to recover the amount of said demands be considered a call;" and denying the allegations in the bill.

The case was argued in writing.

J. Williamson, for the plaintiff, contended, among other things: —

That enough was collected by the firm of Wilson & Porter, on the demands left with them, to pay the note, and a balance beyond to be accounted for.

The statute of limitations does not apply to cases of trusts, because no duty or obligation arises on the part of an attorney till a demand made. 5 Pick. 321; 9 Pick. 212; Angel on Lim. 183; 20 Johns. R. 576; 1 Story's Eq. 442; 4 Greenl. 532. But here a new promise is proved.

Whether the subject of the collections has or has not heretofore been brought into any investigation in an action at law

has no bearing in the matter, because an action at law would not furnish a complete and adequate remedy. Rev. Stat. c. 96, § 10; 1 Story's Eq. 430, 446.

It is too late now to question the jurisdiction of this Court. *Clark* v. *Flint*, 22 Pick. 231.

The Court will take care that injustice shall not be done through the process at law in their own Court, and will therefore grant an injunction to stay proceedings in the action on the note, and will compel a discovery of the sums collected.

Wilson, pro se, said that no money had been collected on the demands, which had not been accounted for, and that this fact had been submitted to the juries and considered by the Court in the actions, *Wilson* v. *Russ*, and *Russ* v. *Wilson*, and decided in his favor, and that therefore he was not bound farther to respond. And that the matter had remained until after the death of his partner, who attended solely to this business, and was undoubtedly settled by him, and that it was honest and right in such case to rely on the statute of limitations. The bill was not brought until fifteen years after the action on the note.

The opinion of the Court was drawn up by

WHITMAN C. J. — In matters of equity this Court has but a limited jurisdiction. It is therefore incumbent on the part of the plaintiff, in every cause of this kind, to bring his case within some one of the specifications in the statutes, authorizing the Court to take cognizance of such matters. The plaintiff, in his bill here, sets forth a special contract between himself and the defendant, and his deceased partner, Porter, and that the same has been broken by them. His statement is, that he had left with them certain demands, against a number of individuals for collection, under an agreement with them, that they should apply the proceeds, when collected, to the payment and discharge of a demand, which the defendant and his partner held, by note of hand, against the plaintiff; and, after fully paying the same, to account for the surplus, which might remain. The breach assigned is, that more than suffi-

cient to pay said demand had been collected, which had not been so applied; and that the defendant has wholly refused to apply or account for the same, and for any surplus thereof.

And it is contended that this was a case of trust; and, as such, cognizable in this Court, sitting in equity. That it was constructively a trust may be admitted; but it is not every case of constructive trust that is, under all circumstances, cognizable in equity. Such trusts embrace a wide field, the remedy in which may, in most cases, be sought at law, and much more appropriately than in equity. Various pretences are often resorted to in order to uphold jurisdiction in equity; but such pretences should not be listened to with too much facility. The proceedings at common law are, in almost every case, especially of contract, sufficiently well adapted to the promotion of remedial justice. They are precise and direct to the object in view; are simple and expeditious; and attended with but little comparative expense; while the proceedings in equity are latitudinary, multifarious, dilatory; and often vexatious. The straining to attain exact equity is not unfrequently the road to ruin to both parties. To yield, therefore, too inconsiderately to the pretences, that a party has not an adequate remedy at law, tends, but too frequently, in the end, to pervert justice, and to render legal proceedings deservedly odious.

If we could take cognizance in equity of an agreement like the present, and of the breach of it, there would seem to be but few cases of breach of contract, which might not, with equal propriety, be presented to us by bill in equity. But we cannot deem the cognizance of such matters otherwise than as pertaining to a Court of law, in which the remedy could scarcely fail to be otherwise than plain and adequate.

The counsel for the plaintiff, in his argument insists, that jurisdiction is to be entertained, because a discovery and disclosure by the defendant is supposed to be needed, or because an injunction, as a remedy, may become necessary. But a discovery can be claimed rightfully only in the cases specified, as being within the equity jurisdiction of the Court. Rev. Stat. c. 96, § 10. Injunctions, it is true, may be granted "in all

cases of equity jurisdiction, when necessary to prevent injustice." § 11 of the same statute.

It is, however, only when the plaintiff has exercised due precaution to prevent an injury, that he can be relieved by an injunction. Whenever he could have defended himself, in an action at law, by making use of the same matter, and has not done it, or whenever it shall be in his power so to defend himself, he is not entitled to such relief. It is only to prevent mischief, otherwise in a manner irreparable, that this mode of redress can be resorted to. In the case upon the note, set forth in the bill, the right of the plaintiff to have availed himself, in his defence, of the matter relied upon here, was ample and perfect. The same testimony now adduced might have been adduced there; and if not there adduced, or if there adduced and proved to be unavailing, the plaintiff can have no right to a review of the same subject matter in equity. *Hopkins* v. *Lea*, 6 Wheat. 109; *York Man. Co.* v. *Cutts*, 18 Maine R. 204; *Harrison* v. *Nettleship*, 2 Mylne and Keene, 423; *Marine Ins. Co.* v. *Hodges*, 7 Cranch, 336.

In the case at bar it is truly singular, that, although, by way of recital, a defence to the note upon grounds here set up, in an answer to one of the plaintiff's interrogatories, is alluded to, yet no direct averment by the defendant, in his answer to that effect is made; nor is there any offer to prove, by record or otherwise, that the plaintiff availed himself of the proof made here, in his defence there; yet the evidence here tends strongly to show that such defence was made there, and supported by the same evidence as adduced here; and, moreover, the defendant, in his argument here, urges this as a ground of defence distinctly; and the plaintiff in his reply does not deny, that such defence was made without effect. If this matter had been directly put in issue by the pleadings, and the proof were what it seems reasonable to believe it might have been, it must have availed the defendant conclusively. There are other anomalies in the bill, answer and pleadings, indicative of great oversight on the one side, and on the other; which it is unnecessary to notice. It is sufficient for the defendant that the

matters set up here by the plaintiff are such as might and should have availed him, if at all, in his defence in the suit upon the note.

The bill therefore must be dismissed.

SION PAYSON *versus* ISAAC CASWELL *& al.*

In an action for malicious prosecution, or for a conspiracy to injure the plaintiff by a groundless criminal prosecution, the want of probable cause for prosecuting is essential to the maintenance of the suit, however malicious the defendant may have been.

In an action for a malicious prosecution, if there be a conviction of the criminal offence charged before a magistrate, having jurisdiction of the subject matter, not obtained by undue means of the prosecutor, it will be conclusive evidence of probable cause.

THIS was an action of the case, the declaration containing three counts, one for a conspiracy to injure the plaintiff, one for a malicious prosecution, and the third a special count setting forth all the facts, and claiming damage for the injury.

The general issue was pleaded and joined, at the trial at December Term of this Court, 1841. The plaintiff introduced copies of a prosecution instituted on the complaint of said Caswell against the plaintiff, made to Stephen Barrows, Esq. dated the 16th of February, 1839, for cutting twenty-five cords of wood on the 7th of the same month on certain land described therein, not having the consent of the owner thereof, and a judgment of the said justice against said Payson, finding him guilty of the offence charged against him; an appeal to the then Court of Common Pleas; and the judgment of said Court, showing a verdict of acquittal, and judgment thereon. The ruling of the Judge was based upon the facts in the case which follow.

The plaintiff then introduced the following witnesses who testified as follows, to wit.

James Keene, Jr. That he was at the office of Edwin Smith, Esq. in Warren, in February, 1839, as he believed; the defendants, Isaac Caswell and Ephraim Bowley, were there,

a conversation took place about a warrant against the plaintiff; but he did not know whether a warrant was obtained. Bowley said to Caswell, "we will have the warrant."

James Tolman testified, that he was present with the defendants after the plaintiff was discharged in the Court of Common Pleas, last season, in a store, Caswell said they did it to draw out Payson's strength. Bowley said, "we did not expect to do any thing, we have made out all we expected;" that the witness did not bear it in mind.

Samuel Hewett; that in conversation with Caswell, in going to Thomaston in Feb. 1840, Caswell said, he did not calculate to beat Payson, but he drew out his strength to use in his civil suit against Payson. The witness had asked him how he made it with Payson.

Lewis Hall; that he heard the defendants conversing together after the trial in the Common Pleas, in a store, about the case. Caswell said, "we did not expect to beat Payson, but to draw out his strength;" that Caswell or Bowley said, "we know now just what we have to prove." Bowley and Caswell were both present before the justice who tried the case against Payson, and testified.

William Bowley; that in the winter of 1840, Caswell said he cared nothing for Payson, if Hewett, (referring as the witness supposed to Ephraim G. Hewett) would not take up for him; said he had found out all Payson would do.

Rufus Keene; that he had conversation with Caswell in April, 1839, witness said, "you have had a suit with Payson and lost it," he said, "that is of no consequence, I did not expect to make out much in that, I only did it to draw out their strength, I know how to take them, I know how to use them up, I am going to bring another suit." Ephraim Bowley was present, and entered into conversation with us.

Ephraim G. Hewett; that he was present at the trial in which Caswell complained of Payson, before the justice, and had conversation with Ephraim Bowley about that case before the trial. This was the November or December before; that Ephraim Bowley called at witness' brother's store and said to

witness, "I understand you have bought, or talk of buying a piece of land of Sion Payson," and he wished to know how it was; that he told him that the plaintiff wished to sell some; Bowley said, as near as he could learn there was no rightful owner to it, said he inquired of Thayer and others, and their opinion was that the one who should chop on it would hold it, said he was not afraid of any one's interfering, excepting Bayley Moore or Sion Payson; was not much afraid of Moore, for he had deeded it or would deed it to Isaac Caswell; that Caswell had used Moore up once, and he would not wish to trouble him; that he was not afraid of Payson unless he got some one to buy the land for him; he was poor and no great sprawl; he said if witness would not buy the land or assist Payson in any way, he would give twenty dollars, or more if that was not enough. Witness told him he had no interest in it, and did not know that he should have, and would not take it.

On cross-examination; that Bowley told him at the same conversation, that he had a deed, or should have one of the land, and witness told Bowley that Payson owed him eighty dollars; that he is not on good terms with Caswell. Payson and witness had before talked about the purchase of the land.

William Bowley called again, — that he had conversation with Caswell about the criminal prosecution and said something about the trial; said Payson was bound over, but he told the justice to fine him as light as he possibly could; he said considerable of the trial, and he got a fine of two dollars on him. After the justice trial, and before the following March, Caswell said he had taken a part of the wood cut by Payson, and he intended to have the whole of it. The morning after Payson was discharged in Court, in Bickford's cellar, Payson said to Caswell, "I shall prosecute you," Caswell said, "you dare not, I did not expect to beat you, but now I know how to take you." Ephraim Bowley was then present. Payson told Caswell he should sue for the wood, he had hauled away.

Stephen Barrows; that he was the magistrate who tried the case, *State* v. *Payson*, on Caswell's complaint; Caswell

brought to him the complaint and warrant; Caswell was a witness at the trial, and George Bowley and Ezekiel Bowley, but could not tell what was the testimony of Isaac Caswell; that Isaac Caswell did not state that he knew Payson had a claim to the land; said he himself had a deed of the land; Ezekiel Bowley was called to testify to the execution of a deed; the plaintiff requested to have the trial put off from the 16th Feb. to 8th of March, and it was done; it was proved that plaintiff cut the wood; witness did not recollect that Payson introduced evidence; Bayley Moore was then examined and his testimony was favorable to Payson. Afterwards witness thought Ephraim Payson was called by Sion Payson. The witness being afterwards called, testified, that Ephraim Bowley was at the trial and testified, and on being inquired of in relation to the plaintiff's claim, said he had no knowledge till recently, that plaintiff had any claim (a deed was presented to witness by the defendant's counsel and he said it was offered at the trial before him;) that plaintiff admitted that he cut the wood described in the complaint, and admitted that the deed shown to the witness from E. Bowley to Isaac Caswell covers the same land embraced in the complaint.

William Bowley, called again; that in 1827 or 1828, Ephraim Bowley came to him and asked him if it would not be a good plan to fence the land which is now in dispute; said Sion Payson was going to hold it; said he had sold that piece of land to Caswell; that he had sold him a piece of his original lot and a piece of the 60 acre lot; that he thought Ephraim Bowley said the plaintiff was going to hold the disputed land under Bayley Moore, but was not positive; same fall, at another time, witness said to Ephraim Bowley, "you had better give me the land, rather than to go to law about it." He said, "you have as good a right as Payson or I," Bowley made a fence all round the land; that he has known the gore between No. 1 and the Camden line about thirty years; lives from it about half a mile, or a little more, to go straight; has lived there about twenty years; set sable traps and crossed hedge fences more than thirty years ago; does not

know who built the fences; Bayley Moore was in possession of lot No. 1; that the witness is nearly fifty years old; that he never worked on the gore; that he worked on the Camden gore; that he knew the line because it was on the way to Grassy Pond.

Ephraim Payson; that he knew the land described in the complaint about twenty-five or twenty-six years ago; Bayley Moore was in possession of lot No. 1 at that time, and Moore told him he was in possession of the gore, at the time he was between the gore and lot No. 1; that in 1817, he bargained with Moore for 60 acres off No. 1, and it came to the gore and no further, and they run the line on a fence which was upon the line of the gore, that he had often seen the fence, and it was called a possession fence. At that time Moore occupied the other part of No. 1, exclusive of the sixty acres, till 1827 or 8; but never possessed the part of the gore that he gave a deed of to Ephraim Bowley; that he told him at the time the deed was given that he had no title to the gore, but Bowley said, it would prevent witness from going on to it, and said he would pay for the deed; that soon after the date of the deed to Ephraim Bowley, there was a dispute between Bayley Moore and the witness, Moore claiming pay for the gore; it was referred to Brickett, Littlehale and Lindsey; Ephraim Bowley testified at that reference, that the witness told him at the time he gave the deed, he had no title to the gore.

On cross-examination; that he found fence between the gore and the 60 acres and went no farther; that Moore gave him a bond of the 60 acres; that he occupied it several years; that he gave notes to Moore for the 60 acres for $480; that when he bargained for the 60 acres, Moore urged him to take the gore for $20, saying he presumed no one would call for it; said he would give a quit claim deed of the gore for $20; this the same day the 60 acres were run out; that he told Moore he would give the $20, to be paid after he had paid for the 60 acres; but when the bond was given, nothing was said about the gore and the deed of that was never given; that the only matter before Brickett, Littlehale and Lindsey as referees,

was the $20, which Moore demanded for the gore; that he had no recollection of having seen the fence between the gore and the 60 acres, after the latter was run out, and he had nothing to do with the gore; that it was in his opinion ten years after the bond was given, before he talked with E. Bowley about the gore lot; that he contracted with him to sell a year before the deed was executed; that E. Bowley said if witness would not think hard of him to go and cut, he would give witness a deed of one and a half acres of land, which would fetch the 60 acres to the road; that witness told him he would not think hard; that he received a deed of the one and a half acres and built a house thereon, and gave nothing excepting a deed of the gore; that he did not pay Moore for the 60 acres and never had a deed; he paid all but $56 of the 480, and Moore conveyed the 60 acres to D. F. Harding without witness' consent; that he never cut or disposed of any thing on the gore, other than by the deed to E. Bowley; that he supposed Moore to be dead; that he never paid him for the gore; that Moore *said* when they run out the 60 acres, that he had fenced the gore, but witness did not know it to be so; that he sold said one and half acres to E. Bowley; that plaintiff was living on the south west part of the gore at the time he gave the deed to E. Bowley, but not the part in dispute; that Moore never lived in Hope; went to Searsmont more than twenty years ago; that the deed from him to E. Bowley embraced the disputed part and no more.

Joseph H. Beckett; that he was a referee between Bayley Moore and Ephraim Payson twenty years ago; Payson said he told E. Bowley he had no title to the land conveyed by him, and that he did not remember that Bowley, who was present, made any objection.

W. Boys; that he knew the gore in 1817, and bought a part of it then; that his purchase was wholly south west of what is opposite lot No. 1; was often before on that which is opposite lot No. 1; before 1817 Bayley Moore cleared a piece on No. 1, and there was a fence round the part so cleared. In a year or two there was a fence round a part of this gore,

small trees lopped down and the butts resting on the stumps, but witness does not know who built it. Moore boarded at his father's and worked on the gore; it was two hundred rods from clearing on No. 1, to the gore and it was one and a half miles from gore to witness' father's house, and that witness worked on No. 1, for Moore.

On cross-examination; that he did not recollect either of the corners between the 60 acres and the gore; that he does not know that he passed over brush fence. E. Bowley owned land near grassy pond and owned and occupied the lower end of gore.

Jeremiah Lassell; that he had known the gore over fifteen years; that the plaintiff lived on a piece of it not in dispute; there was a hedge fence; saw B. Moore in the disputed piece in 1817 or 18, Moore said he had sold it to Sion Payson, and had put him in possession; plaintiff and the witness repaired an old fence on the Camden line in 1825; bought timber of the plaintiff, at one time after fence was repaired, two or three years.

On cross- examination; did not cross over brush fence on Camden line; knows Folger's corner. The place where saw plaintiff and Moore together was southerly of the part in dispute; John Payson and Sion were then dividing the line.

John Floger; that he knew No. 1, and the gore; that he purchased of the plaintiff a part of No. 1, and part of the gore. In 1836, saw plaintiff on the part of the gore now in dispute; spoke of the lot as his own; this was before witness had a deed; while we were there, he offered to sell it to me.

On cross-examination, Payson said he was willing to sell his farm; that the witness knew nothing of the lines; that he worked near the upper camp; that they were sawing stave stuff; one tree was blown down near the line and one they cut; that he gave for farm $1000; plaintiff asked $1200; plaintiff said he would sell as much as there was no dispute about, and he bounded it out in the deed; that the plaintiff offered to sell lumber, but witness could not tell which side of the

line it was; that the deed from E. Payson to E. Bowley includes the land in dispute.

William Wilson; that E. Bowley told him he had a case here and wanted him to come as a witness; that he told him, that he should have to testify about the trees, he said the witness might keep that back, but witness said he forgot all about that statement; that he worked for E. Bowley 16 or 17 years ago; knew the lot, called the gore lot, thinks he has cut timber on it; was a boy 15 or 16 years old; cut at different times 5 or 6 years; that he only knows they called it the gore lot; knew E. Payson's 60 acres; knew the town line of Camden; that he, E. Bowley and others went through and spotted the line, as they said, on the gore; that Bowley owned one side and Leach the other, and on Bowley's side they lumbered; that plaintiff came and sold spruce logs to Bowley; that they were there on the gore; plaintiff asked Bowley what he would give a thousand for such trees as would make plank; plaintiff hauled the logs and witness the plank; plaintiff pointed out the highland; the spotted line was crosswise of the gore.

Joseph Barns; that he was on the land in the winter of 1840; knew it in 1827 and 8; plaintiff then lived on the west end of the gore; that witness lived at Geo. Bowley's and was in his employ and helped cut two trees; Jones was there; the trees were cut on land in dispute; E. Bowley said they were cut on Sion Payson's and they must pay for them; said they had to buy them of Sion Payson.

On cross-examination; that this conversation was in Geo. Bowley's store, and he was there; that witness never knew any of the lines; that the timber was cut between the two camps. Neither George nor Ephraim Bowley were on the land and he did not inform Ephraim where they were cut and he did not know that Epnraim had knowledge where they grew; that witness said, "you get this timber easy," and they said, they must pay Sion Payson for it; that the trees were hauled to Geo. Bowley's barn, short of half a mile to where the trees were cut.

Stephen Hatch; that he knew the east line of the disputed

land, and was there in 1833; that in 1832, he made an agreement with E. Bowley for standing wood on the south and east of the disputed land; had chopped considerable and no lines had been shown; that he told E. Bowley, that plaintiff was watching to see that he did not get over the line; that he called on Bowley to show the lines; that Bowley run on a line and the witness spotted new trees, there was a large pine and a large spruce tree which witness wanted; that he told Bowley he was sorry they were not on the lot he was cutting on; Bowley said, "Oh you must not take them, for they are on Sion Payson's," that he said to Bowley, that as the oak was reserved, he ought to have the pine and spruce, and he answered, "you can find no fault for they are on Sion Payson's;" that plaintiff came there the same winter and witness told him the line shown by Bowley, and the plaintiff said it was right; that the pine and spruce were on him, and he offered to sell them to the witness. In 1834, the witness having cut only a part of the wood, purchased of E. Bowley, he sold it back.

On cross-examination; that the lot of wood was on the pond, but witness did not know how far it extended.

John Folger, called again; that Isaac Caswell was sworn on the trial of his complaint, as was E. Bowley; Bowley testified that he did not know that plaintiff had any title, or said it just after; that Caswell said he did not know a syllable of any claim that plaintiff pretended to have, till about the time he was going to cut; thinks the land described in the deed from Payson to Bowley is the same described in the complaint; that on the trial of the criminal case in the Court of Common Pleas, Sion Payson had eight witnesses; several witnesses came to Belfast on Thursday, started from home on Wednesday, and went home the following Saturday. The jury were out on the case fifteen minutes or a little longer.

The plaintiff offered to prove by parol, that at the trial of the criminal prosecution in the Court of Common Pleas, *State* v. *Payson*, the cause was submitted to the jury on the single question of title to the land in Caswell, but the Court ruled the evidence to be immaterial, and it was not adduced.

The foregoing evidence being adduced by the plaintiff, and he having rested his cause thereon, the defendant's counsel moved a nonsuit, whereupon the plaintiff's counsel contended, "that he was entitled to recover, because he had established the facts, that the judgment rendered against him at the justice court, had been procured principally, or in part at least by the false and malicious testimony of the defendants, especially in said Bowley's denying that he ever knew that said Payson had or pretended to have any title or interest to the premises described in the complaint, until about the time the plaintiff moved away from Hope, and in said Caswell's swearing that he never heard or knew that said Payson had or pretended to have any claim whatever to the premises described in the complaint, till a few days before the cutting by the plaintiff, and by their suppression under oath of other material facts, and hence that the record of said judgment, so rendered, was not evidence for the defendants of probable cause. That from all the evidence, it appeared that Bayley Moore took possession of lot No. 1, and of the entire gore opposite to said lot, some thirty years ago; that he subsequently sold his possessory title to said Sion Payson and put him into the open possession of the same, and that the plaintiff had ever since kept up that possession to the entire gore, in such a manner as to be good in law against Ephraim Bowley, and all claiming under him, or at least, that Caswell had not such title, as would enable them (Bowley and Caswell) to maintain that criminal prosecution in behalf of the State against said Payson; and that the defendants, well knowing the same, instituted that prosecution for the purpose of learning what evidence, it would be necessary for them to procure to defeat Payson's and establish their own claim to the land in a civil suit, without any expectation or belief that they should be able to procure his conviction; that they bore false testimony at the trial in the Court of Common Pleas, in suppressing material facts and in misstating and denying others, and that all the evidence taken together showed an entire absence of probable cause."

"That the cutting of the twenty-five cords of wood, stated in the complaint, being admitted at the trial of the prosecution against Payson, the verdict was evidence, that Caswell had not such title in himself, as would be the foundation of such prosecution against Sion Payson; and that if the jury should be satisfied of a conspiracy of these defendants to get him prosecuted as a criminal in order to harass him and to ascertain and procure evidence for a civil suit, then the defendants would be liable on those counts in the writ, charging them with a conspiracy, whether Payson had in fact acquired by possession a good title or not."

But TENNEY J., then presiding, ruled, that upon the foregoing facts, it did not appear there was a want of probable cause for the prosecution in the complaint and warrant of the *State* v. *Payson*, and intimated doubts, whether there was sufficient evidence to induce the jury to return a verdict for the plaintiff, on the ground of a conspiracy in the defendants to injure the plaintiff. Whereupon it was agreed by the parties, that the defendants might put into the case the deeds adverted to by the witnesses, and that a nonsuit should be entered subject to the opinion of the whole Court. The defendants then produced in evidence a deed from Ephraim Payson to Ephraim Bowley, dated April 22, 1828; also a deed from Ephraim Bowley to Isaac Caswell, dated Dec. 24, 1835, both which had been recorded. A nonsuit was entered according to the agreement, which is to stand, if in the opinion of the Court, on the foregoing evidence, the plaintiff is not entitled to recover. But if the evidence is sufficient to authorize a jury to return a verdict for the plaintiff, the nonsuit is to be taken off and the action is to proceed to trial.

H. C. Lowell argued for the plaintiff, and among other grounds, contended:—

That by an abuse of legal criminal process the defendants had injured the plaintiff in his person, by the vexation caused by it; in his reputation, by his arrest and trial as a criminal; and in his property, by the amount of expenses necessary for his de-

fence. For this he has a remedy in some appropriate form. Const. of Maine, Dec. of Rights, § 19.

To support the count for malicious prosecution, two things are necessary; that the criminal prosecution was without probable cause, and that it was with malice. Here the evidence was examined, and it was insisted both were made out. In examining this question, and in support of various propositions considered to be pertinent, the following cases were cited. The facts should have been submitted to the jury, with appropriate instructions. The facts must be found before the Court can decide as to probable cause as matter of law. *Stone* v. *Crocker*, 24 Pick. 81; *Jackson* v. *Rogers*, 1 Johns. Cases, 81; Tillinghast's Adams on Ejectment, 44 and notes. The defendants had no such title as would enable them to maintain the criminal prosecution, and this was known to them. 14 Wend. 192; 12 Pick. 324; 4 Kent, (4 Ed.) 445 to 449 and notes; Hilliard's Abr. 27; 6 Mass. R. 418; 5 Pick. 348. The defendants acquired no title by the deeds, because their grantor had none, and so informed them, and because none could have passed by reason of a disseizin by the plaintiff. St. 1821, c. 62, § 6; St. 1825, c. 307, § 2; 2 Greenl. 275; 4 Kent, (4 Ed.) 446; 6 Pick. 172; 6 Mass. R. 229; 14 Mass. R. 200; 15 Mass. R. 495; 10 Peters, 414; 11 Peters, 41; 4 Segt. & R. 465; Adams' Ejectment, 430.

The conviction of the justice was not conclusive evidence of probable cause, and indeed no evidence of it. The case of *Whitney* v. *Peckham*, 15 Mass. R. 243, has been examined and overruled, and cannot now be considered as law. 4 Wend. 598; 2 Fairf. 475 and 367. With the other proof, the conviction of the justice furnished evidence of want of probable cause, rather than of its existence.

On the face of the proceedings the justice had no jurisdiction of the matter, and his judgment is void. Const. of Maine, Dec. of Rights, § 6; St. Maine, c. 76; *Merriam* v. *Mitchell*, 13 Maine. R. 439; 8 Greenl. 365; 1 Greenl. 230.

The plaintiff should have been permitted to show, that at the trial of the criminal process in the Common Pleas, the case

was submitted to the jury on the single question of title to the land in Caswell, to rebut any presumption of probable cause. 19 Eng. Com. Law R. 487; 24 Pick. 81.

The evidence was sufficient to support the action on the count for a conspiracy. 2 Mass. R. 337; 9 Mass. R. 415; 16 Eng. C. L. R. 19; Lieber's Pol. Ethics, 346, 367; 7 Cowen, 445; 2 Day, 249; Ham. N. P. 278.

The action is sustained on the special count. 1 Binney, 172; 8 Wend. 674; 4 Wend. 259; 17 Mass. R. 186; Greenl. Ev. 122, 123; 3 Mass. R. 196; 1 Tyler, 60; 1 U. S. Com. Law Dig. 546.

F. Allen and *W. H. Codman*, for the defendants, said that the offence with which the plaintiff was charged before the justice, was not a crime, but a mere trespass to land. It was one mode allowed by statute of preventing a repetition of an injury to the property of the complainant. Without proof of special damage, of which there was none, the action cannot be maintained. And malice must be expressly found. 2 Esp. N. P. 121; 1 Campb. 199.

The complainant had a seizin of the land where the cutting was by his recorded deed. The plaintiff had no title whatever, and could acquire none by possession to unfenced woodland, as this was. There was then neither title, nor possession in the plaintiff, and of course, there was no disseizin to prevent the effect of the plaintiff's deed. The plaintiff admitted the cutting, and offered no evidence of permission from the owner. Not only probable cause was made out for the prosecution, but full evidence to sustain it. Where there was probable cause, the action cannot be maintained even by proof of actual malice. *Ulmer* v. *Leland*, 1 Greenl. 135; 2 Stark. Ev. 907 to 919; Yelv. 105.

The plaintiff defeated his action by the introduction by him of the record of his conviction before the justice. The testimony of the defendants was wholly immaterial, and besides has not been shown to be untrue. *Whitney* v. *Peckham*, 15 Mass. R. 243; *Witham* v. *Gowen*, 14 Maine R. 362.

The nonsuit was properly directed for three reasons, at least;

one that the plaintiff had not introduced evidence to maintain his suit; another, that he had introduced conclusive evidence to defeat it; and the third, that it was done with his consent. Either of the two former is sufficient to show, that the nonsuit was rightly ordered on the merits; and the latter, that he cannot now complain, that the case was not submitted to a jury, even if otherwise it should have been.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff's declaration consists of several counts. The substance of each of them is, that the defendants conspired together maliciously and without probable cause, to prosecute him criminally, under the statute, for a trespass upon land averred not to belong to him. His counsel contends that he has a right to recover upon one or more of three grounds; first, that the prosecution instituted was malicious, and without pobable cause; secondly, that the defendants were guilty of a conspiracy, by joining together in a prosecution against him, well known to them to be groundless; and, under this head, he contends, that it was not necessary to allege or prove the want of probable cause. The third ground relied upon, and which is supposed to be well sustained under the last count, is, that the plaintiff has been grievously injured, by a groundless and malicious prosecution, instituted by the procurement of the defendants, and ought to find redress therefor.

These distinctions were enforced by the counsel in an argument of great prolixity, and with the citation of authorities, indicating great labor and research; but we think without maintaining them. The want of probable cause is essential under either aspect of the case. The last count is, in substance, the same as the others. However malicious the defendants may have been, if they had probable cause for the prosecution, the policy of the law would shield them from harm, in a suit of this kind, whatever form it might have assumed.

In Buller's Nisi Prius, 14, it is laid down, that to support an

action for a conspiracy to prosecute an innocent person, the plaintiff must show both malice in the defendant, and the want of probable cause for his prosecution. In the 2d Vol. of Espinasse's Nisi Prius, pp. 528 and 533, the same doctrine is reiterated. What shall be deemed probable cause, when the facts are not in controversy, is a question of law.

In the present case the plaintiff, in his declaration, sets forth a conviction of himself before a justice of the peace, who had jurisdiction of the subject matter, in the prosecution complained of. Such convictions have been adjudged to be conclusive evidence of probable cause. *Reynolds* v. *Kennedy*, 1 Wils. 232; *Whitney* v. *Peckham*, 15 Mass. R. 243; *Ulmer* v. *Leland*, 1 Greenl. 135. The language of the Courts in these cases was used with reference to the cases then respectively before them, as is often the case, without adverting to the exceptions and modifications, to which a different state of facts might give rise. In *Burt* v. *Place*, 4 Wend. 398, the entire universality of the rule was very properly questioned; and it was held that, where the conviction, in the inferior Court, was procured by the circumvention and fraud of the defendant, it should not avail him; and in *Witham* v. *Gowen*, 14 Maine R. 362, the Court recognized it as sound law, that, if the conviction before the justice was obtained by the false swearing of the defendant, it would not be conclusive evidence in his favor of the existence of probable cause. In these two cases we have instances of exceptions to the general rule, indicative of the general nature of the characteristics which might be expected to attend them; but the rule itself remains unimpaired. If there be a conviction before a magistrate, having jurisdiction of the subject matter, not obtained by undue means, it will be conclusive evidence of probable cause.

In the case before us it appears, that the plaintiff attended before the magistrate, and made defence; and, on his motion, was allowed time to prepare himself to make further defence; which he did with counsel learned in the law. There is no evidence in the case, which can be considered as showing, that the complainants, the defendants here, who were admitted to

testify before the magistrate, prevaricated in giving their testimony; or that the trial was not conducted with fairness. This case then, does not seem to be brought within any reasonable exception to the general rule. Lord Kenyon, in *Smith* v. *McDonald*, 3 Esp. Cas. 7, held, that, if the jury paused upon the evidence before they acquitted the plaintiff upon his trial, it would be evidence of probable cause for the prosecution. In the case at bar, the evidence is, that the jury, on the final trial, were out some fifteen or more minutes before they agreed on a verdict of acquittal. The evidence therefore of probable cause for the prosecution of the plaintiff, seems to have been sufficient; and the nonsuit must remain.

EDMUND DAGGETT *versus* FREDERIC BARTLETT *& al.*

In an action upon a poor debtor bond, where the proceedings were regular, and the condition of the bond would have been performed, if the justices before whom the oath had been taken had both been of the *quorum*, instead of *quorum unus*, and where there was no legal interest in the debtor which was of any value to the creditor or from which he could have obtained any thing to pay his debt; *it was held*, that there was nothing to warrant a jury, under the poor debtor act of 1839, c. 366, in finding that the creditor had sustained any damage.

DEBT on a poor debtor's bond, dated April 13, 1840. Bartlett, the debtor, on June 6, 1840, having previously duly cited the creditor, appeared before "two justices of the peace, quorum unus," submitted himself to examination under oath, took the oath prescribed by law, was thereupon discharged by the justices from arrest, and they made the usual and proper certificate to the jailer of the County of Waldo.

Bartlett made this disclosure before the magistrates before the oath was administered.

"Question to said Bartlett. — What is your title or interest to any real estate?

Answer. — I have no title or interest to any real estate in the world.

Question. — What is your interest in any personal property?

Answer. — I have no personal property.

Question. — How is that property where you live ?

Answer. — That belongs to my wife."

The parties agreed, that the property referred to in the last question was conveyed to Bartlett's wife, and was by them immediately mortgaged back to secure the purchase money; that it has never been paid for; that the mortgage has been foreclosed, and the title has become absolute in the mortgagee, although at the time of the disclosure Bartlett occupied it, and for one year after; and that the annual income was one hundred dollars.

The parties agreed to submit the case for the decision of the Court, "to be decided upon the same principles and rules upon which it would be determined by a jury, if it was on trial before a jury, under the provisions of the first section of the statute of 1839, c. 366." If the Court should be of opinion that the jury, under the provisions of that statute, could legally find and assess the damages, if any, sustained by the plaintiff, *and if the jury should be of opinion that the plaintiff has sustained no damage*, and could legally return a verdict for the defendants, the plaintiff was to become nonsuit; but if the Court should be of opinion, that the bond has become forfeited, and that the defendants could not avail themselves of the provisions of the act of 1839, c. 366, on trial before a jury, then the defendants were to be defaulted, and the plaintiff was to have judgment for his debt and costs.

Harding, for the plaintiff, said that neither of the alternatives in the condition had been performed. The statute required that the oath should be taken before two justices of the quorum. It was not so done in this case. Two justices, quorum unus, only means, that one must be of the quorum. *Gilbert* v. *Sweetser*, 4 Greenl. 484.

Here Bartlett disclosed a tenancy for life, the income of which was one hundred dollars each year. No oath should have been administered under such circumstances. It was a very extraordinary use of power in the legislature in passing this poor debtor act of 1839, and it should not be extended by

construction. Here one of the justices had no authority to administer the oath, and it was a mere nullity. The case should be submitted to a jury, and they have no authority to find, that the plaintiff has sustained no damages.

W. Kelly, for the defendants, said that this bond was conditioned to take the oath before two justices of the peace quorum unus, and had been strictly performed.

The disclosure does not show, that the debtor had any property. He had no interest in the land, and if he had, it might have been taken by the plaintiff. The appraising off of property takes place only when property is disclosed, which could not be taken on execution.

But if there has been a breach of the condition of the bond, it has occasioned no damage to the plaintiff, and there is nothing to submit to the jury. It was no injury to the plaintiff, that one of the justices had not a quorum commission. It is a case within the statute, both in letter and spirit.

The opinion of the Court was drawn up by

SHEPLEY J. — This suit is upon a poor debtor's bond. The act of February 8, 1839, c. 366, provides, that when it shall appear, that the principal in the bond has been allowed to take the oath by two justices of the peace *quorum unus*, or by two justices of the peace and of the *quorum*, or by a justice of the peace and a Judge of any Municipal Court, after notice of his intention to disclose the state of his affairs, the defendants shall have a right to have the action tried by a jury, who shall find and assess the damages, if any, the plaintiff has sustained. This case coming within the express provision of the statute, the only question is, whether it appears, that the plaintiff has sustained any damage. And there is nothing in the case to show, that the principal had any property at the time of taking the oath, unless he derived it from the estate conveyed to his wife, and by her with him conveyed in mortgage to secure the payment. That mortgage has been foreclosed; and it cannot be presumed without proof that the right of redemption was of any value to one, who must have paid the whole debt to

obtain the benefit of whatever interest the husband might have had in it. The debtor continued to occupy that estate for one year after the disclosure, and the income is stated to have been of the value of one hundred dollars. But he had no legal right to the possession of it; and no creditor could have obtained any thing from it even by the indulgence of the mortgagee, unless he could have found a purchaser of the equity. The debtor has received the income through the mere indulgence of the mortgagee without any legal right to it. There being no legal interest in the debtor, which was of any value to the creditor, or from which he could have obtained any thing to pay his debt; there is no proof, that he has sustained any damage; and a nonsuit is to be entered.

CONSTANTINE MCGUIRE *versus* WILLIAM T. SAYWARD.

What the record itself does declare, is to be made known to the Court by a duly authenticated copy of it; and the law does not permit a recording or certifying officer to make his own statement of what he pleases to say appears by the record. A mere certificate, therefore, that a certain fact appears of record, is not evidence of the existence of the fact.

ERROR to reverse the judgment of a justice of the peace for the County of Waldo, rendered in favor of Sayward against McGuire. The action was debt, brought by Sayward, an inhabitant of Thomaston in the County of Lincoln, as adjutant of the fourth regiment, "detailed and commissioned according to law, to take the command of and train and discipline the B company of infantry in said regiment, said company being a company of infantry belonging to the town of Camden in the County of Waldo, and then being, and for three months previous thereto, and ever since having been, without any commissioned officer thereto," against McGuire, an inhabitant of Camden, for the penalty for unnecessarily neglecting to perform militia duty in that company.

Two of the ten causes of error assigned were these.

3. Because the limits of the B company of infantry, men-

tioned in the plaintiff's declaration, was not shown by legal evidence.

4. Because the justice received in evidence two papers signed by the adjutant general, as evidence of the facts therein stated, when the record, or a copy of it, was the only legal evidence.

To prove that the company of militia in Camden, the limits of which had been designated by the selectmen as the first or oldest company in that town, and within which McGuire lived, was the B. company, Sayward introduced a paper of which a copy follows.

"State of Maine.

"Adjutant General's Office, Augusta, Sept. 28, 1841.

"I hereby certify, that the company of local infantry in the town of Camden, designated by the selectmen of Camden in their return of the limits of companies in said town, and received at this office, May 17, 1836, as "the first or oldest company," is designated in the records of this office as the B company of Infantry in the fourth regiment, second brigade, and fourth division, conformable to an order of counsel approved by the Governor and commander in chief, Jan. 23d, 1835. And I also certify, that said B company has been without any commissioned officers since June 27, 1837, at which said time Shutellah M. Rice was honorably discharged from the office of ensign of said B company.

"Isaac Hodsdon, Adjutant General."

The original plaintiff also introduced a copy of the doings of the selectmen of Camden, defining the limits of the first or oldest company in that town, and a copy of an order in Council approved by the Governor, Jan. 23, 1835, in relation to numbering the companies anew, and authorizing the Adjutant General "to employ a suitable person to place such lines and numbers on a map of the State, to be executed under his direction." This copy of the order in Council was certified by the Adjutant General as a true copy of the order in his office certified by the Secretary of State.

There was no evidence to prove, that the first company of

infantry in Camden was the B company in the fourth regiment, but the certificate of the Adjutant General.

The other causes of error are not noticed in the opinion of the Court, and the evidence and arguments bearing upon them are omitted.

W. H. Codman and *M. C. Blake*, for McGuire, after remarking that the judgment must be reversed, if the certificate of the Adjutant General was improperly admitted, as without it there was no evidence that the first company in Camden was the B company mentioned in the declaration, and none that McGuire belonged to the B company, contended that the law was well settled, that the mere certificate of a certifying officer of what facts were contained in a record, instead of giving a copy of the record, was inadmissible. It would be making such officer the judge of what the record was, and taking from the party the right to have that question determined by the Court. *Owen* v. *Boyle*, 3 Shepl. 147; *Oakes* v. *Hill*, 14 Pick. 442; Greenl. on Ev. § 498.

W. G. Crosby, for Sayward, contended that the fact, that the first company in Camden was named the B company, was properly proved by a certificate. The certificate of the clerk of the Court that an action is pending has always been received as evidence of the fact. The order of the Governor and Council authorized the Adjutant General to give new names to the companies, and put their names down upon a map. There was no record but the map, and the certificate of the new name is sufficient evidence of this fact, and indeed the only evidence, unless a new map is to be made for every company.

The opinion of the Court was drawn up by

Shepley J. — The disinclination of the members of this company of militia to avail themselves of the privileges secured to them, and to take upon themselves the duties assigned them by law, has been already exhibited to the Court in the case of *Martin* v. *Fales*, 6 Shepl. 23.

Obedience to the laws is among the first duties of a good

citizen, and especially in a free government. It is only by this, as a general rule, that such a government can be preserved. And one, who refuses such obedience, is instrumental in subverting that government of laws, from which he derives his privileges, and which secures the fruits of his industry. A settled course of disobedience is unworthy of every good citizen; and it can only be supposed to arise out of the want of a correct knowledge of his privileges, rights and duties. When such instances occur, it is matter of regret, that the officers specially intrusted to superintend the execution of the laws should, by their inattention, or want of correct information in the supply of the necessary documents, enable such attempts to prove successful. It remains for the Court however to apply the law to the case, as it is presented.

The only testimony to prove, that the plaintiff in error was a member of the B company of infantry, which the defendant in error was detailed to train and discipline, was a certificate of the then Adjutant General, stating as a fact, "that the company of local infantry in the town of Camden, designated by the Selectmen of Camden in their return of the limits of companies in said town, and received at this office, May 17, 1836, as the first or oldest company, is designated *in the records of this office* as the B company of infantry." The legal proof of that fact was a copy of the record duly authenticated. The law does not permit a recording or certifying officer to make his own statement, of what he pleases to say appears by the record. What the record itself does declare is to be made known to the Court by a duly authenticated copy of it; and upon it, and not upon what the officer may say, that it declares, does the law authorize a Court of justice to rely. The certificate in this case states the existence of a record; and yet instead of a duly authenticated copy, there is only a statement of what the officer says will appear by an inspection of it. The law requires, that the Court, before which it is produced, should inspect and decide, what it contains and proves, and not entrust that duty to a certifying officer. Such testimony

was illegally admitted, and for this cause the judgment must be reversed.

JAMES PAUL *versus* ARVIDA HAYFORD, JR. *& al.*

If personal property be transferred as security for becoming surety on a note, and the note is afterwards paid by the surety, and a new mortgage is then given to him of the same property to secure the repayment of the sum thus paid, within a stipulated time, any rights acquired by the first transfer, must be considered as waived by taking the mortgage.

When property is mortgaged, and the mortgage is duly recorded, the statute of 1835, c. 188, does not authorize an officer to attach and *remove* the property on a writ against the mortgagor, without first paying, or tendering payment, of the amount secured by the mortgage. An attachment of the property, in such case, can only be made, when it can be effected without depriving the mortgagee of the actual possession, or of the right to take immediate possession.

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Trespass for taking articles of personal property. It appeared, that one Sprague was the owner of the property, and had "turned it out as security," to Paul to secure him for becoming surety for him on a note; that Paul was obliged to pay the note; and that without making any conveyance back of the property, a mortgage of the same property was made, and duly recorded, to secure the plaintiff for the money so paid within one year. A formal delivery of the property was made each time, but it remained in the possession of Sprague until it was attached by Hayford on a writ in favor of the other defendant, and by his direction.

The counsel for the defendants requested the Judge to instruct the jury, that as the plaintiff was only mortgagee of the property, and the mortgage not having become absolute, and the property still remaining in possession of the mortgagor, at the time of the attachment, that the officer was justified by his precept in taking said property, and that the plaintiff could not maintain this action against him for thus taking the property.

The Judge declined thus to instruct the jury, and on the return of a verdict for the plaintiff, the defendant filed exceptions.

W. G. Crosby, for the defendants, contended that the first mortgage of the property was not valid against any but the parties to it, the possession having remained with the mortgagor, and it not having been recorded. St. 1839, c. 390, § 1. Nor can the action be maintained by any title under the second mortgage. The officer may attach property pledged or mortgaged, and sell the same on execution, as in other cases, subject however to the right and interest of such mortgagee, pledgee or holder. St. 1835, c. 188, § 2.

The statute gives the right to attach. The officer therefore cannot be made liable for the mere taking under a writ, which is the position contended for at the trial, and against which the Judge ruled. By refusing to deliver up the property on demand, or by selling it, without making a reservation of the interest of the mortgagee, he might become so, but not by the mere attachment. This construction of the statute was recognized in *Cutter* v. *Davenport*, 18 Maine R. 127, although in that case the property was sold without any reservation of the rights of the mortgagee.

W. Kelley, for the plaintiff, said that the plaintiff had acquired a complete and perfect title to the property, on his paying the debt, to secure which it was turned out the first time.

The second mortgage, however, made after the debt had been paid, gave the plaintiff the right to maintain the action as much, as if the sale had been absolute.

But the construction of the statute contended for is erroneous. The officer cannot deprive the mortgagee of his rights. He has no power to remove the property without first tendering the amount due, and is a trespasser if he does. He can only take the rights of the debtor, and may sell those rights, perhaps, without removing the property. The construction contended for by the officer would destroy the security of the

mortgagee. If the property can be removed, and no action be against the officer, it may be sold to an irresponsible person, and none but such would bid on property so situated, and carried beyond the reach of the mortgagee, or destroyed.

The opinion of the Court was by

SHEPLEY J. — It appears, that Emery Sprague on the 24th day of December, 1840, conveyed to the plaintiff in mortgage certain personal property to secure the payment of one hundred and twenty-five dollars in one year from that time; and that the mortgage was duly recorded, and the property left in the possession of the mortgagor. Whatever rights the plaintiff might have had independently of it, he must be considered as waiving by taking the mortgage. This property was on the following day attached by Hayford on a writ against Sprague in favor of the other defendant, and was removed from the possession of the mortgagor. It is contended, that the sheriff was authorized to make such an attachment and removal of the property by virtue of the statute, c. 188, § 2. That statute provides, that personal property mortgaged may be attached, provided the person for whose benefit the attachment is made shall first pay or tender to the mortgagee the full amount of the demand, for which it is mortgaged. It then proceeds to provide for a sale of the property and for a disposition of the proceeds to pay the debt due to the mortgagee, and says, "and the residue of such proceeds shall be applied to the satisfaction of the judgment of the plaintiff in the manner provided by law, or the plaintiff may attach the property so pledged, mortgaged or held, and sell the same on execution as in other cases, subject however to the rights and interest of such mortgagee, pledgee or holder."

There are cases in which by our statutes a valid attachment may be made of personal property, which is left in the possession of the person, who held it before the attachment; and in such cases it may be practicable to make an attachment without interfering with the rights of the mortgagee, pledgee or holder, and without making a tender or payment of the amount

due; as it may also perhaps, where the person in possession procures a receipt for and retains the property. The language of the statute applies equally to the mortgagee and pledgee. The latter relies especially and often wholly upon the actual possession of the property for the security of his rights, which could not be preserved, while the property was taken from him by an attachment. Nor could those of a mortgagee, if he could be deprived of the actual possession, or of his right to take immediate possession, until after the recovery of judgment and a sale of the property, and a transfer of the possession had been made to any one, who should become the purchaser. The statute allows the attachment to be made only subject to the rights of the mortgagee, and does not authorize a diminution of those rights without a payment or tender of the amount due. And without such tender or payment an attachment of the property can only be made, when it can be effected without depriving the mortgagee or pledgee of the actual possession, or of the right to take immediate possession.

In this case, although the mortgagee had not the actual possession, he had the right to take the immediate possession. That was an important and valuable right, which could not be destroyed. The presiding Judge therefore properly declined to comply with the request for instructions; and the exceptions are overruled.

DAVID WHITTIER *& al. versus* JOSHUA HEMINWAY.

If an execution be delivered to an officer for collection, and he pays the amount thereof of his own money, to the creditor, and retains the execution in his own hands until it cannot be renewed, he cannot maintain an action for his own benefit on the judgment in the name of the creditor against the debtor.

DEBT on a judgment. A brief statement of payment of the judgment was filed with the general issue. The parties agreed upon a statement of facts, and upon what a witness testified.

A judgment, as declared upon, was rendered in 1830, and an execution was issued thereon. R. B. Allyn, Esq., original attorney of the plaintiffs, testified that immediately after the issuing of the execution, which was dated Nov. 1, 1830, he delivered the same to Isaac Allard, a deputy sheriff and the same who served the writ, for collection; that on July 14, 1831, said Allard paid to him, as attorney of the plaintiffs, the full amount of the execution, and he immediately afterwards paid the same to the execution creditors, the present plaintiffs.

This action is brought for the benefit of said Isaac Allard, who has hitherto kept, and still has the execution.

If the Court should be of opinion that the action can be maintained upon the principles of law, the cause is to be tried by a jury; otherwise the plaintiff is to become nonsuit.

Crosby, for the plaintiff, said that it was well settled, that an action of debt might be maintained in the name of the creditor upon a judgment, which has been assigned. The officer may well be the assignee. Here no question is raised in the statement respecting the validity of the assignment. Nor does the question whether the judgment has been satisfied by the defendant, come up here. That is for the jury. The delivery over of the evidence of the debt is a valid assignment. *Allen* v. *Holden*, 9 Mass. R. 133; *Dunn* v. *Snell*, 15 Mass. R. 481.

J. Williamson, for the defendant, said that the officer, having an execution in his hands to be collected of the debtor,

could not by paying the debt to the creditor, substitute himself in his place, and maintain an action on the judgment in the name of the creditor, who had been fully paid, against the debtor. The authorities are clear against it. If the execution has once been paid to the creditor, no action can be maintained upon the judgment, whether such payment was with the money of the debtor or the officer. *Stevens* v. *Morse*, 7 Greenl. 36; 7 Johns. R. 426; 15 Johns. R. 443.

But here the creditor never gave his assent to the bringing of the suit, and never made any assignment of the claim. This is an entirely different question from one, where the creditor sold and assigned his judgment, and received the payment as the consideration thereof, and not in satisfaction of his debt.

The opinion of the Court was drawn up by

WHITMAN C. J. — The cases of *Allen* v. *Holden*, 9 Mass. R. 133; and *Dunn* v. *Snell & al.* 15 ib. 481, are in principle very distinguishable from this case. In those cases the officers, having executions, had paid the creditors, upon having assignments of the debts made by them, for their benefit; the debtors never having paid the same to the officers. Here the officer, who held the execution, paid the debt to the creditor, without intimating, so far as appears, that he had not collected the same of the debtor. In such case the debt, so far as the plaintiff was concerned, was extinguished; and he could not, surely, for his own benefit, have sued and have recovered upon the judgment, by virtue of which the execution had issued. And the officer could have no right to do so in the name of the creditor. He could in no sense be considered as an assignee, either at law or in equity. The case of *Stevens* v. *Morse*, 7 Greenl. 36, and cases there cited, are directly opposed to the positions contended for by the counsel for the plaintiff.

Plaintiff nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND,

ARGUED AT APRIL TERM, 1843.

JOHN G. HARMON *versus* JOSEPH F. JENNINGS *& al.*

A submission to referees, under c. 138 of the Revised Statutes, of an action of trespass then pending, "and all other demands, and costs already accrued on, or growing out of said suit," is, it would seem, a reference of all demands between the parties.

When one party to a reference has made out a writ against the other, specifically setting forth his claim therein, and has indorsed his name on the back thereof, and such writ is annexed to the submission, it is a sufficient signing of the demand within the purview of the Rev. St. c. 138.

If one of the parties to a reference of a specific demand, entered into before a justice of the peace under the provisions of Rev. St. c. 138, makes out and signs his demand, and by agreement between them, at the request of the other party, it is omitted to be annexed until the close of the investigation before the referees, and it is then annexed, it is not competent for the opposing party to avail himself of this error, to prevent the acceptance of the report of the referees against him.

THE plaintiff brought an action of trespass against the defendants, and while it was pending in the District Court, it was referred before a justice of the peace. When the report was offered for acceptance in the District Court, it was objected to by the defendants. GOODENOW, District Judge, ordered judgment to be rendered on the award; and the defendants filed exceptions. The grounds of objection appear in the opinion of the Court.

Osgood argued for the defendants, and cited Rev. St. c. 138, § 3, 4; 3 Mass. R. 324; 4 Mass. R. 522; 9 Greenl. 15; 1 Pick. 504.

O'Donnell argued for the plaintiff, and cited 8 Greenl. 288; 1 Metc. 409; 18 Maine R. 251; 1 Hill, 319; 22 Pick. 145; 1 T. R. 610; 1 B. & P. 175; 3 Pick. 408; 2 Metc. 558; 3 Metc. 583; 5 B. & Ad. 606; 15 Johns. R. 197; 23 Pick. 56; 13 Mass. R. 244; 10 Mass. R. 444; 8 Greenl. 19; 1 B. & P. 91; 5 Pick. 217; 17 Maine R. 381; 14 Mass. R. 93; 4 Mass. R. 242; 5 Greenl. 192; 9 Mass. R. 320.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a submission to referees, under c. 138, of the Revised Statutes, which provides that "If all demands between the parties are submitted to the decision of the referees no specific demand need be annexed to the agreement." This cause has, however, been argued, by the counsel for the parties, as if a specific demand only had been referred, in which case it is required, by the statute, that it should be so stated, and be annexed to the agreement, and signed by the demandant. The agreement to refer was of an action of trespass, then pending, "and all other demands, and costs already accrued on or growing out of said suit." Was not this a reference of all demands between the parties? If it was, the arguments of the counsel were in some measure irrelevant; and the objections of the defendants without foundation. Can it be said, that the words "all other demands" are coupled by the conjunction *and* with "costs already accrued on or growing out of said suit" and, therefore, that the words "all other demands" had reference to the costs? This would be doing violence to the natural, and seemingly the obvious import of the phraseology used. If the language had been, that the action "and all demands, and costs growing," &c. the construction adopted by the counsel would be somewhat more plausible, and might be sustained. But the words "all other demands" would seem to embrace a distinct

and independent subject matter, in addition to the action then pending, and costs therein accruing.

But if the subject matter of the reference could be deemed to be specific, in which case the demand is required to be signed and annexed, it may, nevertheless, be questionable whether the objection on that ground should, under the peculiar circumstances of this case, be available to the defendants. The citations, by the counsel for Harmon, show that the instances are numerous in which a party, if conusant of illegality in proceedings at law against him, does not at the time object on account thereof, but suffers the cause to proceed to a final determination, that he cannot, afterwards, be allowed, on a process in error, to avail himself of such illegality. If a juror be illegally returned, and a party to be tried knows of such illegality before his trial, he cannot, afterwards, be heard to allege such illegality to avoid a verdict against him. *Hallock* v. *Co. of Franklin*, 2 Metc. 558. So if a party does not at the first term object the want of a teste to a writ he cannot be allowed to do it afterwards. And it has been doubted whether, if a court martial were constituted in a manner different from what the law has prescribed, it is competent for an individual, having knowledge of such illegality before his trial, to set it up afterwards, to avoid a sentence awarded against him. *Brooks* v. *Davis*, 17 Pick. 148. It is an old and familiar maxim, that consent takes away error. It is perfectly apparent in this case, that the counsel for the defendants, at the time, and during the investigation, had full knowledge of the error alleged, and did not intimate the slightest objection on account of it. And moreover, the testimony in the Court below was, that the counsel for the defendants, when the investigation was about to proceed before the referees, urged that the demand should not be annexed to the agreement till after the hearing, assigning as a reason that it would be more convenient to have the agreement and demand separate, to refer to during the hearing; to which the demandant assented, and the annexation was omitted till the close of the investigation. To allow the defendants now,

after an award against them, to avail themselves of such an error, and so occasioned, would be but little if any short of allowing them to perpetrate a fraud upon the adverse party, which we cannot think it would comport with the duty of a court of justice to allow.

That the writ, which it was intended to annex, and which was annexed by the referees on making up their award, as it was manifestly the intention of the parties that it should be, was a demand specifically setting forth the claim of the demandant, and that the indorsement by him of his name on the back of it was a sufficient signing within the purview of the statute, we cannot doubt. The object of this provision must have been to apprize the referees, and the adverse party specifically of the subject matter of the controversy, and in such manner that the demandant should be concluded by his specification. No particular form is, or, with propriety, could be prescribed. That his signature should be added to his statement of his claim might well be required. But in what particular place it should be inscribed might not be very material, provided it could clearly be understood as authenticating his claim; and surely his writ and declaration, with his indorsement of his name thereon, would be sufficient for the purpose; and may well be deemed a substantial compliance with the requirements of the statute.

Exceptions overruled and
the acceptance of the report confirmed.

EPHRAIM DANA *versus* SAMUEL H. SAWYER.

When a bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day.

A presentment of a bill or note, in such case, however, for payment, a few minutes before twelve at night, is insufficient and unavailing, unless it should appear from an answer made to the demand, that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour.

THIS case was submitted on the following statement of facts. The action is on a promissory note, signed by T. Sawyer & Co. dated Dec. 24, 1838, for $202,50, on four months, payable to and indorsed by the defendant.

It is agreed, that on the day the note fell due George W. Smith came to the house in Gray occupied by said Thorndike Sawyer and S. H. Sawyer, in the evening, between eleven and twelve o'clock, called up said T. Sawyer from his bed and presented the note to him for payment, which he did not pay, and left with him a notice and demand for payment, and delivered another notice of non-payment by the makers of the note, directed to said S. H. Sawyer, and demand of payment to said T. Sawyer for said Samuel, which said Thorndike did not deliver to said Samuel. Said Samuel was then in the house, but was in bed. He had his residence in the same house.

The Court were to enter a nonsuit or default, as they might determine to be the law in the matter.

W. P. Fessenden argued for the plaintiff, citing Story on Bills, § 349, 328, 382; 1 Stark. R. 575; 2 Chitty's R. 124; Chitty on Bills, 305, 308; 6 Peters, 257; 7 Mass. R. 483; 12 Mass. R. 403.

Codman & Fox argued for the defendant, citing 3 Metc. 495; 2 Camp. 527; 4 T. R. 174; 4 Greenl. 479; 17 Maine R. 230; 2 Barn. & Ad. 188; 7 Greenl. 31.

The opinion of the Court was by

SHEPLEY J. — This case is presented upon an agreed state-

ment of facts, from which it appears, that a demand for payment was made upon the maker of the note, between eleven and twelve o'clock at night on the day that it became payable, by calling him from his bed; and that he did not pay it. There is no further statement of any thing else said or done, except that a notice and demand for payment was left with him. When a bill or note is payable at a bank, bankinghouse, or other place, where it is well known, that business is transacted only during certain hours of the day, the law presumes, that the parties intended to conform to such established course of business, and requires, that a demand should be made during those business hours. *Parker* v. *Gordon*, 7 East, 385. The cases of *Garnett* v. *Woodcock*, 1 Stark. R. 475, and of *Henry* v. *Lee*, 2 Chitty R. 124, may show an exception to this rule, that, when a person is found at such place after business hours authorized to give an answer, the demand will be good. While it may be difficult to reconcile these cases with the case of *Elford* v. *Teed*, 1 M. & S. 28. When the bill or note is not payable at a place, where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. *Leftley* v. *Mills*, 4 T. R. 174; *Barclay* v. *Bailey*, 2 Campb. 527; *Triggs* v. *Newnham*, 10 Moore, 249; *Wilkins* v. *Jadis*, 2 B. & Ad. 188. What hour may be a reasonable one has come under consideration in those cases. In the first of them Mr. Justice Buller observes, that "to say, that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences." In the second Lord Ellenborough said, "if the presentment had been during the hours of rest, it would have been altogether unavailing." In the third this remark, among others, is quoted and approved by C. J. Best. In the fourth, Lord Tenterden remarked, that "a presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable." These observations, so just and so applicable to this case, authorize the conclusion, that the demand was not made at a reasonable hour, unless the fact, that the maker was seen and actually called upon at that time

should make a difference. Perhaps in analogy to the exception already noticed, it might be proper to admit of one in this and the like cases, if it should appear from the answer made to the demand, that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. But there is nothing in this agreed statement to show, that payment might not have been refused because the demand was made at such an hour, that the maker did not choose to be disturbed, or because he could not then have access to funds prepared and deposited elsewhere for safety.

Plaintiff nonsuit.

LEMUEL GILBERT *versus* NATHAN L. WOODBURY.

In an action by the manufacturer of an article against an officer for attaching and taking it as the property of another, where the plaintiff calls the debtor to prove that he had not purchased the article, and the defendant proves statements of the witness that he did purchase it, such declarations may discredit the witness, but are not competent to prove a sale by the plaintiff.

Where the remarks of a Judge, in his charge to the jury, are but the expression of an opinion upon the facts and testimony, they do not furnish ground for exceptions.

Where the whole testimony, if believed, will not in law establish a fact, the presiding Judge may express the legal effect of the testimony as matter of law.

The presiding Judge is not bound to give an instruction to the jury upon a mere speculative question of law, not relevant to the case on trial.

A new trial will not be granted on account of newly discovered evidence, where the motion does not state what the newly discovered evidence is, or where the same testimony was before the Court and the jury at the trial.

A verdict will not be set aside because the damages are excessive, where they appear to have been assessed neither at the highest nor the lowest estimate of the witnesses, and there is nothing indicating that the jury must have acted under the influence of passion or some undue bias upon their minds.

THIS was an action of trespass, for taking a piano of the plaintiff's, against the defendant as sheriff of Cumberland,

the act having been done by his deputy, who justified the taking by virtue of a writ against John S. Dunlap, keeper of the Cumberland house, in Portland, alleging that the piano was Dunlap's property at the time of the attachment.

The character of the evidence in the case may be sufficiently understood from the instructions given, and requests made for instruction at the trial, and from the opinion of the Court.

The trial was before WHITMAN C. J. who instructed the jury among other things, that it seemed to be admitted that the plaintiff was the manufacturer and once the owner of the piano; that if there was any sale of it by him to Townley or Dunlap, the defendant must make it out by legal evidence; that the declarations of Townley and Dunlap not under oath were no evidence of this, and could have no effect other than to discredit their testimony; and that the plaintiff's rights could not be otherwise affected by such statements; that the jury must judge whether from the evidence in the case there was any pretence of a sale by the plaintiff; and that if the testimony of Dunlap and Townley was out of the case and not worthy of credit, they still had Bolles' testimony and the entries in the plaintiff's books from which they might judge whether there was or not a sale of the piano; but that the counsel for the defendant admitted that Dunlap's general character for truth and veracity was unimpeachable, contending however that his difficulties and perplexities, and conduct in relation to the piano, were such that reliance could not be placed upon his testimony in this case.

The defendant's counsel requested the Judge to instruct the jury that if the piano was sent by Gilbert to Dunlap on trial for three or four months, and that he had the election to pay a given sum for it or return it at the expiration of that time, the property in it passed to Dunlap, and it was subject to attachment for his debts. But the Judge instructed them, that this question did not arise in the case, as the piano never came actually into Dunlap's possession, and declined to give the instructions requested.

The defendant's counsel also requested the Judge to instruct

the jury, that if they should discredit Townley and Dunlap, and find that the plaintiff sent the piano to Dunlap, and that he undertook to exercise acts of ownership over it, such acts were *prima facie* evidence of title in him. But the Judge instructed the jury, that the evidence did not warrant the instruction and declined to give it.

The Judge further instructed the jury that there was not evidence to prove that Townley had any authority as consignee or agent of the plaintiff to sell this piano to Dunlap, or that he had any right to dispose of it in payment of his own old debts. The jury returned a verdict for the plaintiff, and the defendant filed exceptions, and also filed a motion for a new trial, because the verdict was against law and evidence, and because the damages were excessive; and another motion to set aside on account of newly discovered evidence.

Codman & Fox, for the defendant, contended, that the declarations of Townley and Dunlap, the plaintiff's own witnesses, accompanied their acts, and ought to have been permitted to have their full effect.

They also insisted that the Judge erred both in refusing to give the instructions requested, and in giving such as he did. They cited *Buswell* v. *Bicknell,* 17 Maine R. 344; *Perkins* v. *Douglass,* 20 Maine R. 317; *Fairbanks* v. *Phelps,* 22 Pick. 535.

In the argument of the motion for a new trial, they cited *Leighton* v. *Stevens,* 19 Maine R. 154; *Lunt* v. *Brown,* 13 Maine R. 236; *Dearborn* v. *Turner,* 16 Maine R. 17; *Vincent* v. *Cornell,* 13 Pick. 294; *Smith* v. *Dennie,* 6 Pick. 262.

A. Haines, for the plaintiff, said that the proof of the statements made by Townley and Dunlap, when they were not under oath, was only admissible to discredit their testimony, but could prove nothing. 1 Stark. Ev. 210.

The expression of an opinion in relation to the evidence by the Judge is not a matter for exceptions. *McDonald* v. *Trafton,* 15 Maine R. 225; *Phillips* v. *Kingfield,* 19 Maine R. 375; *Ellis* v. *Jameson,* 17 Maine R. 235.

The instructions requested, and not given, were not relevant

to the facts proved in the case, and were properly declined. The Judge is not obliged to give instructions upon a mere hypothetical case; and indeed they should not be given, because they would have a tendency to lead the jury into error. *Comm.* v. *Child,* 10 Pick. 252; *Smith* v. *Cudworth,* 24 Pick. 196; *Ayer* v. *Austin,* 6 Pick. 225.

The opinion of the Court was drawn up by

Shepley J. — This case is presented on exceptions to the instructions and omissions to instruct by the Judge presiding at the trial. The first instruction which is the subject of complaint, was "that it seemed to be admitted, that the plaintiff was the manufacturer and once the owner of the piano, that if there was any sale of it by him to Townley or Dunlap, the defendant must make it out by legal evidence; and that the declarations of Townley and Dunlap, not under oath, were no evidence of this, and could have no effect other than to discredit their testimony." The declarations of the alleged purchaser, that he was the owner, could not deprive the plaintiff of his property, or have any influence upon his rights. When he was called by the plaintiff to prove, that he had not purchased the instrument, they might destroy his testimony, but would not prove a sale by the plaintiff. The same rule would apply to the declarations of Townley, unless there was proof, that he was the agent of the plaintiff to make sale of the instrument; and the testimony does not establish that fact. He appears to have been allowed a large commission on the sale of other instruments, not as the selling agent of the plaintiff, who made the sales himself, but for recommending the instruments and finding purchasers. In remarks accompanying these instructions the jury were informed, that they "must judge, whether from the evidence in the case there was any pretence of a sale by the plaintiff; and other indications were exhibited of an opinion, that there was no satisfactory proof of it. These remarks were but the expression of an opinion upon the facts and testimony; and they were not liable to exception. It has

been already stated, that the second instruction, "that there was not evidence to prove, that Townley had any authority as consignee or agent of the plaintiff to sell this piano to Dunlap," was justified by the testimony presented in the case. Nor was this instruction liable to objection as withdrawing the consideration of the facts from the jury. For where the whole testimony, if believed, would not in law establish an agency or consignment; the Judge might be required to express the legal effect of the testimony as matter of law. The requested instructions were properly refused. As stated by the Judge the question did not properly arise in the case. There does not appear to be any testimony tending to prove, that "Dunlap had the election to pay a given sum for it, or return it." Whatever testimony there is in the case has a tendency to prove, that it was sold to Dunlap, or that it was sent to him without any contract of sale, conditional or otherwise, merely on trial. Whether the reason assigned, why the question did not arise, be satisfactory or not is immaterial.

A motion was filed for a new trial on the ground, that the verdict was against law and against the weight of evidence. And under it, the counsel for the defendant alleges, that the plaintiff could not maintain the action, because he had neither the possession nor the right of possession. And he relies upon the case of *Fairbanks* v. *Phelps*, 22 Pick. 535. In that case the purchaser of the wagon was "to take it and use it and whenever he should pay the sum of $80 the wagon should become his property, but that if he did not pay for it, he should pay for the use of it; that no time of payment was agreed upon." And it was decided, that he was entitled to retain the wagon until the purchase money or the wagon was demanded. In this case, if there was no absolute sale, Dunlap was to receive it on trial for an indefinite time to be determined at the pleasure of either party. The instrument never came into the possession of Dunlap, and even if it had, the demand made of the attaching officer for a delivery of it before the suit was brought was sufficient to determine all such rights and entitle the plaintiff to have immediate possession. There is

no sufficient ground for setting aside the verdict as against the weight of evidence.

Another motion has since been filed to set aside the verdict and grant a new trial on account of newly discovered testimony. There are two insuperable objections to it. The first is, that the motion does not state, what the newly discovered testimony was; and to allow it to have any effect upon the verdict would be to deprive the other party of all opportunity to come prepared to rebut or disprove it. The second is, that the same testimony was before the Court and jury at the trial. It consisted of an entry on a memorandum book made by the clerk of the plaintiff; and that entry and book and the testimony of the clerk in relation to it were in the case at the time of the trial; and they remain in the same state. It is now alleged, that by means of a magnifier, there may be discovered evidence, that there was an original entry of a sale, which had been erased and a different entry made. All this might have been as readily discovered before the case was committed to the jury as since; and it cannot therefore be regarded in the legal sense of the term as newly discovered testimony. If it were made clearly to appear, however, that such an entry had been originally made and erased or altered and a different entry substituted, the Court might feel bound in the exercise of its discretion to set aside the verdict and grant a new trial. In this case however an examination of the book does no more than raise a suspicion, that there might have been some erasure, or entry of other words in addition to the original entry. And the Court cannot properly act upon such a suspicion, especially when there has been no opportunity afforded for an explanation of the suspicious appearances by the person, who made the entry. It may be, that those appearances would have been satisfactorily explained, or that if not so explained, they would have proved to have been different from the allegations of defendant's counsel and consistent with the right of the plaintiff to maintain this suit.

The Court would not be authorized to set aside the verdict because the damages assessed by the jury were excessive,

They do not appear to have been assessed at the highest or lowest estimate of the witnesses, and there is nothing indicating, that the jury must have acted under the influence of passion or some undue bias upon their minds; and in such cases only, would the Court feel authorized to set aside their verdict because excessive damages were assessed.

Exceptions and motions overruled.

ROBERT LEIGHTON *versus* ZACHARIAH B. STEVENS.

Where a pair of oxen had been conditionally sold, but were to remain the property of the seller until paid for, and were delivered into the possession of the conditional purchaser, and before payment therefor were attached and taken as his property, all right of such purchaser to the possession was held to have been determined, when the owner informed him, that he should take back the oxen, and in his presence demanded them of the attaching officer.

REPLEVIN for a pair of oxen. The defendant justified as an attaching officer upon a precept against one Joseph H. Lambert, in whom he alleged the property to have been at the time of the attachment on June 24, 1837.

The verdict was for the plaintiff, and no objection appears to have been made to the ruling of the Judge; but the defendant moved that the verdict should be set aside because it was against the evidence, and without evidence to sustain it; because it was against law; and because it was against the evidence and the law, and against the instructions of the Court upon the law of the case.

So much of the facts as may be pertinent to the questions of law raised will be found in the opinion of the Court.

F. O. J. Smith, for the defendant, contended that the action could not be maintained until after the plaintiff had rescinded the contract, and demanded back the property. The demand on the officer was not sufficient to rescind the con-

tract. It should have been made of Lambert. *Fairbanks* v. *Phelps*, 22 Pick. 538; *Wheeler* v. *Train*, 3 Pick. 255; *Wyman* v. *Dorr*, 3 Greenl. 183.

Codman and *Fox*, for the plaintiff, contended that the verdict was right, even upon the gentleman's own view of the law, so far as it had any applicability to the case.

The opinion of the Court was drawn up by

SHEPLEY J. — This case having been again submitted to a jury, and they having found a verdict again for the plaintiff, a motion has been made to set it aside as against the weight of evidence. And it is insisted, that the witnesses introduced by the plaintiff did not agree, but differed materially in their account of the transaction. There may be very good reason to conclude, that some of them were either mistaken, or inclined to misrepresent; but this was a matter for the consideration of the jury; and they may have been satisfied from the attending circumstances, that the witness, who made the bargain with the plaintiff, and must have known, what it really was, stated it truly. And this would have been sufficient to authorize the verdict. It is also insisted, that the contract with Lambert was for a conditional sale, and that there must have been proof, that the plaintiff had rescinded it to entitle him to maintain the action. The testimony of Lambert is in substance, that he agreed with the plaintiff for the purchase of the oxen at the price of $110, and "they were to remain plaintiff's till paid for." That he had not fully paid for them; that as soon as they were attached he informed the plaintiff, who "said the oxen were his, and he should take them back, we then went to Stevens, told him the bargain, and plaintiff demanded the oxen of Stevens." According to this testimony the right of property had not passed to Lambert; and whatever right he might have had to the possession was determined between him and the plaintiff, when he was informed by the plaintiff, that he should take them back, and afterwards went with him, and without objection heard the plaintiff demand them of the defendant as his property.

Judgment on the verdict.

RICHARD DAVIS *& al. versus* ELIZA ANN GREENE, *Adm'x.*

When a nonsuit is ordered, all the testimony is regarded as credible, and the facts stated in the testimony as proved. And when there is no longer any dispute respecting the facts; whether a party is entitled to recover upon such a state of facts, is a question of law; and as clearly so as it would be upon a special verdict finding the facts.

THIS was an action of assumpsit for money had and received, brought against the estate of Roscoe G. Greene deceased. The evidence to support the claim consisted of a writing of which the following is a copy. "Whereas Richard Davis of Bridgton and Isaac Dyer of Baldwin, have assigned to me a bond of certain lots of land bonded to them by Thomas Hammond, Charles Merrill and John Leighton. Now therefore in consideration of said assignment, I agree to pay said Davis and Dyer one half of all that I shall sell said lots for in advance of eight dollars per acre, but in no event am I to sell said land without allowing and paying the said Davis and Dyer, as their portion of the profits, the sum of one thousand dollars. And said land was bonded to said Davis and Dyer by bond dated July 8, A. D. 1835.

"Portland, July 11, 1835.

"R. G. Greene."

Several witnesses were examined, called by the plaintiffs, whose testimony is sufficiently stated in the opinion of the Court.

After the plaintiffs had introduced all their proof, WHITMAN C. J. presiding at the trial, ruled that it was insufficient to sustain the action, and directed a nonsuit, which was to be taken off, if the action could be supported.

F. O. J. Smith, for the plaintiffs, argued, that no question of law was involved in the case; but if there was, these rules should be observed.

The Court is required to give a construction to a written contract, that will approach as near as may be to the understanding of the parties to it. *Brinley* v. *Tibbets*, 7 Greenl. 72.

The proof is, that Greene sold to Huntington, and the presumption of law is, that he did not sell for a less sum than that stipulated in the bond. *Linscott* v. *Mc'Intire*, 15 Maine R. 201.

This was a question of fact to be decided by the jury, and the nonsuit should be taken off, and the case should stand for trial for that cause. 17 Maine R. 37 ; 18 Maine R. 280 ; 17 Mass. R. 257 ; 8 Mass. R. 336 ; 3 Greenl. 99.

Fessenden & Deblois and *Haines*, for the defendant, contended, that there was no such sale as is provided for in the agreement, and on which sale alone Greene was to account for any thing to the plaintiffs. He derived no benefit, and was not bound to pay any thing. 8 Mass. R. 214; 3 Fairf. 429; 19 Maine R. 394.

The opinion of the Court was drawn up by

Shepley J. — By the contract the intestate agreed to pay to the plaintiffs one half of what he might obtain by the sale of certain lots of land, over eight dollars an acre; and not to sell the land without paying them, as their proportion of the profits, one thousand dollars. The plaintiffs, to establish their claim, must prove, that he sold the land, or their right to have a conveyance of it by virtue of the bond, which was assigned. The testimony introduced does not furnish any such proof. All which the testimony shows that the intestate did or said respecting it, was to inform the owners of the land, that he and Smith had an assignment of the bond, that they had sent men on to examine the land, and had found, that there was not so much timber on it as had been supposed; and that they introduced Huntington, stating, that he would give a less price for the land than that named in the bond. The witness states, that the owners saw no more of them, and proceeded to bargain with Huntington, that he presumes he had not an assignment of the bond, that he never saw it in his hands, and has no recollection, that it was surrendered to them, when they conveyed the land. The intestate could not be affected by the conclusion of the witness, that the contract with Huntington

was a continuation of the original bargain. He could be affected only by his own acts or declarations. It is contended, that there was testimony tending to prove a sale by the intestate, and that this, being a question of fact only, should have been submitted to the decision of a jury. When a nonsuit is ordered, all the testimony is regarded as credible, and the facts stated in the testimony as proved. And when there is no longer any dispute respecting the facts; whether a party is entitled to recover upon such a state of facts, is a question of law; and as clearly so, as it would be upon a special verdict finding the facts. It is not necessary to consider the other point made in the defence.

Nonsuit confirmed.

DAVID MORTON *versus* CHARLES E. BARRETT *& als.*

Where the testator, in his will, devises certain estate to a trustee, and directs that the income shall be paid to a son during life, and that on the son's death the principal shall be paid to certain other persons; the death of the son prior to the death of the testator, does not prevent the devise over from being effectual.

Where the trustee cannot perform the duties imposed upon him by the will without having a legal title in the property devised to him in trust, he will be considered as taking the legal title.

If it clearly appears from the will, that the word *heir*, as used therein, means *heir apparent*, it will be so considered in giving a construction to it.

That the intention of the testator should be carried into effect, is the great and governing guide for the construction of wills; and the true interpretation of any one clause, is to be sought by considering it in connexion with all the others, and by an examination of the main designs of the testator, as manifested by the whole instrument.

And, therefore, where such general intent clearly appears, it should be carried into effect, although it should require some departure from a literal construction of a particular clause.

Where a controversy existed among the claimants of a trust fund, both as to the persons entitled to receive it, and the respective proportions thereof; and a bill in equity was brought by one claimant against the trustee and other claimants, such trustee is entitled to be paid from the fund, in addition to compensation for care of the property, the expenses by him necessarily incurred in defending the suit.

THIS was a bill in equity instituted by David Morton against Charles E. Barrett, trustee under the last will and testament of Reuben Morton late of Portland, deceased, Samuel Hanson, guardian of his three children who were also children of his late wife, Statira, now deceased, the daughter of said Reuben Morton, and James Furbish, guardian of the two children of his late deceased wife, who was the other daughter of said testator.

The decision of this controversy depended on the construction to be given to the fourth provision of the will of said Morton, bearing date July 27, 1831, and the same subject matter in the codicil to that will, bearing date December 9, 1836.

A copy of this portion of the Will and codicil follows: —

"Fourthly. I give, bequeath and devise to my friend Albert

Newhall in trust, or in case of his declining, I give, bequeath and devise to such Trustee, as may hereafter be legally appointed for this purpose by any Judge of probate in said County of Cumberland, in trust, with power to said Newhall, or any trustee to be so appointed, to sell and convey in fee or otherwise at the discretion of either of them, subject however to the proportion of one seventh of the legacies aforesaid to my beloved wife, during her natural life, one undivided seventh part of my estate, real and personal, allowing however, to make up the said seventh, the balance of the charges made on my books of account, against my eldest son, Charles D. Morton, which amount to three thousand six hundred fifty-two dollars and ninety cents, which have been made, as I now declare the same to be, in advancement of part of his portion or share of my estate, and also such sums as may hereafter be charged against him on my books for the same purpose.

"The proceeds of said seventh, after said allowances, to be held in trust, and vested as soon as may be, in good bank stock of the United States Bank, or banks within the New England States, or kept at interest on good security; and the income or interest thereof to be invested from time to time, in like stocks annually, excepting that in case the annual interest thereof should amount to three hundred dollars, clear of the expenses of managing the fund, said trustee is to apply according to his discretion, the sum of three hundred dollars, annually towards the support and maintenance of my said son Charles D. Morton, in quarter yearly payments, for and during his natural life and no longer. And should that interest be less than three hundred dollars annually, no more than that lessened interest, clear of said expenses, is to be appropriated in manner aforesaid for the support and maintenance of my said son, Charles D. Morton, annually, nor is he, in any event, to have or receive the principal. But said trustee, after the death of said Charles, is to pay the principal or so much thereof as may remain, and the accumulated interest thereof, over equally to be divided to the rest of my heirs, who may be living at the

time of the decease of said Charles, exclusive of his wife, and any child or children which she has, or may have."

The provision of the codicil is :—

"Thirdly. I give, bequeath and devise, to my friend Albert Newhall, Esq. in trust, and in case of his declining, I give, bequeath and devise to such trustee as may be appointed by any Judge of Probate in said County of Cumberland, and in trust, such portion of my estate, real and personal, as shall be equal to one fifth part thereof, allowing however, to make up said fifth part, the charges on my books of account, against my son, Charles D. Morton, as is contemplated and directed in my said last will and testament, with the powers to said trustee, as given in said last will and testament. The proceeds of said fifth part, if converted into money, to be held also in trust and invested as in my said last will and testament is directed in the bequest therein made for the benefit and use of said Charles. And the income thereof to be applied in amount and manner as in my said last will and testament is directed for the support and maintenance of said Charles. And the balance of income, if any, and the balance of principal remaining at the decease of said Charles, to be applied as is ordered and directed in my said last will and testament."

The other provisions in the will, and the facts relative to the devisees and legatees, bearing upon the present enquiry, are given in the opinion of the Court.

At the April term, 1842, the questions were very fully argued by counsel. The arguments are much too extended for publication.

F. O. J. Smith, for the plaintiff, in a printed argument, contended that David and Stephen Morton, the only children of the testator, surviving on the death of Charles, not excluded by the will, were alone entitled to this estate, to be divided equally between them. In his argument he cited 1 Ventris, 231; 2 Burr. 1112; 2 Wils. 322; Willes, 297; *Hayden* v. *Stoughton*, 5 Pick. 530; *Olney* v. *Hull*, 21 Pick. 313; 3 P. Wms. 259; 2 Ves. Senr. 74; 1 Ves. Jr. 384; 4 Kent's Com. 524; *Brown* v. *Porter*, 4 Pick. 209; 4 Kent, 204;

Prec. Ch. 316; 1 Eq. Ca. Abr. 245; 1 Cowper, 41; 2 Powell on Dev. 311; 2 Atk. 321; Perkins, Title, Devises, § 506, 507; 1 Salk. 229; 1 Ves. Senr. 421; Doug. 63; 3 Atk. 330; 5 Vin. Abr. 343; 1 Atk. 361; 1 Cox, 183; 15 Ves. 29; 1 Ves. & Bea. 124; Dougl. 504; 3 Binney, 161; *Bowers* v. *Porter*, 4 Pick. 209; Fort. 182; 8 Mod. R. 222; 1 P. Wms. 341; Gilb. Eq. 136; 3 Call, 289; 11 East, 558, and note; 3 Yeates, 33; 1 Wash. 53; 7 Ves. 455; 7 East, 272; 2 B. & A. 441; 10 Ves. 202; 1 Meriv. 320; 4 Madd. 67; 3 Bro. C. 401; 4 Ves. 692; 5 Bin. 601; 2 Vern. 107; 1 P. Wms. 229; 2 W. Black. 1010; Roberts on Wills, § 4; 1 Ambler, 273.

Preble, for Hanson, in an oral argument, contended that the portion of the estate now in question should be divided equally between the three children of the late Mrs. Hanson, who was Statira, the eldest daughter of the testator, the two children of the late Mrs. Furbish, who was the youngest daughter of the testator, and David and Stephen Morton, sons of the testator, giving to each of them one seventh part.

Longfellow, Senr. and *Longfellow, Jr.* for Furbish, also contended, in a written argument, that the five grandchildren and two sons of the testator, before named, were entitled to the fund in the hands of the trustee, to be divided between them in equal shares. They cited Plowden, 343, 413; Willes, 294; 4 Kent, 534; Cro. Car. 184; 3 Atk. 315; 6 East, 486; 7 T. R. 437; 1 Wash. 262; 4 Pick. 518; Ambler, 487; 1 Williams, 398; 11 East, 332; 13 East, 362; 3 Atk. 375; 20 Pick. 378; Toller's Ex. 304; 2 Fonb. 363; 1 Ves. 116, 140; 2 Ves. 463; 2 Vesey, Jr. 333, 529; 2 Williams, 194; 4 Kent, 263; 21 Pick. 313; 2 Cowp. 780; 3 Burr. 1881; 1 Cowp. 309; 3 East, 278; 1 Dougl. 264; 1 Johns. R. 61; Com. Dig. Devise, 4; 4 Dane, 590, § 6; 4 East, 498; 4 Pick. 210.

Adams, for Barrett, said that the trustee was desirous of giving up the fund in his hands to such as were legally entitled to it. It had been intimated by the counsel for the plaintiff, that the fund was not to be charged with the expense attend-

ing the care of it. He is not only entitled to be paid from it those expenses, but the expense attending his being brought into Court in this suit. 1 Bailey, 230; *Sawyer* v. *Baldwin*, 20 Pick. 388.

The trustee only asks to be protected, and wishes it to be directed to be paid to those legally entitled to it. But as Charles D. Morton died before the testator, it is believed that the share in controversy became lapsed, and went to the heirs at law of the testator, as intestate estate. In that case it would be divided into five shares; of which the two surviving sons would be entitled to a share each; the three children of Statira to one share; the two children of Nancy to one share; and the son of Charles D. Morton to the other fifth part. He cited 13 East, 532; *Hayden* v. *Stoughton*, 5 Pick. 538; 4 Dane, 579, § 6; *Fisher* v. *Hill*, 7 Mass. R. 86.

The opinion of the Court was delivered at an adjourned term in this county, in March, 1844, by

Shepley J. — It appears from the bill, answers and proof, that Reuben Morton made and executed his will on July 27, 1831, having at that time a wife and seven children. He made provision for his wife, and gave to four of his children, Statira, Nancy, David and Christopher, one undivided seventh part of the residue of his real and personal estate. He gave to a trustee in trust three other sevenths. All these portions were to be ascertained by charging each child with advances made or to be made. The income of one seventh, given in trust, was to be applied to the support of his son Stephen and wife and their son under certain regulations; and two thousand dollars of the principal was on certain contingencies to be paid to that son, and the remainder, after the decease of Stephen and his wife, was to be paid to Statira, Nancy, David, and Christopher. The income of another seventh, given in trust, was to be applied to the support of his son Ebenezer, and the principal might be paid to him on certain conditions; but in case of his death within a certain time, it was also to be paid to Statira, Nancy, David and Christopher. The in-

come of the other seventh given in trust, not to exceed three hundred dollars annually, was to be applied to the support of his son Charles during his life, and after his death the principal, with any accumulated interest, was, in the language of the testator, "equally to be divided to the rest of my heirs, who may be living at the time of the decease of said Charles exclusive of his wife and any child or children, which she has or may have."

On the ninth day of December, 1836, the testator made and executed a codicil, which recites, that since his will was made his wife had died, that his sons Ebenezer and Christopher had died without leaving issue, and that his daughters Statira and Nancy had died, each leaving children. After giving certain specific legacies the remainder of the estate is divided into five instead of seven parts. Of these one fifth is given to the children of Statira, one fifth to the children of Nancy, one fifth to a trustee in trust to apply the income to the support of Charles as directed in the will, and the principal with the accumulated income "remaining at the decease of said Charles, to be applied as is ordered and directed in my said last will and testament;" another fifth to a trustee to apply the income to the support of his son Stephen and wife and their son, and the whole of the principal, instead of two thousand dollars of it, was directed to be paid to their son, if he should live to be twenty-one years of age, and be in the opinion of the trustee capable of using it with discretion. And the other fifth in trust for the benefit of his son David.

The testator died on June 22, 1838, and his son Charles on February 3, 1837. The trustee named in the will declined the trust; and the defendant, Barrett, was appointed trustee by the court of probate. The disposition of that fifth of the estate, which was to be disposed of on the death of Charles, is now presented for consideration.

It is contended by the counsel for the trustee, that, as the son died before the testator, this fifth must be regarded as a lapsed devise and legacy. This cannot be admitted, for it was not devised to the son. He was not in any event to re-

ceive the principal. That was given in trust for the benefit of others. The devise of the real estate was to the trustee with authority to sell and convey it in fee or otherwise, and to invest the proceeds in stock. The income only could be affected by the death of Charles. If the principal had been given to Charles, as there was a devise of it over upon the event of his death, the happening of that event during the life of the testator would not have prevented the devise over from being effectual. *Counden* v. *Clark*, Hob. 29. *Gulliver* v. *Wickett*, 1 Wil. 106; *Willing* v. *Baine*, 3 P. Wms. 113; *Miller* v. *Warren*, 2 Vern. 207; *Humphreys* v. *Howse*, 1 Russ. & Myl. 639; *Walker* v. *Main*, 1 Jac. & Wal. 1. There was no contingent interest in this fifth undisposed of by the will, and no part of it could therefore pass under the devise of the residue of the estate.

It is contended by the counsel for the plaintiff, that those entitled to this portion became so on the death of Charles; that the purpose of creating the trust, having been defeated by his death, the estate never passed to the trustee, but vested in them. But this portion is not devised to others on the death of Charles. They are to receive the proceeds only by virtue of the directions given to the trustee, and through him in the execution of his trust. He could not have performed the duties imposed upon him by the will without having a legal title in the property devised to him. And when it becomes necessary, that the title should be vested in a trustee to enable him to execute the declared purposes of the will, he will be considered as taking the legal title. *Silvester* v. *Wilson*, 2 T. R. 444; *Harton* v. *Harton*, 7 T. R. 652; *Sanford* v. *Taby*, 3 B. & A. 654; *Murthwaite* v. *Jenkinson*, 2 B. & C. 358; *Doe* v. *Nicholls*, 1 B. & C. 336; *Tenney* v. *Moody*, 3 Bing. 3; *Huston* v. *Hughes*, 6 B. & C. 403; *Wykham* v. *Wykham*, 18 Ves. 414; *Biscoe* v. *Perkins*, 1 V. & B. 489. As the son died first, the testator at that time, technically speaking, had no heirs. But the rule *nemo est haeres viventis* does not apply, when it is apparent from the will, who were intended by the testator to be the recipients of his bounty. A devise to the

heirs male of E. L., and in default of such issue, to the testator's own right heirs. E. L. being alive at the time of the testator's death, technically speaking, had no heirs, and yet it was decided, that the son of E. L. took the estate. *Darbison* v. *Beaument*, 3 Bro. P. C. 60. Other cases, fully sustaining the position stated, are cited and commented upon in the case of *Doe* v. *Perratt*, 5 B. & C. 48. In that case Mr. Justice Littledale states the settled doctrine to be, "that if there be sufficient upon the will to shew, that the word heir is used in the will in such a way, as proves the testator to have meant heir apparent, it shall be so considered, as he intended it." Mr. Justice Holroyd also says, "if it appeared therefore plainly by the will to have been the testator's intention, that an heir male apparent should take by the devise, I agree that the rules of law would not prevent the giving such a construction to the will as to carry that intent into effect." Mr. Justice Bayley also observes, that the rule, that to enable one to take under a will by purchase, he must be truly an heir, "never has prevailed, where it is evident upon the instrument containing the limitation, that the presumptive heir male was the person intended." To carry into effect the intention of the testator, the word heirs should be construed to mean heirs apparent, or children, or those entitled under statutes of distribution. *James* v. *Richardson*, 2 Lev. 232; *Nightingale* v. *Quartley*, 1 T. R. 630; *Goodright* v. *White*, 2 W. Bl. 1010; *Carne* v. *Roch*, 7 Bing. 226; *Hart* v. *Hart*, 2 Desau. 57; *Brailsford* v. *Hayward*, 2 Desau. 18; *M'Cobe* v. *Spruil*, Dev. Eq. Rep. 18. To declare the devise to be inoperative and void, because the testator had, technically speaking, no heirs at the time, when Charles died, would be to defeat some of the clearest intentions of the testator, exhibited both in the will and codicil, viz. that all his property should be disposed of by the will, and that the children of Charles should not by devise or otherwise be entitled to any benefit from it.

Considering the property as devised by the will, the question arises, who are the persons entitled to this fifth now in the hands of the trustee; and in what proportions are they entitled. The word heirs could not have been used by the testator in the

clause of the will providing for a distribution of it, in a technical sense, or as designating his children, or those persons, who would become his heirs at law upon his decease. For under the term heirs the testator appears to have supposed, that the wife of Charles would be included, who could in no event become his heir. And her children, and others not then in being, who would become heirs of the testator only by the death of their father during his life. It would seem to have been used in a sense unusual, and as comprehending all those persons, who might be benefited by the estate, if he should die intestate, either directly or intermediately. That the word was used in this enlarged sense is proved by the careful exclusion of those, who could be included only by such a use of it. And yet if this be the sense, in which that word was used, that clause of the will does not admit of a literal interpretation; for the result would be, that all the persons not excluded, who could be thus benefited, and should be alive at the death of Charles, would be entitled to equal shares of it. And this would be contrary to the intention of the testator, manifested in various clauses of the will, as well as contrary to its general purport and spirit. A literal construction of the clause becomes therefore inadmissible, if the intention of the testator be carried into effect. And that is the great and governing guide for the construction of wills. The true interpretation of the clause must be sought by considering it in connexion with various others; and by an examination of the main designs of the testator as manifested by the whole instrument. These designs will be found to be not obscurely expressed or exhibited. That it was his intention by the original will to give an equal share of his estate to four of his children is undeniable. He not only gives to those four an equal share, but gives to them also equally two other shares on certain contingencies. And makes them residuary devisees and legatees in equal proportions. Before the codicil was made, three of those four had deceased, one of them without, and the other two leaving children. The same purpose is still manifested so far as it was possible to execute it; and provision is made, that the children

of those deceased should receive the share designed for the parent. This design, that the children should take the share destined for the parent, where death or considerations of prudence did not interpose, is further manifested in that clause of the codicil, which directs the trustee to pay to his grandson, the son of Stephen, on certain contingencies an equal portion of his estate. A slight change is made in the share of David, which is put in trust to become his on certain conditions. Four fifths of the estate under certain regulations are divided equally among four children or their children taking according to the right of representation. And there is no intimation in any part of the will or codicil of an intention, that the equality among those, who took a full share, so carefully observed in all other cases, should be departed from in the distribution of this fifth. If such be the clear intention, it should be carried into effect, although it should require some departure from a literal construction of the clause. No great departure from such a construction however, is believed to be necessary for this purpose. In the argument presented by the counsel for the plaintiff respecting the construction of this clause, it is said, that the testator "was not referring to any persons, who might become his heirs; but to those, who then were, and who should continue to be so up to an appointed juncture, viz. the death of Charles." But this reasoning is at variance with that part of the clause, which excludes as a part of his heirs, the child of Charles then living as well as other children, that might thereafter be born. It is also said these words, "the rest of," are evidently words of contrast and of reference. They refer to certain individuals of a particular class and relation to the testator, viz. to some, who should be living at Charles' death; and toey contrast these individuals, who were once of the same particular class, but who at the death of Charles had by his death ceased to be of that class and that relation to himself." The words appear however to have been used, not to distinguish those, who should remain alive from those who should decease, but to distinguish those who might be entitled to the bounty of the testator from those excluded from it. The

meaning being, the rest of my heirs, after excluding certain persons named. Those not excluded by name are again diminished by selecting those as recipients of the bounty, who should survive Charles. The sense of the testator may perhaps be best explained by reading the clause thus, "equally to be divided to the rest exclusive of his wife and any child or children, which she has or may have, who may be living (and be) of my heirs at the time of the decease of said Charles." This transposes and employs all the words in such a manner as to give them all effect. And the two words inserted as explanatory can scarcely be required for that purpose. The idea in the mind of the testator would seem to have been, that he would distribute that share on the death of his son Charles equally among those members of his family, who might be then living and entitled as his heirs to receive it, excluding the persons named. Upon this construction, or upon one producing a like result, it is contended by the counsel for the children of the deceased daughters, that the grandchildren, being then heirs at law, took equal shares with the surviving children. To come to such a conclusion it is necessary to return again to a technical use and sense of the word heirs, which has necessarily been abandoned to enable the grandchildren to be admitted at all to participate in the distribution of this share. And when it was employed as above to represent in part the idea in the mind of the testator, he was not supposed to have used it in a technical sense, but as comprehending those of his family, who might be entitled to benefits by a distribution of his estate. This construction prevents their exclusion, and it is necessary for that purpose; and they cannot reject it, and claim strictly as heirs to the grandfather. They are entitled then not technically as heirs, but as being a part of the family of the testator designated by the use of that term; and not among those named and excluded; and the manner, in which they are to take under the will, is not determined by the use of the word heirs, but is to be ascertained from the will itself, taking into consideration its various provisions. That intention has been already shewn to be to make an equal distribution be-

tween certain of his children, and to continue it to their children as representing them. The intention appears to be clear, that the grandchildren should neither be benefited nor injured in this respect by the decease of their parents, but should take the shares, to which their parents would have been entitled, had they been alive. To decide, that each grandchild should take a proportion equal to a child, would be contrary to the design and spirit exhibited throughout the whole will and codicil. And it could only be justified by some peremptory rule of law, or technical use of language. These have not been found.

The conclusion is, that the trustee, after deducting such reasonable charges and expenses, as are allowed in the Probate Court in like cases of trust, and the expenses by him necessarily incurred in defending this suit, convey and pay over the residue of this fifth part of the estate, in equal proportions, to David Morton, to Stephen Morton, and to the guardians respectively of the children of Statira, and of Nancy. A decree is to be entered accordingly, and without costs.

SAMUEL SAWYER, JR. *versus* MARK R. HOPKINS.

The rule of practice seems to be, that the plaintiff should have the opening and closing of his cause, whenever the damages are in dispute, unliquidated, and to be ascertained by the jury; and therefore in actions of slander, where the defendant, in pleading, admits the speaking of the words, and avers that they were true, and does not plead the general issue, the plaintiff is entitled to open and close.

Where the defendant, in an action of slander, has pleaded a special justification, admitting the speaking of the words, and averring that they were true, without pleading the general issue, the plaintiff may give evidence, other than what is furnished by the plea itself, of the extent and degree of malice, actuating the defendant, in traducing the plaintiff, to affect the question of damages.

And it may well be doubted whether the defendant, in such case, by relying upon his justification solely and failing to sustain it, is precluded from giving evidence in mitigation of damages.

Sawyer *v.* Hopkins.

In such action of slander, where it appeared that the plaintiff, a minister of the Gospel, had been tried before a conference upon a charge of having made alterations in certain charges of immoral conduct, signed by others, against one of his brethren in the ministry, for the purpose of procuring an investigation thereof; and the present defendant, on such trial of the present plaintiff, had been active against him, and in connexion with which the charge of forgery had been made by the present defendant against the present plaintiff; and the truth of which had been set up as a special justification on the present trial; *it was held*, that the plaintiff might give in evidence the proceedings at the trial before the conference in aggravation of the damages.

The mere insertion of other matter in the charges against such third person in an additional specification, would not constitute the crime of forgery, unless it was done with the intent to defraud or deceive some one.

When the defendant, in an action of slander, has placed his defence upon the ground, that certain papers were the subjects of forgery and had been forged, he has no cause of complaint, if the presiding Judge suffers the cause to proceed to trial, and does not instruct the jury that the papers were not the subjects of forgery, even if they were not so; for if the instruction had been, that they were not the subjects of forgery, the plaintiff could not have been guilty of that offence, and the instruction must then have been, that the defence had not been made out.

If the plaintiff altered those charges, after they had been signed, with praiseworthy intentions, relying upon that confidence he had been accustomed to experience from the brethren of his church, while endeavoring, in pursuance of their instigations originally, to bring a member of the same denomination to an examination as to charges against him, supposed to be susceptible of proof, such alteration is not a forgery.

A verdict may be put in form, and affirmed, after the jury have in substance found to the same effect.

A juror who has been implicated in reference to a verdict, which he may have given, is admissible to remove the ground of objection.

THIS was an action of the case for slanderous words, alleged to have been spoken by the defendant, accusing the plaintiff of forgery.

The defendant justified by pleading the truth of the words spoken. In two of the pleas the defendant set forth the documents alleged to be forged; and in the other two pleas the justification was general, describing the forgery of the instruments in general terms. An issue was tendered in the replication to each plea and joined.

The defendant thereupon took the opening and the close of

the case; and introduced testimony tending to show that the plaintiff had forged the documents set forth in the pleas.

The pleadings were referred to, but were not to be copied as part of the case, and no copies of them were found in the papers.

It appeared that the plaintiff and defendant were both ministers of the Methodist Church. The plaintiff contended, that what was alleged to be his trial, at which the allegation of forgery was made by the defendant, and at which the defendant, was active against the plaintiff, and his pretended dismission and proceedings thereat, were unjust and oppressive, and that he claimed time to maintain his defence, which was denied him, and that he was hastily convicted, by said conference, upon charges which were not properly preferred against him, and of which he had not proper notice; and offered testimony to support these positions. This testimony was objected to by the defendant, as being foreign and immaterial to the issue, and as raising a false issue, and tending to mislead the jury. But WHITMAN C. J. presiding at the trial, overruled the objections and admitted the testimony, (which was copious and in some measure contradictory) as evidence of malice, and as having a tendency to affect the question of damages.

The Judge in his charge to the jury stated, that it was very questionable whether the documents alleged to have been forged were properly subjects of forgery. That forgery was ordinarily committed where a person had something to gain by it in a pecuniary point of view or otherwise. But in this case, this question need not be considered, as the pleadings amounted to an admission that the defendants had accused the plaintiff of the crime of forgery and that the instruments in question were such that the crime might be committed in the exhibition and use of them. That it only remained to determine whether the fabrication and alteration of them had been done with base and sinister views. If not, the crime of forgery had not been committed, and the justification in such case would not be made out.

It appeared that a paper containing certain charges of immoral and unchristian conduct against the Rev. Joseph Turner, a Methodist minister, was drawn up by the plaintiff, at the request of William Morrell, as was alleged, and signed by said Morrell and witnessed by Thomas Morrell, and afterwards signed by Moses Plummer, and addressed to the presiding Elder, Paul C. Richmond, for the purpose of bringing said Turner to trial on said charges. William Morrell testified, that he gave the plaintiff authority to use his name to any paper necessary to bring said Turner to trial on those charges, and that he then supposed the papers he had signed might not be in proper form for that purpose ; and that the plaintiff told him at that time, it would be necessary to draw up specifications in proper form ; that about two weeks after, he saw the plaintiff and told him to insert a new charge in the paper he (witness) had signed about the violation of the Sabbath in connexion with Churchill's horse ; that he heard Thomas Morrell at the same time, give the plaintiff authority to use his name as a witness to any other paper necessary to bring said Turner to trial properly ; but Thomas Morrell, being called by the plaintiff, did not recollect of giving the plaintiff any such authority to use his name as a witness to any paper, that he did not sign. Moses Plummer called, by defendant, testified that he signed only the first mentioned paper, which had been previously signed and witnessed by said Morrell and that he never gave the plaintiff any authority whatever to use his name to any other paper ; and that when he signed the paper the plaintiff wanted to insert the charge about Churchill's horse, and that he refused to have it inserted, because he did not believe that charge to be true.

Ivory H. Pike, called by the plaintiff, testified that about a month after the paper signed by Plummer and others was executed, viz. about April 25, 1841, he was in conversation with said Plummer, and the plaintiff came up and said to Plummer, "I have copied off those charges and put in the Churchill affair and am going up, the next day, to hand them to the presiding Elder," and that Plummer replied, "that he had seen

Brother Turner and had told him that he had signed charges against him," and that the plaintiff immediately passed away, and this was all that was said between the plaintiff and Plummer.

Plummer, called again by the defendant, contradicted said Pike on this part of his testimony.

Paul C. Richmond, the presiding elder, called by the defendant, testified, that the plaintiff presented to him, as presiding elder, a paper which he, the plaintiff, said bore the signatures of said Morrell and Plummer, and of which he, the witness, took an exact copy, by the plaintiff's request, to furnish to the circuit preacher, Rev. L. S. Stockman, with orders for him to take the usual steps to bring said Turner to trial; that the copy he took is in the case, and that the original he handed back to said plaintiff.

The defendant requested the Judge to instruct the jury that even if they should find that the plaintiff had the authority or assent of the signers to insert the said charge about the Churchill horse, in the charges they had signed against said Turner, yet if they did not find that the plaintiff had authority to insert other substantial specifications in the paper alleged to be forged, that paper would be forgery.

This instruction the Judge declined giving.

The jury returned the following verdict. "State of Maine. Cumberland, ss. Supreme Judicial Court, November Term, 1842, *Samuel Sawyer, Jr.* v. *Mark R. Hopkins.* The jury find for the plaintiff, and that the said plaintiff has not been guilty of forgery. The jury assess damages for the plaintiff the sum of two hundred and fifty dollars."

"$250,00. William Gerrish, Foreman."

The Judge directed the plaintiff's counsel to reduce the verdict to proper form, and he thereupon, wrote a verdict as follows. "State of Maine. Cumberland, ss. November Term, 1842. *Samuel Sawyer, Jr.* v. *Mark R. Hopkins.* The jury find that the said defendant of his own wrong spoke, uttered and published the false, scandalous and malicious words and charges in the plaintiff's writ and declaration set forth, without

any such justifiable cause, as he in his several pleas has set forth, and assess damages for the plaintiff in the sum of two hundred and fifty dollars."

The defendant objected to the language of this verdict, and to the verdict itself; and to its being affirmed; but the Judge overruled the objection and pronounced this verdict to be in proper form; and directed that it should be affirmed; and it was accordingly affirmed and recorded. To the rulings, directions and orders of the Court the defendant excepted.

There were also motions to set aside the verdict for several causes, which, with the evidence, will be sufficiently understood from the opinion of the Court.

Howard & Osgood argued for the defendant, contending, that in an action of slander, where the truth is pleaded in justification, and there is no other plea, the issue is upon the truth of the facts; and no evidence is admissible, which does not tend to prove, or disprove, the issue joined. *Sperry* v. *Wilcox*, 1 Metc. 270; 1 Stark. Ev. 330; 2 Stark. Ev. 223.

The evidence permitted to be given of the trial of the plaintiff, his dismission, and the alleged oppression, were remote facts, could not prove or disprove the issue, were calculated to prejudice and mislead the jury, and should not have been admitted. It was not admissible as evidence of malice, or in aggravation of damages under the issue. When the defendant pleads the truth in justification, and fails in his proof, it is conclusive evidence of malice, and he is precluded from an attempt to mitigate damages by proving an honest intention, or mistake, or that he had reason to believe that the words spoken were true. *Larned* v. *Buffington*, 3 Mass. R. 553; *Alderman* v. *French*, 1 Pick. 19; *Bodwell* v. *Swan*, 3 Pick. 377; *Jackson* v. *Stetson*, 15 Mass. R. 48; *Hix* v. *Drury*, 5 Pick. 296; 2 Campb. 254; *Smith* v. *Wyman*, 16 Maine R. 14. If the defendant, under the pleadings, could not introduce evidence in mitigation of damages, the plaintiff could not in aggravation thereof, no special damages being alleged. 2 Stark. Ev. 465.

If the documents were not the proper subjects of forgery, as

stated by the presiding Judge, then he should have instructed the jury, that the action could not be maintained. If no forgery could be committed, the words were not in themselves actionable; and no special damage being alleged, the action cannot be maintained. The pleadings of the defendant admit only the facts, and cannot alter the character of the document alleged to have been forged. If not forgery aside from the pleadings, it is not made so by them.

But these instruments were properly subjects of forgery. At common law, "forgery is the false making or alteration of a written instrument with intent to defraud or deceive." 2 Russ. on Cr. 317; 2 Ld. Raym. 1461; *State* v. *Ames*, 2 Greenl. 365; Rosc. Cr. Ev. 381; 2 East's P. C. 852; 2 Binney, 332.

The Court should have given the last requested instruction. The plaintiff stated to Richmond that the paper presented to him by the plaintiff contained the signatures of the Morrells and Plummer, which was untrue. It was false and exhibited as genuine, and therefore was forged and counterfeited, with the intent to deceive another. 2 East's P. C. 972.

The verdict in its present form ought not to have been affirmed. That returned by the jury properly stated the facts found by them. In the verdict affirmed, there are facts stated, which were not found by the jury, and language introduced, which the jury did not, and could not properly use. Neither the counsel nor the Court had a right to do any thing more than to have the verdict reduced to proper form. They had no right to introduce new matter of fact or of law.

It was contended that the verdict was against evidence.

In commenting upon the alleged improper conduct of a juror, it was said, that the testimony of the juror ought not to have been received; and 3 Bro. & Bing. 272 was cited.

Deblois argued for the plaintiff, and contended, that the Judge did not err in allowing evidence of the facts accompanying the uttering of the slander, because they furnished legitimate evidence of the malice with which the words were spoken, and properly went to fix the damages. And this evidence may be given either on the general issue, or on a traverse

of a justification. *Larned* v. *Buffington*, 3 Mass. R. 546; *Coffin* v. *Coffin*, 4 Mass. R. 1; Chitty's Prec. 641, note; 2 Stark. Ev. 869; 7 Car. & Pay. 163; 1 Campb. 49; *Bodwell* v. *Swan*, 3 Pick. 376; *Bodwell* v. *Osgood*, ib. 379; 3 Binney, 550; *Allen* v. *Perkins*, 17 Pick. 369; *Smith* v. *Wyman*, 4 Shepl. 13.

The Judge might well doubt whether a paper like the one in question could be the subject of forgery, where there was no pecuniary interest involved. 2 Hawk. P. C. c. 70, § 11; 2 Russel on Cr. 1455; 2 East's P. C. 862. But be this as it may, the ruling of the Judge rendered this question immaterial.

This ruling was, that under the particular form of these pleadings, and for this trial, it was admitted by the pleadings, that these instruments might be the subject of a forgery, and that if they were altered for base and sinister purposes, it was a forgery. This was beneficial to the defendant, for otherwise he failed in the defence set up; the *quo animo* with which the papers were altered, is a necessary ingredient of the crime of forgery. If not made with any base or sinister motive, the alteration does not amount to a forgery. 2 Hawk. c. 70, § 11; 2 Russ. on Cr. 1467; 2 East's P. C. 854. And the Judge rightly left the intent to be found by the jury. *Smith* v. *Wyman*, 4 Shepl. 14; 2 Chitty's Pr. 642, note; 3 Esp. Cas. 133; 6 Car. & P. 675.

The refusal of the Judge to charge as the defendant requested, is justified on two grounds. 1. He had already substantially charged as requested; and 2. The Judge was right because there was no fact of which the defendant offered any proof, which called for such instruction. *Hammatt* v. *Russ*, 16 Maine R. 171; *Irving* v. *Thomas*, 18 Maine R. 418.

The verdict of the jury, as affirmed by order of the Judge, was unexceptionable. The defendant pleaded that the plaintiff had been guilty of forgery, and the plaintiff replied, that the defendant of his own wrong, spoke, uttered and published the false, scandalous and malicious words, set forth, &c. without any such justifiable cause, as he in his several pleas has set forth. The informal verdict substantially found, that the plain-

tiff was not guilty of the forgery. The burthen of proof was on the defendant to prove that the plaintiff was guilty. The amended verdict merely put into form, what the jury had found, as is lawful and common. *Sperry* v. *Wilcox*, 1 Metc. 267.

The replication, made in this case, was the proper one. 2 Chitty's Pl. 642, note; 1 Saund. 244, note 7; 1 B. & Pull. 76.

He also contended, that a new trial ought not to be granted for the causes set forth in the motions. To show that the juror was rightfully permitted to state the facts in relation to his own conduct, he cited *Haskell* v. *Becket*, 3 Greenl. 92, and *Taylor* v. *Greely*, ib. 204.

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

WHITMAN C. J. — This is an action of defamation. The defendant, in pleading, admits the speaking of the words, and avers they were true; and does not plead the general issue. He was, thereupon, permitted to open and close in his defence. We are not prepared, however, to have this instance drawn into precedent, so as to become obligatory hereafter. It is true that, in *Ayer* v. *Austin*, 6 Pick. 225, Mr C. J. Parker states it to have been the practice, in such cases, to allow the defendant to open and close. He however, treats it as a question of practice; and professor Greenleaf, in his Treatise on Evidence, Part 2, c. 3, so regards it. Accordingly the fifteen Judges of England, (*Carter* v. *Jones*, 6 C. & P. 64,) have adopted a rule, that, in actions for slander, libel, and for personal injuries, although a justification alone be pleaded, yet, that the plaintiff shall open and close. Mr. Greenleaf, in the chapter above referred to, would seem to have collected together all the learning upon the subject, and the rule suggested by him, as indicated by the weight of authority, is apparently simple, and easy of application, and in accordance with sound sense, and practical utility. It is, that the plaintiff should have the opening and closing of his cause whenever the damages are in dispute,

unliquidated, and to be ascertained by the jury; and this is uniformly the case in actions of slander. In actions of trespass *qua. clau.* where title to the *locus in quo* is alone the matter in controversy, and in many other cases where the defendant's plea so far admits the allegations of the plaintiff, that he must recover the precise amount, or the thing claimed, if any thing, it would be otherwise.

The first position contended for by the defendant, under his bill of exceptions, would seem to be, that, as he has pleaded a special justification, the plaintiff could not be permitted to give evidence, other than what is furnished by the plea itself, of the extent and degree of malice, actuating the defendant, in traducing the character of the plaintiff. This is ground which we cannot believe to be tenable. It would be singular indeed if the defendant could be guilty of all manner of outrage in his endeavors to prostrate the reputation of his neighbor, and then, by pleading a special justification, which he could not sustain, shut the plaintiff's mouth, and place him in a predicament, in which a jury might not be let into a knowledge of any special reason for awarding him any thing more than nominal damages. If the defendant should fail to support his justification, he merely admits the allegations in the writ to be true. These are merely formal, and do not indicate the precise amount of damages to be recovered. The same admission would be made by a default or a demurrer in all actions of tort; yet nominal damages only would, in such cases, be awarded, in the absence of further proof to show the actual amount of damage sustained. It is true that it has been adjudged, in the courts of Massachusetts, and while we were a part of that State, that pleading a justification in an action of slander, and failing to prove it, was to be regarded as an aggravation of the malice; but it was never heard of, that other evidence, tending still further to aggravate the malice was, in such cases, inadmissible. Much, very much must always depend upon the circumstances under which slanderous words may be uttered. The place where, the time when, the number of the repetitions, the number of persons present, the hostile

object in view, and every other concomitant of the outrage are to be taken into view in estimating the injury the plaintiff may have received. And these cannot be excluded by a plea of justification, any more than by a default or by a plea of any other kind.

It is argued, that the introduction of such evidence would raise a false issue, and one which the defendant could not be expected to come prepared to meet. How so, any more than in any other case of damage to be recovered? The issues to be joined in Court are never directly in reference to the damage to be recovered. In trover, trespass, assumpsit or case, whoever heard of any such issue? The damages are but an incident, which, if the issue joined be found for the plaintiff, are in controversy, and to be ascertained from evidence adduced by either party. Every defendant must know, that in an action of tort, if the cause of action be decided against him, a question of damages will thereupon arise, and that he must be prepared to meet it.

The defendant further urges, that, by relying upon a justification solely, and failing to sustain it, he is precluded from giving evidence in mitigation of damages. Be it so, and whose fault is it? Not that of the plaintiff. If the law be as he supposes, by pleading a false plea he places *himself* in such a predicament. Surely the plaintiff should not be abridged of any of his privileges by reason of such a misadventure on the part of the defendant.

But it may be doubtful if the defendant's premises, on this head, are quite correct. In *Larned* v. *Buffington*, cited by the counsel for the defendant, the Court did not so hold. The learned Chief Justice Parsons, in that case, says, "But we are not prepared to declare, that there are no facts or circumstances, from which the jury may mitigate the damages, under a special justification of the truth of the words, in which he shall fail." And there is no known rule of the common law inconsistent with this *dictum*. To me it would seem, that a defendant, who has a right to plead such a plea, as much so as to plead the general issue, though he may fail to support it,

should be debarred of no privilege, any more in the one case, than in the other, except in so far as his plea of justification must be regarded as an admission of facts. In either case he does but fail of making out a legitimate ground of defence, which he was at liberty to attempt to establish. It is true that Mr. Justice Jackson, in *Alderman* v. *French*, 1 Pick. 1, remarked, that, "in the case of *Larned* v. *Buffington*, it is intimated, that evidence, tending to show that the defendant was, by the misconduct of the plaintiff, led into the belief, that he was guilty of the offence he had imputed to him, might, perhaps, be received in mitigation of damages, as well after a failure to prove a justification pleaded, as under the general issue." He then says, "We do not find this *dictum* supported by any authority." But here we may well inquire, what authority has been or can be adduced in opposition to it. The profound, erudite and discriminating mind of C. J. Parsons, aided as he was at that time by able associates, was not aware of any; or of any reason why the defendant was in any such case, further than his plea must be taken to be an admission of facts, precluded from evidence in mitigation, as in other cases. And surely when the plaintiff offers evidence in aggravation, if not of the kind admitted, to a certain extent, by the plea of justification, the defendant should be allowed to rebut it. At any rate, it would seem, that this would be in accordance with the law as recognized before our separation from Massachusetts; and we may well hesitate before we allow it to be otherwise established by any *dictum* since, uttered by any of the Judges of Massachusetts, however respectable they may be, (and this Court is behind none other in its respect for that learned bench,) if unsupported by authority.

In the case at bar the defendant does not appear to have been restricted in the use of testimony to rebut that introduced in aggravation. Indeed no ground of complaint of that kind is intimated. It is only contended, that the course of pleading could have given him no intimation to be prepared in reference to the question of damages. But he had, as before remarked,

the same intimation that every other defendant has when he tenders an issue, which he cannot support.

The defendant also complains, that the proceedings at, what was called, a trial of the plaintiff, in which the defendant was active, and in connexion with, and in furtherance of which the imputation was uttered by the defendant, were allowed to be exhibited. There was assuredly very little, if any reason, for such a complaint. The very papers which the defendant set out in several of his pleas in justification, were those used in the course of those proceedings, and on which they, mainly, if not wholly, purported to be bottomed, under the pretence that they were forgeries. Strange indeed would it have been, if the plaintiff could not have been let into a developement of the whole scene in reference thereto; to show the manner in, and effect with which the defendant urged his accusation; and the wantonness and flagrancy of his whole deportment; and the extent of the injury, which the plaintiff might be believed to have sustained in the laceration of his feelings, and destruction of his reputation. On looking into the case of *Larned* v. *Buffington*, it will be seen, although a special justification was set up, that a long train of evidence was gone into, showing the particular circumstances attendant upon, and connected with the utterance of the slander, whereby the degree of its malignity and recklessness became manifest. If a precedent to sanction such a developement as was resorted to in the case before us were wanted, the case just cited would seem to furnish it in the fullest extent. But who can doubt, if one man be pursuing another to his destruction, and, in aid of such an object, shall traduce and vilify him, that, in an action for the slander, he would have a right to give in evidence, not only the slanderous words, but the object of them, and the means used in pursuance of, and in connexion with them, with a view to the accomplishment of the object?

In the bill of exceptions it appears, that, " the counsel for the defendant requested the Judge to instruct the jury, that, even if they found that the plaintiff had the authority or assent of the signers to insert the said charges, about the

Churchill horse in the charges they had signed against the said Turner, yet, if they did not find that the plaintiff had authority to insert other substantial specifications in the paper alleged to be forged, that paper would be a forgery." In declining to give this instruction we do not see that the Judge erred. He could not say to the jury that the paper would be a forgery, without it had been made as defined in a quotation made by the counsel for the defendant, viz. "falsely with intent to defraud or deceive some one." The mere insertion, in the writing alluded to, of any additional specification could not have constituted it a forgery, unless it were made with an intent to defraud some one. The definitions of forgery, as contained in various authors, are collected in the 2 East's P. C. 853. He quotes Mr. Justice Blackstone as saying, that it "is the fraudulent making or alteration of a writing to the prejudice of another;" and Mr. Justice Buller as saying, it "is the making a false instrument with intent to deceive;" and Baron Eyre, in Taylor's case, as saying, "it is a false instrument made with intent to deceive." And in the word deceive, Mr. East says, "must doubtless be intended to be included an intent to defraud." And so it was defined, he says, by Grose J. in delivering the opinion of the Judges, in the case of *Parks* and *Brown*, viz. "the false making a note or other instrument with intent to defraud." And the same in substance by Eyre, Baron, in *Jones & Palmer*. In this case, although it is not so stated in the bill of exceptions, the plaintiff may have had such reliance upon the members of the church, over which he was placed, and may have had such evidence of the confidence they reposed in him, as to lead him to suppose they would assent to any course, which he might think proper to adopt, to bring a supposed offender to justice. He may have acted with innocence of intention, and in the belief that he was promoting the cause of religion and virtue, in making insertions of specifications without having consulted those, who had, at first, set the matter on foot. We are all aware of the implicit confidence often reposed, by the members of a church, in their pastor; leading him to presume upon their support in whatever

he may do with good intentions; and especially to promote the cause in which they are all engaged. It was a matter exclusively within the province of the jury to decide whether there was any such fraudulent intent, in whatever the plaintiff did, as is essential to constitute the crime of forgery. The Judge therefore could not have given the instruction desired.

The Judge, in his charge to the jury, is reported to have stated, "that it was very questionable whether the documents alleged to have been forged were properly subjects of forgery; that forgery was ordinarily committed by a person, who had something to gain by it in a pecuniary point of view or otherwise; but that, in this case, the question need not be considered, as the pleadings amounted to an admission, that the defendant had accused the plaintiff of the crime of forgery; and that the instruments in question were such, that the crime might be committed in the exhibition and use of them." Thereupon it is urged by the counsel for the defendant, that the Court should have decided that the instruments were or were not subjects of forgery; and if not, that the jury should have been instructed that the words were not actionable. But this would by no means follow. If the Court had decided that the instruments were not subjects of forgery, the instruction must have been that the defence had not been made out; for unless the instruments were subjects of forgery the plaintiff could not have been guilty of forgery in reference to them; and so the plea in justification would have failed. The counsel, nevertheless, still contends that the instruments were subjects of forgery at common law; and this is his proper ground of defence. If they were subjects of forgery, and have been forged, then his defence was complete; otherwise not. Surely the defendant has no ground for complaining that the Court did not instruct the jury that the instruments were not subjects of forgery. He has placed his defence upon the ground that they were so; and the Court suffered the cause to proceed upon that ground. And as the parties saw fit to make up their issues it was not the duty of the Court to have instructed the jury otherwise than to look to the matters put in issue. It may

be that the defendant's position, as to the nature of the instruments is correct. We do not feel ourselves called upon at this time to decide whether it is or not. The law, as laid down by Sergeant Hawkins, c. 70, § 8, 9 & 10, would be adverse to it. But the statutes, and even the decisions as at common law, Mr. East, in his P. of the C. p. 856, says, have greatly extended the range of instruments in regard to which forgery may be committed. As late as 1793, however, East's P. C. 862, one, who was committed to jail, under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor to the sheriff and jailer, under which he obtained his discharge from jail. A minority of the Judges, and the Chief Justice among the number, the point being reserved, were of opinion that it was not forgery; and the culprit was convicted of a misdemeanor only.

A motion has also been filed to set aside the verdict as against evidence, and against law. To set aside the verdict as against evidence it is urged, that Plummer, whose signature purports to be to the documents alleged to have been forged, positively swears, that he did not authorize his name to be put to them, and, with reference to certain specifications therein, that there is no pretence that he was contradicted in his testimony. But his credibility was for the consideration of the jury. There may have been good grounds, of which a bill of exceptions, or even a report of the evidence, if there were one, could exhibit no indications, for their not believing him. They had an opportunity of judging of the credibility of the witness by seeing him upon the stand, and hearing his examination and cross-examination; by witnessing his capacity, his ability to recollect and narrate facts; his peculiar traits of character; his temperament; his leaning towards one party, and his hostility to the other; and could gather from all they could see and hear his partizan zeal, and the other influences under which he testified; none of which could be fully displayed upon paper. We cannot know, therefore, however positively he may have testified, that the jury ought to have believed him.

But suppose the witness were credible, and even that the

jury believed every word he uttered, there would still be a question, and an essential one to be determined, viz. did the plaintiff do what he did otherwise than in the simplicity of his heart, and with praiseworthy intentions, relying upon that confidence he had been accustomed to experience from the brethren and sisters of his church, while endeavoring, in pursuance of their instigations, originally, to bring a member of the same denomination to an examination as to charges against him, supposed to be susceptible of proof? This was a question peculiarly within the cognizance of the jury. And it cannot be gathered or understood from any thing that we have before us, that their finding was not wholly for the want of proof, that should satisfy them of a fraudulent intent on the part of the plaintiff in what he did; without which they could not have found that he had been guilty of forgery. But verdicts are not to be set aside as against evidence except in cases of palpable and gross error on the part of the jury; for which we look in vain into the case as developed before us.

As to whether the verdict was against law, what we have already said will show that a new trial cannot be granted for any such cause.

It is furthermore urged, that the verdict should not have been affirmed, in its present form. The jury, it appears, returned a verdict substantially, and in their own language for the plaintiff. It was, however, not in the form coinciding with the issues, which had been joined. The pleas of the defendant, having been in justification, the reply was, that he uttered the false, scandalous and malicious words, of his own wrong, &c. upon which issue was joined. The Court therefore directed the verdict to be put in such form as was required by the issues. In that form it was affirmed. In finding for the plaintiff the jury necessarily found that the words were false, scandalous and malicious, and the verdict as amended was to that effect. The practice of putting verdicts in form to be affirmed, after the jury have found, in substance, to the same effect, is of such frequent occurrence, and the propriety of it is so obvious, that it is truly a matter of surprise to find any question

made about it. If it can be necessary to cite authorities upon this point the cases of *Ropps* v. *Barker*, 4 Pick. 239, & *Porter* v. *Rummery*, 10 Mass. R. 64, are very decisive upon the point.

But, finally and lastly, we are met with a motion for a new trial, because, as is alleged, one of the jury, who tried the cause, had been talked with, and had expressed an opinion unfavorable to the defendant. The affidavit of one Hanson, a member of the Methodist Church, was taken, in which he states, that John Gallison, one of the jury, before the trial, said to him, that "Sawyer would get his case; that that was clear enough; that they could prove nothing against him." And the counsel for the defendant urges, that this is conclusive of the facts; and that the juryman cannot be called to disprove it; and cites the case of *Caster* v. *Merest*, 3 Brod. & Bing. 272, in which it was held that, "where it was sworn, that handbills, reflecting on the plaintiff's character, had been distributed in Court, and shown to the jury on the day of the trial, the Court would not receive from the jury affidavits in contradiction, and granted a new trial against the defendant, though he denied all knowledge of the handbills." This case is shortly reported, and the above is the reporter's marginal abstract of the decision. Their report of what was said by the Court is in these words, "But the Court refused to admit the affidavits, thinking it might be of pernicious consequence to receive such affidavits in any case, or to assume that a jury had *been unduly influenced;* and, though the defendant denied all knowledge of the handbills, they made the rule absolute." The new trial in that case was manifestly granted upon the ground, that the defendant must be presumed to have caused the handbills to be distributed, notwithstanding his denial, with a design to affect the decision of the cause. Such practices should be discountenanced. And it might be reasonable to grant a new trial in such cases, first, because it could not be rendered perfectly certain that an undue influence had not been produced by the dispersion of the handbills in Court; and, secondly, as a merited rebuke of such attempts to produce an undue

influence in the trial of a cause. It is undoubtedly well settled that jurors shall not be heard to impeach a verdict which they may have returned. But the authorities in this country, if not in England, are abundant to show, that a juror, who has been implicated, in reference to a verdict, which he may have given, is admissible to remove the ground of implication. In *Dana* v. *Tucker*, 4 Johns. R. 487, the Court say, "The better opinion is, and such is the rule of this Court, that the affidavits of jurors are not to be received to impeach a verdict; but they may be received in exculpation of jurors, and in support of their verdict." In *Bishop* v. *Williamson*, 2 Fairf. 495, a juror was admitted to testify, that although he had been approached by one, who had been a witness in the cause, who had made remarks such as should not have been addressed to a juror out of Court, if known to be such, yet that the witness did not appear to know that he was a juror. In the same case, in the opinion as drawn up by the Court, it is stated, that "some slight proof was, also, offered to show, that Job White, one of the jury, had formed an opinion in the cause before the trial, unknown to the defendant; but it did not appear to have been any thing more than some impressions from what he had heard of the former verdict, and floating rumors, without professing to have had any knowledge of the facts." Now it is not stated that the juror was sworn as to any opinion he might have formed. But how did the Court come to the knowledge, that the juror had only, "some impressions from what he had heard of the former verdict and floating rumors, without professing to have had any knowledge of the facts?" Who, other than the juryman himself, could have been competent to inform the Court of such particulars? Who else could have known his impressions; the extent and strength of them, or whence derived? It can scarcely be doubted, that the Court had before them the juror's own account in reference to those matters. In *Hilton* v. *Southwick*, 17 Maine R. 303, it was alleged, that a son of the plaintiff, and a witness in his behalf, had been guilty of some impropriety in regard to a juror, who being sworn, testified that no such impropriety took place, and

the motion which had been made for a new trial was thereupon overruled. Other cases might be cited to the same effect, but it would be a work of supererogation.

The juror's affidavit having been taken in this case we must look into it, and see how far his testimony conflicts with that of Hanson. He directly denies that he ever uttered what Hanson states that he did say. And states further, that he knew nothing of the cause or of the parties, till it came to Court; nor of the facts in the cause, till it came to trial; that when called on to the jury seat he had no impression, prejudice, belief or knowledge concerning the facts, or in relation to them; and that no impression had been communicated to him by any one in relation to the cause, except as the case was developed on trial. We cannot therefore consider the testimony of Hanson as otherwise than neutralized by that of the juror.

Exceptions and motions for a new trial are overruled, and judgment must be entered on the verdict.

JOHN BRADLEY *versus* EDMUND BOYNTON *& al.*

Where a trespass has been committed upon the land of tenants in common, and a settlement has been made with the trespasser by one of such tenants, who released him from all liability for the trespass, as well for his co-tenant as for himself, such settlement and release binds both tenants in common.

A settlement and release of a trespass necessarily operates as a transfer of the property, severed from the freehold, to the trespasser; and when a release of one tenant in common discharges the cause of action, it must have a like effect.

Although one tenant in common of personal property can sell but his own share, and not that of his co-tenant, yet when they have both been deprived of the possession and enjoyment of it by a wrongdoer, their right to compensation for the injury is a joint one, and their remedy is by a joint action; and hence it is, that one of them may release and discharge both the joint right of action, and the action itself.

TROVER for a quantity of pine mill logs.

At the trial of the action, after the facts were before the jury, and which are sufficiently stated in the opinion of the

Court, a default was entered by consent, which was to be taken off, if the defence was made out.

Osgood, for the defendants, contended that a mortgagee of land, who has not entered into possession for condition broken, cannot maintain trover against a stranger for cutting trees thereon, although perhaps he might against the mortgagor. *Hammatt* v. *Sawyer*, 3 Fairf. 424; 17 Mass. R. 289; 15 Johns. R. 205; 2 Greenl. 387; ib. 173; ib. 132; *Gore* v. *Jenness*, 19 Maine R. 53; *Wilkins* v. *French*, 20 Maine R. 111.

But if the mortgagee can maintain a suit, one tenant in common as the plaintiff is, cannot maintain trover without joining the other. 12 Pick. 120; Gould's Pl. 200; 1 Chitty's Pl. 43; 13 Johns. R. 286. It is not necessary to plead non-joinder of plaintiffs in abatement.

Nor is the plaintiff in the least relieved from his difficulty by the severance of the trees from the land. One tenant in common cannot maintain trover against the other for a mere detention of the property. Nor can one, without joining the other, maintain a suit against a stranger for the destruction or sale of the property of both. 7 Wend. 449; 9 Wend. 338; 21 Wend. 72; Stark. Ev. (in 2 Vol.) 840; 21 Pick. 559.

The release of Chase, one of the tenants in common, is a complete and perfect bar to the maintainance of the plaintiff's suit. The cause of action is thereby discharged, and the plaintiff's remedy is only on his co-tenant. *Rising* v. *Stannard*, 17 Mass. R. 282; *Knox* v. *Silloway*, 10 Maine R. 201; *Rawson* v. *Morse*, 4 Pick. 127; *Maddox* v. *Goddard*, 15 Maine R. 218; 8 Wend. 505; *Arnold* v. *Stevens*, 1 Metc. 266; 13 Johns. R. 286; Bac. Abr. Release, G.

Fessenden, *Deblois* and *Fessenden*, for the plaintiff, argued, that the mortgagee, although he had not entered into the actual possession for condition broken, could maintain trover for logs cut by a stranger, and sold to the defendants, who had them in possession when the demand was made. An action will lie in favor of the mortgagee against the mortgagor or his assignee for cutting trees. *Stowell* v. *Pike*, 2 Greenl.

387; *Smith* v. *Goodwin*, ib. 173; *Blaney* v. *Bearce*, ib. 132; *Newhall* v. *Wright*, 3 Mass. R. 138. If the mortgagee can maintain trover against the mortgagor, much more shall he against a stranger. Nor could the defendants acquire any title under the trespasser. *Gore* v. *Jenness*, 1 Appl. 53; *Perkins* v. *Pitt*, 11 Mass. R. 130; *Starr* v. *Jackson*, ib. 519; *Higginson* v. *York*, 5 Mass. R. 341; 1 Johns. R. 471; *Ripley* v. *Dolbier*, 6 Shepl. 382. The trespasser can impart to another no rights superior to his own. The mortgagor, as against the mortgagee, has only a right in equity to redeem, but no title. 3 East, 38; 3 Greenl. 424.

Nor can the defendants contend successfully under the release of Chase, the other mortgagee of an undivided share of the land. That release did not discharge the plaintiff's right of action. One tenant in common cannot discharge a trespass committed in relation to a chattel, nor a suit in trover by a co-tenant to recover his share of the value of the chattel. Chase, having wrongfully converted the property, could not convey any rights to the defendants. One tenant in common cannot, like a partner, sell the whole interest of his co-tenant. Nor could he give any greater rights to the defendants, than he had himself. And if a personal chattel, held in common, be sold by one of the tenants as exclusively his own, such sale is a conversion. 9 Cowen, 230; 5 Johns. R. 174; 7 Wend. 449; 4 Wend. 525; 15 Johns. R. 179; 2 Wend 553; *Reed* v. *Howard*, 2 Metc. 36; *Weld* v. *Oliver*, 21 Pick. 559; Buller's N. P. 34. Or if one tenant in common destroy the thing in common, the other may bring trover. *Herrin* v. *Eaton*, 1 Shepl. 193; 1 Taunt. 241; 1 Conn. R. 95; 10 East, 121; 1 L. Raym. 737. One of several tenants in common of a tree, may maintain an action against the others for cutting it down. Chitty on Pl. 170; *Maddox* v. *Goddard*, 3 Shepl. 223; *Gibbs* v. *Chase*, 10 Mass. R. 125; 15 Mass. R. 204; 20 Pick. 413. On a demand by the plaintiff, and a refusal to deliver and a denial of our rights by the defendants, they became liable. 2 Campb. 335; 2 Stark. Rep. 312; 13 Pick. 297; 21 Pick. 559. But, as before said, trover may be

maintained by one tenant in common against another, when the latter sells the whole property as his own. *White* v. *Osborne*, 21 Wend. 72.

The rule of the common law is, that no right passes by a release, but the right which the releasor had at the time of the release, made. *Quarles* v. *Quarles*, 4 Mass. R. 680; Co. Lit. 265. The defendants, therefore, could thereby only acquire Chase's interest, and not the plaintiff's.

The opinion of the Court was afterwards prepared by

SHEPLEY J. — This is an action of trover brought to recover the value of certain mill logs cut and carried away from township numbered one, in the ninth range, by Thomas J. Grant, as a trespasser; and by him delivered to the defendants in payment of advances made to him. The plaintiff and Stephen Chase being at that time mortgagees and tenants in common of that township, a settlement for the trespass was afterwards made with Grant by Chase, who released him from all liability as well for himself as for his co-tenants. The question presented is, whether the settlement and release of one tenant in common binds his co-tenant, and transfers the property to the trespasser.

In actions *ex delicto* and for injuries to their real property, tenants in common must join. 1 Chitty Pl. 52. *Low* v. *Mumford*, 14 Johns. R. 426. *Rich* v. *Penfield*, 1 Wend. 380. In Ruddock's case, 6 Co. 25, (a) it is said, that when the ground of action is a joint interest and the plaintiffs seek to recover for any personal thing, as in an action of debt or trespass, the release of one shall bar the others. In the case of *Razing* v. *Ruddock*, Cro. Eliz. 648, the rule of law was stated to be, that when an action is brought by several to charge another, the release of one bars the others, while it would not thus operate in a case, where they sought to discharge themselves by the action of a judgment, wherein they had been defendants. The same doctrine was held in the case of *Blunt* v. *Snedston*, Cro. Jac. 117. The case of *Austin* v. *Hall*, 13 Johns. R. 286, was an action of trespass *quare clausum*

brought by tenants in common. The defendant, among other pleas, pleaded releases by two of the plaintiffs; and the plaintiffs demurred. The Court said, "the action is strictly a personal one, and the plaintiffs were bound to join in it. The release therefore by two of the plaintiffs is a bar to the action." In the case of *Decker* v. *Livingston*, 15 Johns. R. 481, it is said, "there can be no doubt, that when there is such a unity of interest as to require a joinder of all the parties interested in a matter of a personal nature, the release of one is as effectual as the release of all." In the case of *Baker* v. *Wheeler*, 8 Wend. 505, it was decided, that a license given by one tenant in common to cut timber, having himself a right to cut timber on the estate held in common, bound his co-tenant. In the case of *Sherman* v. *Ballou*, 8 Cowen, 304, a discharge of rent by some of the tenants in common was adjudged to bind their co-tenant. This action might have been defeated by a plea in abatement for the non-joinder of Chase; and if he had been joined his release would have been a bar to the action. The same would have been the result, if the plaintiff had waived the tort, and brought an action of assumpsit for the money received from the sales of logs or lumber. *Gilmore* v. *Wilbur*, 12 Pick. 120. He had therefore no legal remedy for the injury but upon his co-tenant. The omission of the defendants to defeat this action by a plea in abatement, cannot change the legal effect of the release by one of the tenants in common. The right to release the action arises out of the right to control and discharge the ground of action. And if the cause of action may be released after action brought, it may be, after it has arisen and before that time. A settlement and release of a trespass necessarily operates as a transfer of the property to the trespasser. And when a release of one tenant in common discharges the cause of action, it must have a like effect. The plaintiff would avoid this result by shewing, that the mill logs, after they were cut, became the property of the plaintiff and of Chase; that one tenant in common of personal property can sell his own share only, and that the settlement and release of Chase was an attempt to sell the whole

property; and that it could not therefore destroy the right of property in the plaintiff. These positions are correct, so long as the common property exists unaffected by the illegal acts of others and subject to the possession of the tenants in common. But when they have been deprived of the possession and enjoyment of it by a wrongdoer, their right to compensation for that injury is a joint one; and their remedy is by a joint action. And hence it is, that one of them may release and discharge both the joint right of action and the action itself.

Default taken off and new trial granted.

RANDOLPH A. L. CODMAN *versus* ELISHA STROUT and Trustee: and

ELISHA STROUT *versus* SAMUEL R. CLEMENTS.

It is not competent to bring the decisions of a Judge of the District Court into this Court for revision, when given in two distinct suits wherein the parties are not the same, by one bill of exceptions.

Where a suit had been commenced, and the demand had been submitted to the decision of referees by rule of court, and the referees had met and adjourned, and afterwards again met and made their report; and, after the first meeting of the referees and before the second, the defendant had been summoned as trustee of the creditor at the suit of a third person, and had come into Court and disclosed credits in his hands; *it was held*, that the proceedings in the trustee process furnished no sufficient ground for refusing to accept the report, or for holding the trustee chargeable.

THE actions *R. A. L. Codman* v. *Elisha Strout*, and *S. R. Clements*, Trustee, and *Elisha Strout* v. *Samuel R. Clements* came, thus entitled, from the District Court to this Court by one bill of exceptions, signed by Messrs. Codman & Clements, but they were entered as separate actions. The facts appear in the opinion of the Court.

Codman & Fox argued for Codman and for Clements, and contended that Clements should have been charged as trustee; and that being rightly charged, furnished a good defence for him in Strout's suit. Clements was summoned as trustee before the referees met. Having submitted the claim of Strout against him to the decision of referees, does not prevent his

being summoned and held as trustee. The only question is, whether he could have been protected. It was not too late for him to have had complete protection, by deducting the amount of Mr. Codman's debt against Strout from the sum awarded in Strout's favor against Clements, or recommitting the report to the referees for that purpose. *Smith* v. *Barker*, 1 Fairf. 458; St. 1839, c. 368; Rev. St. c. 119, § 13.

Swasey, for Strout, said that there was no legal objection to the acceptance of the report; and therefore its acceptance was a mere discretionary act. No legal rights were involved, and exceptions do not lie to the exercise of this power by the District Judge. 8 Greenl. 288; 15 Maine R. 159; 17 Maine R. 169; 1 Metc. 225; 3 Greenl. 216.

But if the decision of the District Judge is open to revision here, it was clearly right. The reference had been entered into, the papers had been before the referees, the parties had agreed that judgment should be rendered upon their report, and there was no opportunity for Clements to avail himself of this trustee process in defence of Strout's suit against him. If there was any opportunity, it was before the referees at their last hearing. But it was not presented there. 3 Mass. R. 121; 13 Mass. R. 215; 17 Maine R. 401; 19 Maine R. 458.

The opinion of the Court was drawn up by

WHITMAN C. J. — In the last of these cases an agreement to refer was entered between the parties, and a rule of court thereupon taken out, and handed to the referees, who met and heard the parties; and adjourned for a further hearing; after which, and before the next meeting, the plaintiff, in the first case, had commenced the above suit against the plaintiff in the last, and summoned the defendant therein as his trustee. The referees thereafter proceeded, and made a report in favor of Strout; before which Clements had made a disclosure, denying his indebtedness to Strout; but, after the report was made against him, disclosed further, expressing a willingness to be adjudged trustee for the amount due to said Codman, and to have the same deducted from the judgment to be ren-

dered upon the report. And the said Codman thereupon objecting to the acceptance of said report, filed a motion in writing, that the said Clements should be adjudged trustee, and that the amount of his, the said Codman's, judgment, rendered against the said Strout, with costs for the trustee, should be deducted from the amount of said award; or that the report should be recommitted, with instructions to deduct that amount, on proof that the same had been paid to him by said Clements. But the Court overruled the motion, and adjudged that the report should be accepted, and that the trustee should be discharged. Whereupon the said Codman and said Clements filed exceptions to the said adjudications as against law.

We however think, that it is not competent for parties to blend two suits in this way, in one bill of exceptions, and thereby bring them into this Court. If Clements was aggrieved by the adjudication against him he should have excepted; and, if Codman was aggrieved at the adjudication in his suit, he should have filed his exceptions therein.

But, on looking into the causes of complaint, set forth in the exceptions, we do not see that either could have claimed to have been aggrieved. After the suit of *Strout* v. *Clements* was submitted to referees, under a rule of court, and a report made, it was too late to refuse its acceptance for the causes set forth, and to render judgment thereon. And in such case the trustee could not be held as chargeable. It was not in his power to arrest the proceeding in the action of Strout against him. He had agreed, that, on report being made, judgment should be rendered thereon. It would have been altogether unprecedented for the Court to have interfered, and have refused to enter judgment, when there was no legal objection to the report itself; and especially to enter up judgment for a part of the sum awarded, in order that the defendant might be enabled to give to the other part a destination contrary to what he had agreed upon. Such an act on the part of the Court would, moreover, have been arbitrary, and unprovided for by any statutory regulation, or recognized rule of law.

The bill of exceptions, and the actions aforesaid are dismissed from this Court.

THE PRES'T. DIRECTORS & CO. OF THE BANK OF PORTLAND *versus* DANIEL BROWN.

Such demand as is obligatory upon the maker of a note is a sufficient demand in reference to the liability of an indorser thereof.

If there be no appropriation of a payment made by either of the parties, the law will appropriate it, other considerations being equal, in the first instance, to the payment of a note absolutely due to the creditor, rather than of one transferred to him as collateral security only.

ASSUMPSIT against the defendant as indorser of a note of which a copy follows. — "Portland, March 31, 1835. For value received I promise to pay Daniel Brown, or order, two thousand eighty-one dollars in two years with interest annually.

"Henry Illsley."

This note was indorsed by the defendant and by Mason Greenwood.

The messenger of the Portland Bank testified, that on April 3, 1837, he gave the maker of the note a written bank notice in the usual form, in the street at Portland, where he resided. He had not the note, which was at the bank. He also testified, that the defendant lived at Waterford in the county of Oxford, and that he deposited a letter, directed to the defendant at that place, in the postoffice on the same third of April, notifying him of the demand and non-payment. This suit was commenced December 12, 1840. The plaintiffs also introduced testimony to prove that their usage was to keep notes in their bank, and send written notices to the makers and indorsers without sending out the notes to the makers; and that Illsley, the maker of the note now in suit, was acquainted with this usage. No testimony was offered to show, that the defendant had any knowledge of such usage of the bank.

The defendant proved, that the plaintiffs on April 24, 1837, instituted a suit against Mason Greenwood, as indorser of this note, and also against him in the same suit, as maker of another note, dated Oct. 27, 1836, for $4000, signed also by William Cutter and others, payable to the Georgia Lumber Company,

and indorsed to the plaintiffs; that at the April Term of the S. J. Court, 1839, they recovered judgment in that suit for $7150,84, debt, and $7,25, costs; and that an execution issued thereon was satisfied by levy on real estate and sales of equities of redemption to the amount of $4787,78.

SHEPLEY J. presiding at the trial, instructed the jury, that if they were satisfied from the testimony, that the usage before mentioned was proved to exist, the maker of the note in suit knew of that usage, and that notice to the defendant was deposited in the postoffice as stated by the messenger, that there was sufficient evidence of a presentment and demand on the maker, and notice to the defendant, to render him liable as indorser, although he was ignorant of the usages of the bank. The question of appropriation of payments was left, by consent, for the whole Court, upon the facts in the case.

It was proved by the plaintiffs, that the note now in suit was negotiated to them by Greenwood as collateral security for a draft drawn by Glover & Co. on said Greenwood, and by him accepted, and which yet remains the property of the plaintiffs, and is unpaid.

The verdict was for the plaintiffs for the amount of the note in suit, which was to be amended or set aside, as should be the opinion of the Court.

Howard, for the defendant, contended, that as Brown was wholly ignorant of any of the usages of the bank, that he should not be bound by them. The demand on Illsley, the maker of the note, could not affect him. He was equally liable without any demand, and one was made on him merely to be effective as the foundation for charging Brown, and as he knew nothing of bank usages, he could not be made liable by them. 14 Mass. R. 303; 18 Maine R. 99.

The plaintiffs brought an action on this and another note in the same suit, and recovered judgment as one entire sum. More than the amount of this note has been paid on that judgment, and the plaintiffs cannot deny that this is not fully paid.

The parties made no appropriation of this payment, and the law appropriates it. The debtor having the first right of ap-

propriation, his intention and his interest is first to be looked at in making it by law. It is for his interest to have it appropriated to the payment of this, rather than the other note. 1 Mason, 323; 8 Wend. 403; 9 Wheat. 520; 1 Vern. 24; 1 Ev. Pothier, 368; 3 Sumn. 110; 1 Ld. Raym. 286; 2 Stark. R. 101; 1 Har. & Johns. 754; 2 Har. & Johns. 402; 9 Cowen, 747.

That to appropriate the payment to extinguish this note first is the right appropriation, appears from the consideration, that on this he was liable for the whole, and on the other only for and with others.

Longfellow, Sen. for the plaintiffs, said that any demand on the maker which constitutes a good demand on him, is sufficient for the purpose of laying the foundation for charging the indorser. Relies on *Whitwell* v. *Johnson*, 17 Mass. R. 449, as conclusive on this point.

The payment came from Greenwood's property, and if the law regards the interest of the debtor in making the appropriation, it was for his interest to have the appropriation made in payment of the other note. The plaintiffs have made an appropriation by bringing this suit on this note as unpaid. But if this was not done seasonably, the law would make the same. 3 Sumn. 99; 9 Wheat. 520.

The opinion of the Court, SHEPLEY J. concurring in the result thereof, was drawn up by

WHITMAN C. J. — The first question raised by the counsel for the defendant seems to be disposed of by the case of *Whitwell* v. *Johnson*, 17 Mass. R. 440. It is there decided, that such a demand as is obligatory upon the makers of notes is sufficient, in reference to the liability of indorsers. It is also said, in the *Bank of Washington* v. *Triplett*, 1 Peters, 34, that it is fairly to be presumed, that the maker of negotiable paper is acquainted with the customary law of the place in which he lives. The maker of the note in question was not only resident in the place at which the plaintiffs did their business, but was proved to have been conusant of the usage of

the plaintiffs at their banking house; and the mode of making the demand upon him was in conformity to that usage. This usage by banks has, moreover, been so often proved, and recognized as sufficient, in the cases reported, that perhaps it may now well be regarded as matter of public notoriety, and obligatory upon all in any manner connected with negotiable paper.

The other question presented is one of more difficulty. Certain rules have been laid down as to the appropriation of payments, which seem to be plain and explicit; but it still becomes difficult, in many cases, to determine, whether a case which may be presented comes within one or another, or either of them. The cases in which adjudications have been had are, mostly, if not all, those of payments made by the debtor himself from his own funds. The case here is of an involuntary payment, obtained by a levy of an execution upon the property of another. The debtor here, therefore, could have had no right to direct, as to how the payment should be applied. It was exclusively with the creditors to make the application. If they have done it, and have applied it to so much of their judgment against Greenwood, as was recovered upon the four thousand dollar note, there is an end of the defence upon this point. They contend that they have done so by bringing this action. It has been said, that the intention of the parties is to govern, in such cases. In this case the defendant cannot be said to have had any intention about it. He was not privy to the payment; and does not appear to have had the slightest knowledge of it. We have, therefore, the intention of the plaintiffs to look to solely. In *Chitty* v. *Naish*, 2 Dowl. P. C. 511, and *Brazier* v. *Bryant*, 3 ib. 477, it is said that, if there be no appropriation of payments made by the parties, they will be appropriated according to the presumed intention of the parties, to be collected from all the facts. Are there any facts in this case from which we can infer what must have been the intention of the plaintiffs, as to the application of the payment obtained by them? The four thousand dollar note was due to the plaintiffs absolutely. The

two thousand and eighty dollar note, indorsed by the defendant, and on which this action is brought, was held by them as collateral security merely. Now other considerations being equal, and it does not appear that they were not, it would seem to be presumable that the plaintiffs would apply the payment, in the first instance, to a debt absolutely due to them, rather than to one transferred to them as collateral security only. We are, therefore, led to the conclusion that the plaintiffs are entitled to recover. But the amount satisfied by the levy was more than sufficient to pay the amount due on the four thousand dollar note. According to the agreement of the parties therefore, the verdict may be so amended as to correspond with the balance remaining due to the plaintiffs.

BARRETT POTTER, JUDGE, *versus* EUNICE TITCOMB, EX'X.

Where the domicil of one owning real estate here was in a foreign country at the time of his death, no law of the country of his domicil can control the descent and distribution of his lands in this State, or have the slightest influence here upon it.

A widow, who was an alien and who with her husband, at the time of his death, were domiciled in a foreign country, cannot come into this State, and claim under our laws, by reason of her husband's having died without issue, the half of his real estate situated here.

If a will be made in a foreign country by one domiciled there, and it be there duly established as his will, it can have no operation upon his real estate here, unless made and executed in conformity with the laws of this State.

But it would seem, that such will is sufficient to pass to a legatee personal property found here.

Where the heirs at law have been admitted to prosecute an administrator's bond and recover judgment thereon for their share of the amount due, without a decree of distribution, the widow may sue out a *scire facias* to recover her share, without first obtaining a decree of distribution in her favor.

A contract cannot be rescinded, on account of fraud in obtaining it, without mutual consent, if circumstances be so altered by a part execution, that the parties cannot be put in *statu quo;* for if it be rescinded at all, it must be rescinded *in toto.*

SCIRE FACIAS by the administrator of Elizabeth Titcomb, who was the widow of Moses Titcomb, deceased, on whose estate Joseph Titcomb was administrator, to have execution for one half of the amount of a judgment formerly recovered against Joseph Titcomb, founded on official delinquency in fraudulently concealing a debt due to the estate from the administrator himself and neglecting to account for the same. During the pendency of this *scire facias* Joseph Titcomb died, and Eunice Titcomb became executrix of his will. The last trial was before WESTON, late C. J. It there appeared that Elizabeth, the widow of Moses Titcomb, was an alien, and that Moses Titcomb, at the time of his decease, was domiciled at the Island of St. Croix, which was subject to the King of Denmark. He left no issue. It did not appear what was the law at that island, by which the personal estate of a party deceased was to be distributed, but by the law of Massachusetts,

then in force here, a widow under such circumstances would be entitled to one half of the personal estate. Questions arising in the original action and in this *scire facias* have already been five times before the Court, and may be found in 7 Greenl. 303; 1 Fairf. 53; 2 Fairf. 157 and 218, and 3 Fairf. 55. If any one should desire a fuller statement than is given in the opinion of the Court, he is referred to those cases for its history.

The question of fraud in respect to the assignment was submitted to the jury, and also the question whether it was not ratified and confirmed by the final settlement in 1810. The presiding Judge stated to the jury, that if the widow had been deceived with regard to the existence of the debt, they would consider, whether upon the whole she had been defrauded; that the widow was not entitled by law to participate in the real estate in Massachusetts, of which Maine was then a part; that she had interposed difficulties to coerce the heirs into an allowance of her claim to a moiety of this estate; that a resort to indirection on the part of the heirs to diminish this claim, though it might be morally wrong, did not entitle her to open and repudiate the settlement, and to sustain further claims against the estate, if she had already received more than she had a legal right to claim; that although she had not been allowed a moiety of this debt, about 2000 dollars, to which she was entitled, she had been allowed a much larger sum, $23,000, on account of the real estate to which she was not entitled; that all these facts were to be taken into consideration by the jury; and a strong opinion was expressed to the jury by the Judge, that she was not upon the whole defrauded, and not therefore entitled to sustain by this action, through her representative, any further claim to the estate in this country.

The jury returned a verdict for the defendant, adding, upon inquiry put to them, that they were of opinion, that Henry Titcomb had practised fraud and deception upon the widow, yet that she was not defrauded thereby of her rights, taking the whole matter into consideration.

The correctness of the instructions to the jury, and the whole case were submitted to the consideration of the whole Court.

The case was elaborately argued at the April Term in this county, 1842, by *Preble*, for the plaintiff, and by *Daveies*, for the defendant.

For the plaintiff, the case *Potter, Judge*, v. *Titcomb*, 7 Greenl. 303, was cited.

For the defendant were cited *Potter J.* v. *Titcomb*, 2 Fairf. 157; Story's Conf. of Laws, § 481, 395; 3 Hazzard, 403; 1 Binney, 336; 1 Greenl. 148. To the point that a contract must be wholly rescinded, and cannot be in part only, and within a reasonable time. 2 Shepl. 364; 14 Pick. 466; 1 Sumn. 509; 2 Pick. 184; 12 Pick. 307; 2 Kent, 480; 2 Fairf. 227; 5 East. 459; 4 Mass. R. 502; 15 Mass. R. 318; 1 Metc. 547; 3 Greenl. 30; 4 Greenl. 306; 7 Greenl. 13; 3 Fairf. 278; 3 Peters, 201. That the Court will not inquire into the terms of a compromise. 1 Sim. & St. 288, 564; 14 Ves. 91. To rescind a contract for fraud, the party must not only have had false representations made to him, but he must thereby have been misled to his injury. 2 Kent, 488; 1 Story's Eq. § 203; 12 East. 637; 1 Greenl. 376; 2 Shepl. 364; 3 Shepl. 225.

The opinion of the Court, SHEPLEY J. having been of counsel in the original action, and taking no part in the decision, was drawn up and read at the April Term, 1844, by

WHITMAN C. J. — It is important in the first place to understand what rights Elizabeth Titcomb, if living, could claim as the widow of Moses Titcomb, under the laws of this State. She was an alien, and, with her husband, was domiciled in St. Croix, an island in the West Indies, under the dominion of the King of Denmark. Her husband having died possessed of a considerable real estate situate in this State, and having debts due him here, administration was granted to Joseph Titcomb, the defendant's testator, to take charge of the same. This administration must be considered as ancillary to the administration in the place of the domicil of Elizabeth and her husband.

She could not come into the court of probate here, as the widow of her husband, and make a claim, such as she might if she and her husband had both been citizens of, and domiciled in, this State. She could not here claim an allowance to be made to her of the personal estate of her husband. She could not, being an alien, claim to be endowed of the real estate, either by the assignment of the probate court, or at common law. 1 Inst. 31 (b,) 32 (a.) And she could not, under the ancillary administration here, claim, by reason of her husband's having died without issue, to have one half of the net amount of the personal estate distributed to her by the probate court here. And if she could, she would be entitled to such one half only upon the final settlement of the estate, after the payment of all debts due from it, both here and elsewhere. She then by our statutes, under the administration of the estate in this State, as the widow of Moses Titcomb, had no rights whatever. Her administrator here can have no other rights than she would have had, if living, of which, by statute law, in this State, we have seen, as the widow of Moses Titcomb, she had none.

She would then, as the ground-work of any claim, which she might have had by succession to any of the estate, of which her husband died possessed, be remitted to the law as existing in the place of the domicil of herself and husband. Of the law of that place, as to the successions to estates, the case furnishes no evidence. And it is clear, that no law existing there could control the descent and distribution of real estate, or have the slightest operation here, upon it. The "*Lex loci rei sitæ*" is the only law which has ordinarily any controling power over such estates.

But it appears that Moses Titcomb left a will, which was duly established under the government of the Island of St. Croix, in which he bequeathed the one half of his real and personal estate to his widow. This will was not made and executed in conformity to the laws of this State, and cannot therefore have any operation upon the real estate here. And it is contended, as by our law a will purporting to be made

with a view to the disposition of real as well as of personal estate, if not valid for the former, is not so for the latter, that the widow in this case could not derive any right under it to the latter. The statute of wills in this State was made with a view to the disposition of estates of its citizens, domiciled within it, and had no view to the effect and operation of testaments made by foreigners in their own country. If a will be made, therefore, in a foreign country, which, by the laws in force there, is sufficient to vest in a legatee the personal estate of the deceased, as such an estate has no *situs*, it might pass such estate here, as well as elsewhere. The will of St. Croix seems to have been considered entirely sufficient to pass to the widow the one half of the personal estate; and whether it might be found here or elsewhere would seem to make no difference. Story's Conf. of Laws, § 380 and 384. And this Court, in the original suit on the bond, relied upon in this case, manifestly so considered it. Otherwise, in rendering judgment in that case, they would not have required that the heirs of Moses Titcomb, deceased, should release to the assignee of his widow's half of the personal estate here any claim they might have thereto. This they surely would not, and legally could not have done, if they had not considered that she had under the will a valid title to such half. We must therefore regard the original right of the widow to the moiety of the personal estate of her deceased husband, although to be sought for in this State, as well established; although but for this adjudication we might well entertain doubts upon this point.

But it is contended that she could not have been admitted to prosecute this *scire facias* until after a decree of distribution. The heirs however have been admitted to prosecute this bond without any such decree of distribution, and to recover their half of the amount due under it. And it would seem that whoever has a right to the other half should be entitled to maintain a *scire facias* to recover it. Besides, no decree of distribution could have been made while it remained uncertain what the amount recoverable would be. After the amount was ascertained, the court as the supreme court of probate,

made a distribution, assigning to each of the heirs their appropriate and respective parts of one half the fund. And by reserving the other half, as pertaining to the right of the widow, may be regarded as having virtually decreed a distribution of that half also, to the widow or her assignee. Her administrator therefore may be regarded as *rectus in curia* to claim it, if she had not by her own act divested herself of the right to make claim to it. This it is contended she has done.

In 1805, the year after the decease of her husband, she entered into a contract with Henry Titcomb, one of the heirs of her husband, living in this country, and who had been dispatched to St. Croix, as the agent of the others; and for the consideration therein expressed, assigned all her right to any and every part of the personal estate, to which she was, in any manner entitled, remaining in the United States, to him. She, however, afterwards, learning, that there was more property in the United States than she had been aware of, and considering herself as having been imposed upon and overreached in the contract with Henry Titcomb, became uneasy, and instituted proceedings at law in St. Croix to avoid the effect of it. The heirs thereupon despatched a Mr. Metcalf to St. Croix, who, in their behalf, effected another or additional compromise with the widow, wherein various concessions and stipulations were contained. Among them is a ratification of what she calls the exchange of property, made between herself and Henry Titcomb; and after reciting that the property in America, according to the probate records, amounted to $60,000, of which, according to the will, she was entitled to one half, yet, to obtain a final settlement, she is willing to accept $23,000. This proposition being acceeded to, the compromise was signed, and there is no pretence but that the $23,000 was duly paid. The operation of those two instruments to discharge the claim, which she could have made to the sum in question, is not disputed, provided the compromises were entered into without fraud or deception, practiced by the heirs or their representatives in obtaining them.

The jury have found, that Henry Titcomb did practise fraud and deception in obtaining the first, but there is no pretence that Metcalf did any thing of the kind in obtaining the last. In the last she obtained $23,000, in consideration of an equitable claim set up under the will, to the half of the real estate in this country, to which she had no legal title. It may be that, but for the concealment by Henry and Joseph Titcomb, of the existence of the debt in question, she would not have executed those instruments; and indeed it may be presumed that she would not.

She at the time of executing the last agreement, as well as of the first, was without doubt, deceived as to the existence of this debt.

The original concealment therefore may be believed still to have had its operation upon her mind. And this it is contended should have the effect to prevent those instruments from operating as a bar to the plaintiff's recovery; and on the decision of this point the cause must turn.

Are we authorized, under existing circumstances, to treat these instruments as nullities? They were contracts entered into in solemn form. Various proceedings of great magnitude, have taken place under them. Under the last agreement the widow was paid the sum of $23,000. Various changes in pursuance of the other articles therein, and in faith thereof, were effected in St. Croix. Thirty years or more have since elapsed. The large estate in that island, relying upon the efficacy of the articles of compromise, must have been allowed to experience a great variety of modifications. The widow has since deceased, and her share of it has, doubtless, been distributed among her heirs and relations. It is in the nature of things impossible, it may, and indeed must be believed, at this day, to reinstate things as they were at the time of executing the deeds of compromise. Yet if these contracts are to be treated as nullities in any part, they should be so for the whole. "A contract," says Chancellor Kent, "cannot be rescinded without mutual consent, if circumstances be so altered, by a part execution, that the parties cannot be put *in statu*

quo; for if it be rescinded at all it must be rescinded *in toto.*" 2 Kent. 480.

This doctrine is recognized in a great variety of authorities, both English and American; and is most explicitly and emphatically laid down by Mr. Chief Justice Parsons in *Kimball* v. *Cunningham,* 4 Mass. R. 502. We, therefore, find ourselves bound to come to the conclusion that the agreements between the heirs of Moses Titcomb, deceased, and his widow, are in full force, and uncancelled; and that they must operate to bar the plaintiff of a right to recover in this action.

This obstacle to the right of the plaintiff to recover may not in form be precisely that, which prevailed in behalf of the defendant at the trial; and we find on file a motion for a new trial grounded upon supposed misdirections of the Judge to the jury. The Judge, however, in his report, says, the correctness of his instruction to the jury "and the whole case is submitted to the consideration of the Court, that judgment may be rendered on the verdict, or the same set aside and a new trial granted as they may be legally advised."

We thereupon, having examined the whole case, have come to the conclusion, that the verdict is such as would be authorized upon a new trial. And, indeed, whenever it is apparent that a verdict is, as it must necessarily be returned upon a new trial, it would be worse than useless to set it aside, although there may have been some irregularities in obtaining it.

Judgment on the verdict.

WILLIAM MCLELLAN *versus* RANDOLPH A. L. CODMAN.

Where the return of an officer sets forth, that by virtue of his precept he had made diligent search for the property of the debtor, and could find none, the return would be false, unless he had the execution in his hands before the return day; for he could do nothing *by virtue of it*, unless it was in force at the time. And therefore where an officer makes such return on an execution, under a date subsequent to the return day, it must be considered, that the execution was in his hands seasonably, and that his return of his doings had reference to the time when he could lawfully act by virtue of it.

In *scire facias* against the indorser of a writ, the inability of the execution debtor to satisfy the execution, where that fact is relied upon to sustain the process, should be directly averred. If, however, this has not been done, but the plaintiff has averred, that his execution for costs has not been satisfied, and has recited the officer's return thereon, showing that the want of satisfaction arose from want of ability in the debtor to discharge the same, and has alleged, that for want of sufficient property of the debtor to satisfy the execution, the indorser became liable, the declaration will not, for that cause, be bad on general demurrer, under the provisions of Rev. st. *c.* 115 § 9.

MCLELLAN sued out his writ of *scire facias*, of which a copy follows.

Whereas William McLellan of Portland, in the County of Cumberland, Merchant, by the consideration of our justices of our Supreme Judicial Court holden at Portland within and for our county of Cumberland, on the second Tuesday of April, A. D. 1838, recovered judgment against Benjamin Weymouth of Portland, Gentleman, for the sum of thirty-four dollars and seventy-eight cents costs of suit, as to us appears of record, by him about said suit in that behalf expended, whereof the said Benjamin Weymouth is convict as to us appears of record, and although judgment be thereof rendered, yet the said execution for said costs doth yet remain to be paid, although the same issued from the office of the Clerk of said Court on the 12th day of May, A. D. 1838, and said execution was duly delivered into the hands of Royal Lincoln, who was then a deputy sheriff of said county and for more than three months thereafter, and at the time of the return on said writ, who made a return thereon in the words following and figures to

wit, " Cumberland ss. June 22, A. D. 1839. By virtue of the within execution, I have made diligent search after the property of the within named Weymouth, and not having found any estate, real or personal, belonging to said Weymouth, and the said Weymouth not being within my precinct, I hereby return this execution wholly unsatisfied.

" Royal Lincoln, Deputy Sheriff."

And the same execution remains wholly unsatisfied, and the plaintiff avers that Randolph A. L. Codman indorsed the original writ whereon said judgment was rendered by his christian and surname, as the plaintiff's attorney according to the statute; whereby and for want of finding property of said Benjamin Weymouth to satisfy said execution the said Codman became liable to pay said costs to the plaintiff, who was defendant in said original writ. Wherefore the said William McLellan has made application to us to provide a remedy for him in that behalf. Now to the end that justice be done: We command you to attach the goods and estate of Randolph A. L. Codman of Portland, in the County of Cumberland, Counsellor at Law, to the value of one hundred dollars, and summon the said Codman, if he may be found in your precinct, and make known unto him, that he be before our justices of our Supreme Judicial Court next to be holden within and for our County of Cumberland on the Tuesday next but one preceding the last Tuesday of April, to show cause if any he have why the said William McLellan ought not to have execution against him the said Codman for his costs aforesaid, and further to do and receive that which our said Court shall then consider. And then and there have you this writ with your doings. Hereof fail not, &c.

To this the defendant demurred generally, and the demurrer was joined.

Codman & Fox argued in support of the demurrer, contending that the only evidence of inability or avoidance must come from the return of the officer. *Ruggles* v. *Ives*, 6 Mass. R. 494; *Wilson* v. *Chase*, 20 Maine R. 389. The return on an execution by an officer, after the return day, is

wholly void. *Prescott* v. *Wright*, 6 Mass. R. 20. Here it does not appear, that the officer ever had the execution in his hands during the life of it. The search might as well be made on a dead execution, as on a live one, and amounts to nothing.

Fessenden, *Deblois* and *Fessenden* argued for the plaintiff. They cited *Chase* v. *Gilman*, 15 Maine R. 64; *Harkness* v. *Farley*, 2 Fairf. 491; *Stevens* v. *Bigelow*, 12 Mass. R. 434; *McGee* v. *Barber*, 14 Pick 212; *Welch* v. *Jay*, 13 Pick. 477.

The opinion of the Court was drawn up by

WHITMAN C. J. — The returns of ministerial officers, of their doings, by virtue of precepts entrusted to them, should be explicit; and leave as little as possible to intendment. The date of the return, in this case, of the officer's doings on the execution, being long after it had ceased to be in force, created some doubt whether it was actually in his hands before the day on which it was made returnable. But the returns of sheriffs and their deputies must be taken to be true; and the return set forth is, that, by virtue of the precept, he, the officer, had made dilligent search for property, &c. Unless he had the execution in his hands before the return day, his return would be false; for he could do nothing *by virtue* of it, unless it was at the time in force; after that it would be in his hands as a dead letter. We must, therefore, conclude, that the execution was in his hands seasonably; and that his return of his doings had reference to the time, when he could lawfully act by virtue of it. In such case it must be considered that there is evidence showing, that the person, against whom the execution was issued, was not of sufficient ability to pay the amount due on it. This satisfies one of the alternatives in the statute giving a right to sustain this process.

But it is contended that the *scire facias* is bad, inasmuch as it does not directly, and in terms, aver the inability of Weymouth, the execution debtor, to satisfy the execution. It would undoubtedly have been regular so to have averred. It was a fact to be proved; and therefore should in substance at

least have been alleged. The demurrer, however, of the defendant is general, under which errors in matter of form merely are not to be noticed, and the statute, ch. 115, § 9, is very broad. It provides, "that no summons, writ, declaration, plea, process, judgment, or other proceedings in courts of justice, shall be abated, arrested or reversed for any kind of circumstantial errors or mistakes, when the person and case may be rightly understood." Is there any difficulty in this case in understanding the *gravamen* relied upon? The plaintiff has averred, that his execution for costs has not been satisfied, and recites the officer's return thereon, showing that the want of satisfaction arose from the want of ability in the debtor to discharge the same. The plaintiff then avers, that, for want of sufficient property of the debtor's to satisfy the execution, the said Codman became liable, &c. From these averments and recitals we cannot see why the case may not be rightly understood.

The *scire facias*, and matters and things therein contained, adjudged good.

JOSEPH R. MATTHEWS *versus* BENJAMIN F. DEMERRITT.

The visible possession of an improved estate by the grantee, under his deed, even if no *visible change of the possession* takes place at the time of the conveyance, is implied notice of the sale to subsequent purchasers, although his deed has not been recorded.

To this there may be an exception, when the second purchaser is proved to have known, before the conveyance to the first purchaser, that he was in possession without claiming title, or where from the circumstances such knowledge must be presumed.

With respect to implied notice, the law will not give to an attaching creditor any rights superior to those of a second purchaser.

If at the time the action was brought, the tenant was in possession of the premises only under a lease for one year, and the fact that he was not tenant of the freehold was put in issue, and there was no evidence tending to prove, that he ousted the demandant, or withheld the possession of the premises from him, the action cannot be maintained, under the provisions of the tenth and eleventh sections of the revised statutes.

THIS was a writ of entry in which was demanded of the tenant, the possession of a lot of land with the buildings thereon, situate in Portland.

The writ was dated Sept. 21, 1841.

The general issue was pleaded, with a brief statement, that Demerritt was not tenant of the freehold, but tenant for the term of one year under a lease from S. Pease and wife, and that he claimed nothing further.

It appeared in evidence on the part of the demandant, that on April 18, 1838, the demandant sued out a writ against one Joshua Dunn, upon a note dated October 9, 1837, by virtue of which writ "all the right, title and interest the said Dunn had in and to all real estate in the County of Cumberland," was attached on said 18th day of April; that said action was duly entered and prosecuted in court, and judgment recovered against said Dunn at October Term, 1838, of the Court of Common Pleas, in Cumberland County; that execution issued upon said judgment which was duly levied upon the premises in question as the property of said Dunn, within thirty days of the rendition of the judgment.

The demandant also introduced a deed of the premises in

question, from Joseph D. Roberts to said Dunn, dated April 18, 1837, acknowledged the same day, and recorded April 22, 1837.

The tenant offered in evidence a deed of the premises from said Dunn to John P. Briggs, and Dorothy Briggs his wife, dated July 18, 1837, acknowledged July 25, 1837, and recorded April 26, 1838, conveying said premises to them as joint tenants and not as tenants in common.

John P. Briggs who was and for sometime had been a U. S. pensioner, died July 22, 1837, and the deed from Dunn was delivered to Mrs. Briggs soon after his death. He lived in the house two or three months before he died, and the tenant boarded in the house before Briggs' death, and had lived there ever since. Mrs. Briggs married Simeon Pease in the spring of 1838. Dunn never claimed to exercise any ownership over the property.

The tenant also offered a lease of the premises for one year from Simeon Pease and Dorothy Pease to himself, dated Jan. 1, 1841.

The demandant offered to prove that at the time John P. Briggs occupied the premises, and for years previous, he was notoriously insolvent, and to show circumstances to rebut any presumption of Briggs' ownership of the premises arising from his occupancy of the same, but WHITMAN C. J. then presiding, refused to allow the introduction of the proposed testimony.

Whereupon a nonsuit was entered by consent, subject to the opinion of the full Court upon the report of the facts. The Court were to confirm the nonsuit, order a new trial, or render such judgment as they should deem legal.

Howard and *Osgood* argued for the demandant, contending, that his title, under his attachment and levy, was superior to that set up by the tenant under the unrecorded deed from the debtor. Briggs had been in possession of the premises under a lease from the former owner before the deed to him and his wife. No change in the possession took place when the deed was given. The possession of Briggs, under such circumstances, gave no notice of a claim on his part under a deed.

There must be a change of possession at the time of the conveyance, that it may operate as constructive notice, and dispense with the necessity of recording the deed. The character of the possession was such that it could not amount to implied notice of the deed. Actual notice must be proved, or such possession as amounts to actual notice. *McMechan* v. *Griffing*, 3 Pick. 149; *Hewes* v. *Wiswell*, 8 Greenl. 98; *Lawrence* v. *Tucker*, 7 Greenl. 195; *Davis* v. *Blunt*, 6 Mass. R. 487; *Farnsworth* v. *Child*, 4 Mass. R. 637; *Marshall* v. *Fisk*, 6 Mass. R. 24; *Prescott* v. *Heard*, 10 Mass. R. 60; *Connecticut* v. *Bradish*, 14 Mass. R. 296; *Trull* v. *Bigelow*, 16 Mass. R. 406; *Cushing* v. *Hurd*, 4 Pick. 253; 10 Johns. R. 470; 8 Johns. R. 108; 3 Ves. 478; *Priest* v. *Rice*, 1 Pick. 164; *Curtis* v. *Mundy*, 3 Metc. 405.

Preble argued for the tenant, and contended, that notice of the conveyance of the premises to Briggs and wife was to be inferred from the actual possession of the premises by the grantees from the time the deed was made, until after the attachment. Dunn had conveyed the premises long before the demandant's debt was contracted, and he had never been in possession of the property. The slightest inquiry of the tenants in possession would have satisfied any one, that the property did not belong to Dunn, but to Mrs. Briggs. He considered the law well established, that actual possession by the grantee under his deed was sufficient notice, and denied that there was any foundation for the distinction set up.

He also contended, that this action could not be maintained against the present tenant, even if the demandant acquired a title by his attachment and levy, he being only a lessee for a single year.

The opinion of the Court was drawn up by

Shepley J. — The demandant caused the premises to be attached on a writ in his favor against Joshua Dunn on April 18, 1838. He obtained a judgment and caused an execution issued thereon to be levied upon the premises on the fifth day of November of the same year. Before this attachment

Dunn had conveyed the premises on July 18, 1837, to John P. Briggs and his wife, as joint tenants by a deed not recorded until after the attachment. But the grantees were at the time of its execution in possession of the dwellinghouse and lot conveyed; and they continued in the open and exclusive possession thereof until after the attachment and levy. This levy operated as a statute conveyance from Dunn to the demandant at the time of the attachment; and the fact, that the deed was recorded before the levy was made, does not impair his rights. *Stanley* v. *Perley*, 5 Greenl. 369. It has long been the settled construction of the statutes, requiring the registry of conveyances, that the visible possession of an improved estate by the grantee under his deed is implied notice of the sale to subsequent purchasers, although his deed has not been recorded. It is contended for the demandant, that this rule does not apply to a case, where there was no visible change of possession at the time of the conveyance. And this position finds some support in the language of decided cases.

In the case of *McMechan* v. *Griffing*, 3 Pick. 154, the opinion says, "but suppose, that a lessor should grant the land to the lessee, he being in possession under the lease, and the next day should make a second grant to a third person, who knew, that the lessee the day before was in possession under the lease, how does this continued possession furnish evidence of notice of his purchase? To imply notice in such case is to presume a fact without proof, and against probability." This supposed case is presented as an exception to the general rule, and is founded upon a knowledge of the second grantee, that the person in possession of the premises did not claim to be the owner one day before he purchased. And that he could not therefore be guilty of any fraud in making the purchase. In the case of *Hewes* v. *Wiswell*, 8 Greenl. 98, it is said, "a person may be in possession under a lease; or the fee may be conveyed from the lessor to the lessee in possession, and thus no change of possession follows. In such circumstances a continuance of the open possession would seem to give little or no notice to strangers of the existence of the con-

veyance; at least the facts could only furnish evidence, from which a jury might or might not infer notice, according to the particular nature of those facts."

One important evidence of title to an improved estate is the possession of it. And when one person purchases of another, who is not in possession, he is put upon inquiry into the cause of such apparent defect of perfect title. And the law will not suppose him to be so inattentive to his interest as to neglect to make full inquiry into the cause of it. When another is in the visible possession, if he should without inquiry interfere, and interrupt that possession by a purchase of the estate, it would afford presumption of a fraudulent intention. And it is upon this principle of an interference with the visible rights of others, and not upon a change of possession, that the presumption of law arises, that the second purchaser conducts fraudulently towards the first, when he is in possession at the time of the second purchase. It is possible, that a second purchaser may be able to repel such a presumption by showing, that it was a matter of notoriety, that the person in possession did not claim to be the owner at the time of the second conveyance, or that he was in possession under a lease from the owner, or that he was so informed by the tenant. A change of possession at the time of the first conveyance would seem to be required only, where the second purchaser is proved to have known before the conveyance to the first purchaser, that he was in possession without claiming title, or where from the circumstances such knowledge must be presumed.

In the case of *Webster* v. *Maddox*, 6 Greenl. 256, there was no visible change of possession at the time of the conveyance to the tenants; and yet their possession under a deed not recorded was decided to be sufficient notice of their title to an attaching creditor.

In this case there is no evidence, that Briggs and wife, before the conveyance to them, were in possession under a lease from their grantor. There is reason to believe, that upon inquiry a different state of facts would have been elicited. The testimony proposed to be introduced, that Briggs was notoriously

insolvent would not have been sufficient to relieve a second purchaser from making the proper inquiries. For it might be, as in this case, that the wife, or some member of the family of the occupant, would prove to be the owner of the estate; and their title should not be destroyed by the insolvency of the head of the family and the neglect of the second purchaser, who can never be injured by this presumption of law, when he is not guilty of negligence. An attaching creditor may not have the same motives, or the same opportunity, to make inquiries respecting an apparent defect of title, as a second purchaser. But he must be regarded as such; and the law will not give him any superior rights.

It is not perceived, that the demandant can recover against the tenant, if his title should be considered superior to that of the former wife of Briggs. The tenant was in possession under a lease executed on January 1, 1841; and the fact, that he was not tenant of the freehold, was put in issue by the brief statement. There is no testimony tending to prove, that he ousted the demandant; or that he withheld the possession of the premises from him. One cannot be considered as withholding premises from another, unless he has been requested to relinquish the possession to him and has refused, or has in some other way manifested an intention to resist the title of the demandant, before the commencement of the action.

This case does not appear therefore to come within the provisions of the tenth section of c. 145 of the revised statutes. And the eleventh section of the same chapter regulates the rights of the demandant and tenant, where the general issue only is pleaded.

Nonsuit confirmed.

ERASTUS STONE *versus* WILLIAM HYDE *& al.*

By St. 1821, c. 60, an attorney conducting a suit has a lien for his costs upon the judgment recovered, which the creditor cannot discharge.

Such lien is not discharged by a delay of several years to collect the demand, if there be no negligence on the part of the attorney, and the debtor has notice of the claim.

Although a judgment on which the attorney in that suit has a lien for his costs has been discharged by the creditor, the attorney may enforce his claim by an action on the judgment in the name of the creditor.

THE action was debt on two judgments recovered by the plaintiff against the defendants in 1834, the costs in both suits amounting to $33,60. Messrs. Smith & Bradford were the attorneys of record of the plaintiff in the recovery of these judgments. In August, 1839, the defendants made a compromise with the plaintiff, then residing in New York, by paying a portion of these judgments, and received a full release and discharge of the debts and costs, without the consent or knowledge of Smith or Bradford, and without making any provision for the payment of the costs. Within the last year prior to this release and discharge of the judgments, the defendants had made several unsuccessful attempts to compromise this debt with Smith & Bradford, as the attorneys of the plaintiff, by paying a small portion thereof. Smith & Bradford have not been paid their costs, and this suit is brought by them to recover a sum equal to the amount thereof. If the action could be maintained for that purpose, the defendants were to be defaulted; and if not, under the circumstances, the plaintiff was to become nonsuit.

F. O. J. Smith, for the plaintiff, admitted that by the common law, an attorney had not such lien for his costs upon a judgment recovered as would disable his client from discharging the whole judgment.

But he contended that by a Massachusetts statute, re-enacted here, Maine St. 1821, c. 60, § 4, such lien is given to the attorney. And he considered the question entirely settled by decisions in Massachusetts and this State. *Baker* v. *Cook*, 11 Mass. R. 236; *Dunklee* v. *Locke*, 13 Mass. R. 525.

Ocean Ins. Co. v. *Rider*, 22 Pick. 210; *Potter J.* v. *Mayo*, 3 Greenl. 37.

Preble, for the defendants, said that at common law an attorney had no lien for his costs. *Getchell* v. *Clark*, 5 Mass. R. 309; *Baker* v. *Cook*, 11 Mass. R. 236.

The statute of 1821, c. 60, gives no rights to the attorney, but merely prohibits the officer from setting off the costs of the attorney, in cases where set-off is allowed. The whole execution may be levied on real estate, and the property will be wholly in the creditor. Here the attorneys had failed for years to collect the debt, and had declined to compromise it. The creditor chose to take a part of his debt against insolvent men, rather than lose the whole, and there is no law to restrain the creditor and debtor from making such arrangements. The legislature never could have intended by that statute to sanction such claim as is now set up. This suit is brought upon the judgment, after it has been satisfied and discharged, and in the name of the creditor who has given the discharge.

The opinion of the Court was by

TENNEY J. — A lien upon the costs in a judgment and execution does not exist at common law in favor of the attorney, through whose agency they have been obtained. But the statute of Massachusetts, chap. 84, passed in 1810, which empowers and directs the officer, who may have executions in which the creditor in one is the debtor in the other, to cause one execution to answer and satisfy the other, so far as the same will extend, provides, that this direction, shall not affect or discharge the lien, which an attorney has or may have upon any judgments or executions for his fees or disbursements. This statute the Courts in Massachusetts at different times have examined, and treated as amounting to a legislative declaration, that such a lien does certainly exist.

When Maine became a separate State, the same provision was incorporated into its laws, in chap. 60, sect. 11, of the statutes of 1821, after the construction of the Courts had been published. In *Potter, Judge*, v. *Mayo & als.* 3 Greenl.

37, the Court had the same statute under consideration; and although the question before them was different from the present, and did not require an opinion, whether it gave absolutely such a lien or not, for no dispute arose in that respect, yet the reasoning of Chief Justice MELLEN proceeds upon the ground, that the lien does unquestionably exist upon a judgment execution.

We are then to inquire, whether the lien could be lost because the executions had expired, and so long a time had elapsed, that they could not be renewed; and if not, whether the creditor could discharge the judgment, so that an action cannot be maintained upon it for the amount secured by the lien.

An officer, having in his hands, executions, in which the creditor in one is the debtor in the other, who makes an offset of the whole amount, refusing or omitting to except the taxable costs of the attorney, is held liable for such costs; this is upon the ground, that the creditor is not to be benefitted by, and cannot control the costs to the prejudice of the attorney; consequently the release thereof by the creditor alone, the debtor having notice of the lien, is a void act, and can in no wise destroy the lien, and discharge that portion of the judgment.

An unsuccessful attempt of the attorney to obtain satisfaction of judgment, and the expiration of the execution issued thereon, no negligence being imputed to the attorney, cannot discharge the lien upon either, when it has once attached; lapse of time alone ought not, and cannot annul it. It follows then, that when such a lien exists, the costs taxed and secured thereby, remain an unsatisfied part of the judgment, notwithstanding the creditor's release.

This action is brought for the benefit of the attorneys of the plaintiff, who are such of record, as we infer from the case; with them the defendants had long been endeavoring to obtain a discharge of the judgments, on which this action is brought, by a compromise; they are presumed to have had

full knowledge of the lien, and they are not to be exonerated from the effect of it by the acts of the plaintiff alone.

Defendant to be defaulted, and judgment for the amount of costs and interest thereon and costs in this suit.

BY THE REPORTER. — *See* Rev. Stat. c. 117, § 1, 37.

WILLIAM MARR *versus* JOSEPH HOBSON *& al.*

By the provisions of the Rev. St. c. 121, if a petitioner for partition choose to take an issue on the question of the respondent's interest, he may do so, and on its being determined in his favor, he is placed as he would have been, if the respondent had not appeared.

But if the respondent shows himself to be interested, and so authorized to contest the claim to partition, the petitioner must prevail by the strength of his own title, and not by the weakness of the other party.

By a conveyance of "several tracts of land in the County of Cumberland, bounded as follows" describing several parcels and concluding with, "and it is hereby to be understood, that I convey all the real estate I own in the County of Cumberland"— all the real estate of the grantor in that County passes, although not included in any of the descriptions of particular tracts.

A description of the premises as "a certain tract of land situated in S. as will appear by deed dated July 3, 1833, and recorded in the Cumberland registry of deeds, book 135, page 292," without naming the parties to the deed referred to, is sufficient to adopt the description, and to convey the land described in the deed to which reference is thus made.

If a deed, which by its original terms contained a condition by the non-performance of which it had become void, be altered by the destruction of such condition, and then recorded in its altered form, the deed of the grantee can give no title to a third person.

If an administrator's deed of land, sold under a license for the payment of debts of the intestate, be not delivered until after one year has elapsed from the time of the license, such deed is merely void, and will give no seizin to the grantee therein named.

THIS was a petition for partition, entered at the June Term of the District Court, 1840, against persons unknown. The respondents entered their appearance in that Court, after the Revised Statutes went into operation, and it was brought into this Court by demurrer. No question was raised, whether,

as the law then was, an appeal would lie. The respondents claimed to be sole seized of the premises; and the pleadings are referred to in the report but are not found in the copies. All the material portions of the title deeds under which the parties, respectively, claimed are found in the opinion of the court. The report of the trial before SHEPLEY J. states, that testimony was introduced by the respondents, tending to show, that the deed from the administratrix of the estate of William Pierce to the petitioner was not delivered within a year from the time of the license to sell real estate; and also, that the deed from A. L. Came to Dyer & Pierce was originally a conditional deed, and that since its execution and delivery, and before it was recorded, the condition, which had been attached by wafers, had been taken off; and that the import of the condition, thus taken off, was, that the deed should be void upon a certain contingency, which had happened. No possession or occupancy was proved by either party.

The presiding Judge instructed the jury, that the petitioner must show a seizin in himself, and that if he failed to do this he could not prevail, whether the respondents proved a seizin in themselves or not. And also instructed them, that the deeds offered might, for the purposes of that trial, be considered as covering the premises in question, as claimed by the parties respectively; and that, if they were satisfied that the deed of the petitioner from the administratrix of Pierce was not delivered within a year from the date of her license, or that the deed from A. L. Came to Dyer & Pierce had been mutilated, as contended for by the respondents, they should find for the respondents — otherwise, they should find for the petitioner.

The verdict was for the respondents, but was to be set aside or affirmed, as the Court, upon a consideration of the facts and the law, should determine to be right.

Howard & Osgood, for the petitioner, remarked that both parties claimed under A. L. Came, the petitioner being entitled to an undivided moiety under the earliest deed from Came to Dyer and Pierce, dated August 6, 1833, and under the deed

of the administratrix of Pierce to the petitioner. This makes out a *prima facie* if not an actual title in him, and shows that he had the legal seizin, and the right of entry. No stranger to the title has a right to call in question the validity of the deed from Came to Dyer and Pierce, or the regularity of the proceedings of Pierce's administratrix, or her deed to the petitioner, or its delivery. Upon this proof his right to partition is maintained against the respondents, who prove neither title, interest, possession nor occupancy in themselves. *Knox* v. *Jenks*, 7 Mass. R. 492; *Gilman* v. *Stetson*, 16 Maine R. 127; *Baylies* v. *Bussey*, 5 Greenl. 157; *Welles* v. *Prince*, 9 Mass. R. 508; *Barnard* v. *Pope*, 14 Mass. R. 434. The case last cited explains that of *Bonner* v. *Pro. Ken. Pur.* 7 Mass. R. 475. Any person interested, in possession, or having a right of entry, can maintain the process for partition. Rev. St. c. 121, § 2; *Call* v. *Barker*, 3 Fairf. 320.

The question here presented is, whether the respondents have any interest in the premises, and not whether the petitioner has a title. Under the Rev. Stat. c. 121, § 11, 12, 13, which must govern, the respondents have no right to question the interest or right of the petitioner, until they establish some title or interest in themselves, although third persons may not be bound by such partition. § 33.

The respondents have no interest or estate in the premises. Here the deeds A. L. Came to M. R. Came, M. R. Came to Jabez Hobson, and Jabez Hobson to the respondents, were particularly examined, and the conclusion drawn, that no one of them covered the premises in controversy. And the case shows, they were not in possession.

From the view taken, it follows that the instruction of the Judge to the jury, as to the construction of the deeds of the respondents, was erroneous.

The instruction that the petitioner must show a seizin in himself, and that if he failed to do this, he could not recover, whether the respondents proved a seizin in themselves or not, was also erroneous. It enables the respondents, without title, interest, possession, or occupancy, to prevent our having par-

tition. However correct before the Revised Statutes went into operation, the instruction is not so under those statutes, and under these pleadings, made in conformity thereto. The burthen of proof is on the respondents, to show a title or interest in themselves, before they can call on us to show our title.

Deblois and *Swasey*, for the respondents, contended that where the petitioner alleges seizin in himself, as in this case, and respondents come in, and plead sole seizin, and traverse the seizin of the petitioner, as we do, the affirmative is on the petitioner to show his interest in the estate. The same principle applies here, as in other cases, the claimant must make out his case, as he has set it forth. The petitioner cannot have land set off to him, unless he shows an interest in himself to be set off. *Nason* v. *Willard*, 2 Mass. R. 478; *Bonner* v. *Pro. Ken. Pur.* 7 Mass. R. 475; 6 Dane, 480; *Mussey* v. *Sanborn*, 15 Mass. R. 155; *Paine* v. *Ward*, 4 Pick. 246; *Swett* v. *Bussey*, 7 Mass. R. 503; *Gilman* v. *Stetson*, 4 Shepl. 124; *Bussey* v. *Grant*, 7 Shepl. 281.

The law on this subject is not altered by the Revised Statutes. No new principle of evidence is introduced. c. 121, § 1 and 2, gives the right to have partition made only to such as have title and are in fact tenants in common. Sections 11, 12 and 13, apply only to cases where the petitioner is in fact a tenant in common of the land, and merely provides, that an entire stranger shall not interfere in the manner of making the partition. The statute does not authorize the setting off of land to one who has no share in it.

The petitioner has entirely failed to show a title sufficient to enable him to recover.

The jury have found, that the deed of the administratrix was not delivered within the year from the time of the license; and such deed is entirely void, and gives neither title nor seizin. St. 1821, c. 52, § 12; *Willard* v. *Nason*, 5 Mass. R. 240; *Wellman* v. *Lawrence*, 15 Mass. R. 326; *Macy* v. *Raymond*, 9 Pick. 285.

Nor had William Pierce, the intestate, any title to the premises, which could be conveyed by his administratrix. The

jury have found that the deed to the intestate was altered in a material part, and that if it had remained unaltered, it would have become inoperative by reason of the non-performance of the condition. Shep. Touchst. 69.

The petitioners acquired an indefeasible title to the premises under the deeds A. L. Came to M. R. Came, M. R. Came to Jabez Hobson, and Jabez Hobson to the respondents. Each of these deeds covered the premises. *Keith* v. *Reynolds*, 3 Greenl. 393; *Worthington* v. *Hylyer*, 4 Mass. R. 196; *Ward* v. *Bartholomew*, 6 Pick. 409; *Child* v. *Fickett*, 4 Greenl. 471; *Jackson* v. *Clark*, 7 Johns. R. 217; *Jackson* v. *Blodget*, 16 Johns. R. 172; *Adams* v. *Cuddy*, 13 Pick. 460; *Foss* v. *Crisp*, 20 Pick. 121; 1 Greenl. 219; 6 Pick. 460; 15 Pick. 23; 20 Maine R. 61.

The opinion of the Court was afterwards drawn up by

TENNEY J. — The petitioner claims to be seized of a moiety of the land described in the petition in common and undivided with persons unknown. The respondents come in and file their brief statement, alleging therein, that they are sole seized. The petitioner files a counter brief statement denying to the respondents any right to controvert or put in issue his seizin, because they have no estate or interest in the lands; and he relies upon c. 121, § 11, 12 and 13, of the Revised Statutes.

The respondents insist that the Revised Statutes have introduced no alteration, and that the petitioner must prevail or not, as he shall show his own title to be. Several new provisions have been introduced into the Revised Statutes on the subject of partition. After providing in section 4, that the cotenants, if known to the petitioner, shall be named in the petition, and in section 11, that "any person interested in the premises of which partition is prayed may appear and allege jointly with the other respondents or separately any matter tending to show, that the petitioner ought not to have partition as prayed for in whole or in part, and this may be done in the form of a brief statement;" section 12 provides, that, "to such brief state-

ment the petitioner may reply in the form of a counter brief statement, that the person thus answering as a respondent has no interest in the premises; and may also reply any other matter to show the insufficiency of the respondent's brief statement;" and section 13, farther provides, that "if it shall appear, that the respondent has no estate or interest in the lands, the objections to the partition shall be no farther a matter of inquiry, and the petitioner shall recover of the respondent the costs attending the trial."

The two last sections are new, and were manifestly intended to prevent the interference of strangers, who could have no interest whatever in the subject. If the petitioner chooses to take an issue on the question of the respondent's interest, he may do so, and on its being determined in his favor, he is placed as he would have been, if the respondent had not appeared.

Before then the petitioner's seizin can be inquired into, under the first issue as it is prosented, we are to see whether the respondents have any interest in the lands. Both parties claim under Abraham L. Came. The earliest title is a warrantee deed from Robert P. Marr to him, dated July 3, 1833. Came conveyed with covenants of warranty to William Pierce and Isaac Dyer by deed of Aug. 6, 1836; but in the succeeding November, Dyer relinquished all his right to said Came. The title was then in Came and Pierce or the heirs of Pierce, and so continued till June 5, 1837, when Abraham L. Came conveyed to Mark R. Came with covenants of seizin and warranty, the whole of several parcels of real estate, and among them, "one other tract, or mill privilege, situated at Steep Falls in said Standish, being the same property, I bought of Robert P. Marr, as appears by his deed, bearing date July 3, 1833," and in the same deed is added, "and it is hereby understood, that I now convey all the real estate, I own in the County of Cumberland."

It is through this deed of June 5, 1837, that the respondents claim to have an interest in the lands in controversy; and the deed therein referred to, of July 3, 1833, describes the same

land embraced in this petition. From the language used in the deed of June 5, 1837, it is quite manifest, that the grantor did not profess to give an accurate and minute description of the premises intended to be conveyed, but by the comprehensive terms used, and the references made, it probably would not be difficult to ascertain the situation of the estate. Without however recurring to other matter, than that contained in the deed itself, the land could not all be found and its limits correctly defined. The estate at Bonny Eagle Falls is not described. Then follows, with nothing to indicate the precise location, "three other tracts of land in Standish, with the buildings thereon." "Also one other tract or mill privilege, situated at Steep Falls in said Standish, being the same property I bought of Robert P. Marr, as appears by his deed to me, bearing date July 3, 1833." By the reference, the last named deed becomes a material part of the description of the one now in question, and is to be treated in the same manner as though its contents were copied. This deed of July 3, 1833, covers three other parcels as well as that in dispute.

It is contended by the counsel for the petitioner, that it was not the intention of Abraham L. Came to convey to Mark R. Came all the land described in the deed from Robert P. Marr to him; that he describes it as "one other tract" — "a mill privilege," — "at Steep Falls." Perhaps the first clause was not the most precise use of language, if more than one distinct parcel was intended to be embraced; but a farm is often described as a *tract* of land, where it may be composed of more than one piece, separated by roads, and perhaps by the lands of strangers. The terms used do not necessarily denote a mill privilege, for the language is in the alternative "a tract of land *or* a mill privilege," which is a proper mode of expression, if there was an uncertainty in the mind of the grantor, whether it was one or the other, as much as if he intended a twofold description of the same parcel, the idea of which was existing in his mind. "Steep Falls" may mean, without any violence to the language used, the neighborhood or village, if

there be a village, situated near Steep Falls. It would be an usual mode of expression to say, that the land was at Steep Falls, if it were in the vicinity of Steep Falls.

Again it is contended that the final clause in the description was not intended to enlarge it, but has reference only to the preceding language in the deed. It is a familiar principle, that effect must be given to every word in a deed, if possible, and that the language must be construed most against the grantor. We think the last sentence has important meaning. If it had been omitted, some parcels of the land referred to could not be found with any degree of certainty; and we think this clause was for the purpose of supplying the deficiency in the previous description of the several parcels intended to be conveyed. Without these comprehensive terms, how could "three other tracts of land in Standish" be embraced, where there is nothing to serve as a guide to them in the deed, especially, if there be other real estate not conveyed, as is contended there is? From the whole deed of Abraham L. Came to Mark R. Came, it was the manifest expectation of the parties, that resort to other means of determining the situation and boundaries of the land embraced would be necessary, and we entertain no doubt, that it was the intention of the parties, that all the land described in the deed referred to should be conveyed.

Was the same land conveyed to Jabez Hobson by Mark R. Came's deed of Jan. 19, 1839? The terms are here, as in the other deed, "a certain tract of land situated in Standish as will appear by deed dated July 3, 1833, and recorded in the Cumberland Registry of Deeds, Book 135, page 292;" and in the same deed another parcel is referred to, as being in a deed dated Nov. 7, 1836, and recorded Book 157, page 87.

In these references the names of the parties to the deeds are not mentioned; and as the one recorded in Book 135, page 292 contains several distinct tracts, it would be impossible to determine which was intended, if all were not included; and we cannot believe that this deed is so uncertain, that it

should be treated as void. The description in this deed is in the same terms used in the deed from Marr to Abraham L. Came. The deed also from Jabez Hobson to the respondents, after describing other estate, embraces another piece of land in Standish, and being so much of that conveyed to the grantor by Mark R. Came's deed, dated Jan. 19, 1839, as is recorded in Book 135, page 292. The description given in the deed from Robert P. Marr to Abraham L. Came must apply to the two deeds to the respondents and to their grantor with equal force and will pass the land in controversy.

The respondents having shown themselves interested in the premises, and so authorized to contest the petitioner's right to partition, we now consider the remaining question. Has he shown such a seizin as to entitle him to hold in severalty the interest described in his petition? He must prevail by the strength of his own title, and not by the weakness of that of the other party. He claims under a deed from Abraham L. Came, duly executed and recorded, dated Aug. 6, 1836, to William Pierce and Isaac Dyer, their heirs and assigns, and a deed given by the administratrix of the estate of said Pierce, purporting to be under a license from the Probate Court. Although Abraham L. Came, after he conveyed to Pierce and Dyer, executed and delivered a deed of the same land, from which last the respondents claim to derive their title, yet it was of a later date and could not repeal a former conveyance, which was still operative. Both the deeds under which the petitioner claims are attempted to be impeached in their effect, the first on the ground that it had been altered in a material particular, and the last, that it was not delivered till after a year had elapsed from the time, that license to sell was obtained. From the instruction of the Judge, and the verdict of the jury one or both these facts were found. If the deed from Abraham L. Came was essentially mutilated, it could have no effect upon the issue. But from the case, by its original terms, it had become void, which would well account for the grantor's subsequent conveyance.

The deed of the administratrix could pass no title after the

expiration of a year from the time license was obtained. The delivery was essential to make the sale perfect. St. of 1821, c. 52, § 12; *Macy* v. *Raymond & al.* 9 Pick. 285.

No attempt having been made to show that the petitioner ever occupied the premises, he could have no seizin, excepting by virtue of the deed from the administratrix, which failed equally to give seizin as it did title. Lands on the death of the owner pass to the devisee or heirs, who are entitled to possession. The executor or administrator has in no case, *virtute officii*, a right to the possession of the deceased's lands. If they are wanted to pay debts, they can be sold under license; the right to sell being a naked power, which cannot be defeated by alienation or disseizin. And the purchaser of lands lawfully sold by an executor or administrator may enter and maintain a real action on his own seizin by virtue of the conveyance and his entry. *Willard* v. *Nason*, Adm'x. in error, 5 Mass. R. 240. It follows from these principles that the deed from the administratrix, even if the intestate had title, could transmit nothing whatever.

Judgment on the verdict.

Thomas Varney *versus* Isaac Stevens.

Where a testator in his will, after having said that, "as touching my worldly estate, I give, devise and dispose of the same in the following manner and form," and after directing that his "debts and funeral charges be first paid," without stating by whom or from what fund, proceeded thus: — "My will is, that my said wife Dorothy Varney, shall have the whole of my estate real and personal during her natural life," and made no other devise or bequest in his will; *it was held*, that Dorothy Varney took but an estate for life in the land.

It is the duty of a tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid; and if he neglects it, and thereby subjects the land to be sold to pay such taxes, and afterwards receives a release of the title acquired under that sale, it will but extinguish that title, and can give him no rights to hold under it against the reversioner.

Where the occupant of land has a legal right to the possession thereof as tenant for life, he is to be considered as occupying according to his legal rights, and not as a wrongdoer, and he cannot establish any title therein by disseizin against the reversioner; his possession cannot be adverse; and he cannot, therefore, be entitled to "betterments" against the reversioner "by virtue of a possession and improvement" under the statute.

Writ of entry demanding one undivided ninth part of a farm in Windham.

Jonathan Varney made his will in November, 1802, and afterwards died seised of the land in controversy, and the will was duly proved and allowed in September, 1806. Varney left a wife but never had children. Excepting the formal parts the whole will was as follows.

"Touching such worldly estate wherewith it has pleased God to bless me in this life, I give, devise and dispose of the same in the following manner and form.

"Imprimis. My will is, that all my just debts and funeral charges be first paid.

"Item. My will is, that my dearly beloved wife Dorothy Varney, whom I likewise constitute, make and ordain my sole executrix of this my last will and testament, my will is, that my said wife Dorothy Varney shall have the whole of my estate, real and personal, during her natural life."

The demandant is one of the brothers and heirs at law of Jonathan Varney. The demandant also proved, that Stevens,

the tenant, some few years after the death of the testator, and more than thirty years next before the commencement of this suit, married Dorothy Varney, the widow of Jonathan Varney, and has continued to live thereon ever since. She died about two years before the commencement of this suit.

The tenant offered in evidence a deed of the demanded premises from Woodbury Storer, Collector of the United States direct tax, dated August 11, 1818, to Daniel Howe, acknowledged and recorded the same day; a deed from Howe to Staples of the same, dated the same day, and a deed from Staples to Stevens, dated Jan. 9, 1819, both acknowledged and recorded. No objection was made to the execution or delivery of these deeds. WHITMAN C. J. presiding at the trial, ruled that these deeds were not available to the defendant for any purpose in this suit, unless he should first prove that the Collector had complied with all the requirements of law previous to making sale of the property, and rejected the deeds, no such evidence having been introduced.

The tenant thereupon became defaulted; but the default was to be taken off, if the deeds ought to have been admitted in evidence, and could have availed the tenant by way of defence, or as a foundation for a claim for betterments for the improvements made by him since the deed from Staples to him.

Preble argued for the tenant.

Deblois, for the demandant, contended that the widow of Jonathan Varney took but an estate for life in the demanded premises. The devise was expressly for the term of her life, and there is not one word in the will enlarging such estate. On the marriage, the tenant acquired an estate during their joint lives, which terminated by her death but two years before the bringing of our suit.

The first objection interposed to our recovery is under an alleged sale for United States direct taxes. Our first answer is, that those deeds were inadmissible, because there was no evidence, that the collector could legally make the sale. 10 Mass. R. 105; 1 Greenl. 306; 7 Mass. R. 488; 14 Mass. R.

177; 16 Wend. 550; 4 Peters, 349. Our second; that the permitting the land to be sold for taxes by the tenant for life, during the continuance of his title, and becoming a purchaser under such sale, was a fraud on the reversioner, and passed no title. Story's Agency, 202; 1 Story's Eq. 321; 3 Sumn. 476; 1 Vern. 276, 284; 2 Johns. C. R. 257; 7 Pick. 1; 13 Pick. 272; 10 Wend. 351; 22 Wend. 123; 8 Wend. 175; 6 Wend. 228; Co. Lit. 232; 3 Pick. 149. Our third answer is: — That the release to Stevens, holding the estate for life, of any title acquired by the sale for taxes which he should have paid, enures to the reversioners. Shep. Touch. Release, 325, Co. Litt. 275, § 470; Cro. Eliz. 718; 1 Fairf. 306.

Where a legal title to hold land is disclosed to the Court, the party shall not be admitted to say he holds by wrong. *Tinkham* v. *Arnold*, 3 Greenl. 120; *Liscomb* v. *Root*, 8 Pick. 378.

This is not a case where betterments can be allowed under our statutes. The entry into possession was under the life estate of the widow, and was not adverse to the title of the reversioners. 8 Pick. 376; 15 Mass. R. 291; 15 Pick. 141; 1 Greenl. 91; 13 Mass. R. 241; 1 Greenl. 315.

The opinion of the Court was drawn up by

Shepley J. — The last will of Jonathan Varney, deceased, contains this clause: "My will is, that my said wife Dorothy Varney shall have the whole of my estate, real and personal, during her natural life." The general rule is, that a devise of lands without words of inheritance, gives only an estate for life. If the devise be accompanied by a personal charge upon the devisee, it is indicative of an intention to give a fee. And it has been decided, that a devise of uncultivated lands, without words of inheritance, gives a fee. In this case there was no personal charge imposed upon the devisee, and there was an express limitation of the devise by the words "during her natural life." And the introductory words, "as touching my worldly estate," "I give, demise, and dispose of the same in the following manner and form," cannot be considered as ex-

hibiting an intention to give a fee in contradiction of the express limitation. *Crutchfield* v. *Pearce*, 1 Price, 353.

The tenant offered certain deeds, showing a sale of the premises by a collector of taxes, and a release of that title to himself. If it had been admitted, he would have taken under such a release according to his title; and the reversioners according to theirs. "A release of a right, made to a particular tenant for life, or in taile, shall aid and benefit him or them in the remainder." Co. Litt. § 453, and 267, b.

It was moreover the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid; and by neglecting it, and thereby subjecting the estate to a sale, he committed a wrong against the reversioners. And when he received a release of the title, if any were acquired under that sale, he would be considered as intending to discharge his duty by relieving the estate from that incumbrance. To neglect to pay the taxes for the purpose of causing a sale of the estate to enable him to destroy the rights of the reversioners, would have been to commit a fraud upon their rights. This is not to be presumed. On the contrary he must be presumed to have intended by procuring that release to extinguish the title under that sale.

Having a legal right to the possession of the estate during the life of his wife, he is to be considered as occupying according to his legal rights, and not as a wrongdoer. "His possession is to be construed according to his rights." *Liscomb* v. *Root*, 8 Pick. 376. He cannot therefore establish any title as a disseisor against the reversioner; and for that purpose only could the deeds offered have been received as evidence. To have established a title under them superior to that of the reversioner's, it would have been necessary to make some proof of the preliminary proceedings so far at least, as they were to be derived from recorded and documentary evidence, even after such a lapse of time. *Blossom* v. *Cannon*, 14 Mass. R. 177.

As the tenant is considered as having during the life of his wife, occupied the estate according to his legal title, his possession could not be adverse to the title of the reversioners;

and he cannot be entitled to claim "by virtue of a possession and improvement" under the statute, while he was thus occupying under a subsisting and valid title.

Judgment on the default.

JOSEPH THRASHER *& ux. versus* JOSEPH TUTTLE.

It is well settled at common law, that the choses in action of a female, upon her marriage, pass to the husband; so that he may, at any time thereafter, during the life of himself and wife, reduce the amount due on them to possession.

The wife cannot receive payment of the sums due on them, except as the agent of her husband; but if he knows of payments made to her, and does not object, he will be considered as authorizing them.

ASSUMPSIT on a note given by the defendant to the wife of the plaintiff before their marriage, with a count for money had and received.

To support his action, the plaintiff, at the trial before WHITMAN C. J. produced the note described in the declaration, taking it from the files in the case, where it had been left by the defendant, on the trial in the District Court, the name of the defendant having been torn from it. The plaintiff proved by one witness, that on May 3, 1838, he notified the defendant in writing, "not to pay any thing to my wife on the note which you gave her, as no payment will be good, without my consent, after this notice," and that Tuttle then said, "that he was not then in circumstances to pay said note." Another witness testified, that he attended court in a case where the plaintiff's wife prayed for a divorce from him, and that the defendant, who is her brother, was a witness in the case, and testified that he owed her about two hundred and twenty dollars, and that he supposed she had the note. Another witness testified, that a day or two after this action was brought, Tuttle said he had paid his sister, Mrs. Thrasher, about three hundred dollars, and he did not know, but he should have to pay it again, and expected he should, but that she had agreed to pay

the money back, if the plaintiff recovered in this action. The defendant offered no evidence. By agreement of the parties, the case was taken from the jury, and submitted to the decision of the Court on the facts; and the Court were to order a non-suit or default.

Mitchell, for the plaintiff, considered the law as perfectly well settled in his favor, and therefore would merely cite 2 Kent, 135.

Preble argued for the defendant, and among other grounds, contended, that when the husband leaves a note given to the wife before marriage in her hands and possession, she has sufficient authority to receive payment for the note, and give it up. He cited the opinion of Judge Ware, found in the Law Reporter for Feb. 1843, and Chitty on Cont. (5th Am. Ed.) 157, and notes.

The opinion of the Court was by

WHITMAN C. J. — Nothing is better settled at common law, than that the choses in action of a female, upon her marriage, pass to the husband; so that he may, at any time thereafter, during the life of himself and wife, reduce the amount due on them to possession. The wife cannot receive payment of the sums due on them, except as the agent of her husband. If he knows of payments made to her, and does not object, he will be considered as authorizing them. In this case no express or implied authority was given to the wife to receive the amount due; but the reverse of it. The defendant had express notice that she had no such authority. He therefore paid her with full knowledge, as it must be deemed, that he was doing wrong. If it had been necessary for the plaintiff to resort to a court of equity to recover this demand, it would have been in its power to have decreed payment to him upon such terms, as it respects a provision for the wife out of the amount due, as might be deemed equitable. But a court of law is without any such power.

Defendant defaulted,
and judgment accordingly.

JOSHUA M. WATERHOUSE *versus* JOSEPH SMITH.

The return of an attachment of personal property by an officer, where he is a party, is *prima facie* evidence, and only such, of the attachment.

To preserve an attachment when made, where the property is capable of being taken into actual possession, and does not come within the class where the statute prescribes a different rule, the officer must by himself or his agent, retain his control over it, and have the power of taking it into immediate possession.

TRESPASS for taking, carrying away and converting certain personal property alleged to have been attached by the plaintiff, then a deputy-sheriff, on a writ in his hands in favor of *George F. Richardson* v. *James P. Frothingham & Co.* The defendant justified the taking, by Jacob Coburn, his deputy, of the property on a writ in favor of Anthony Fernald & al. *v.* the same defendants, as in the former suit, together with George F. Richardson, alleging them to be co-partners under the name of James P. Frothingham & Co. The attachment returned by Waterhouse, the plaintiff, was on Sept. 3d, 1840, and that returned by Coburn, the deputy of the defendant, was on Feb. 15, 1841.

At the trial before WHITMAN, C. J., after the evidence was all before the jury, the plaintiff became nonsuit by consent. The nonsuit was to be set aside, if in the opinion of the Court the action could be maintained. The whole evidence is given in the report of the case, of which sufficient appears in the opinion of the Court for the proper understanding of the questions of law presented.

W. P. Fessenden, for the plaintiff, contended, first: — That the plaintiff made a sufficient and legal attachment of the property which he returned upon his writ. The officer's return is at least *prima facie* evidence of the facts therein stated. *Nichols* v. *Patten*, 18 Maine R. 238. There is nothing in the case to contradict this return.

Second. The attachment was continued in force, and not abandoned, when the property was taken away by the deputy of the defendant. *Denny* v. *Warren*, 16 Mass. R. 420;

Gordon v. *Jenney*, ib. 469; *Hemenway* v. *Wheeler*, 14 Pick. 480; *Foster* v. *Clark*, 19 Pick. 332; *Fairbanks* v. *Stanley*, 18 Maine R. 302.

W. Goodenow, for the defendant, contended, that the plaintiff never made a valid attachment of the property. To constitute an attachment, the officer, by himself or servants, must be in a situation to control the property, and take it into his actual possession. This was never done. *Lane* v. *Jackson*, 5 Mass. R. 157; *Train* v. *Wellington*, 12 Mass. R. 495; *Philips* v. *Bridge*, 11 Mass. R. 242; *Knap* v. *Sprague*, 9 Mass. R. 258; *Nichols* v. *Patten*, 18 Maine R. 238.

But if the property was originally attached, the attachment was lost before the deputy of the defendant interfered. He contended that the facts in the case, showed an entire abandonment of the property. *Knap* v. *Sprague*, 9 Mass. R. 258; *Donham* v. *Wild*, 19 Pick. 520; *Gordon* v. *Jenney*, 16 Mass. R. 469; *Gower* v. *Stevens*, 19 Maine R. 92.

The opinion of the Court was drawn up by

TENNEY J.—The question for our consideration, is whether the plaintiff made, upon the writ in favor of George F. Richardson against James P. Frothingham, an attachment of the goods in dispute; and whether the same has been preserved, if so made, so that it will prevail against that made subsequently by Jacob Coburn, the defendant's deputy.

The return of an attachment of personal property by an officer, is *prima facie* evidence, and only such, of that fact, in a controversy between the officer, and a vendee, or another officer, making a subsequent attachment of the same goods. *Bruce* v. *Holden*, 21 Pick. 187; *Nichols* v. *Patten*, 18 Maine R. 238.

To preserve the attachment, the officer must, by himself or his agent, retain control over the property and have power to take immediate possession thereof; and that possession must be such, as is necessary to constitute a seisure on execution, and it cannot be left under the control of the debtor.

Whether there is evidence in the case at bar sufficient to rebut that arising from the return of the plaintiff on the writ which was in his hands, we think it unimportant to inquire, as we are satisfied, that if the attachment was legally made by him, it must be regarded as abandoned before the attachment made by the defendant's deputy. Frothingham, one of the firm of J. P. Frothingham & Co. resided out of the State. The property attached by the plaintiff was, before the attachment, put by the owners thereof in charge of John Cox, the agent of the company, who requested a Mr. Sewall to look after it. Although the return of the officer asserts that he left a copy of the writ in favor of Richardson with Cox, still the testimony of the latter, that he had no knowledge of the attachment, till after Coburn had attached and removed the goods, is by no means contradicted thereby. It does not appear that Sewall had knowledge of the attachment made by the plaintiff. The goods were not removed by the plaintiff, but by his return they were put into the care of George F. Richardson for safe keeping. Richardson went to New Orleans in Oct. 1840, and before he left he gave to Isaac Richardson, who resided five miles from the property, a bunch of keys, saying they belonged to the buildings of the Westbrook Quarry, and told him to keep them, till he or the plaintiff called for them; and he had retained them since. There was evidence, that on three of the buildings containing the property, about the time the attachment is returned by the plaintiff, there was seen written with chalk the words, "the within goods attached," or the word "attached." But Coburn, who took and removed the goods on the 15th February, 1841, they having been shown him by Sewall, testifies, that he saw no such marks, and that he had not known or heard of any attachment till about ten days after he had removed the goods. There is no evidence of any notice to Coburn, that an attachment of the goods was made previously to the one made by him.

The buildings containing the property were in the legal occupation of J. P. Frothingham & Co. That company had the entire control of the goods, excepting so far as the proceedings

under the writ in the hands of the plaintiff, prevented it. The plaintiff did not pretend to have personal charge of them after he put them into the care of George F. Richardson. Richardson had gone to New Orleans, and cannot be considered the keeper. Isaac Richardson took no charge of them, for it does not appear, that he was requested to do it, or that he was apprised even, that goods were in the building, the keys of which were left with him, much less that they were under attachment. We know of no case, where the attachment has been held to continue, where the goods were so negligently kept as they were by the plaintiff and his agent; and the

Nonsuit must stand.

JAMES WHITE, *Treasurer, versus* CHARLES FOX *& al.*

The duties of clerk of the courts, holden by the County Commissioners, are a part of the duties of the clerk of the Judicial Courts of the county; and he is entitled to receive the fees therefor, and is required to render an account of the same in the same manner as for fees received as clerk of the Supreme Judicial Court and District Court.

A clerk of the Courts is required by law to perform many duties, as part of the duties of the office, for the performance of which no compensation is provided in the fee bill; but he is not entitled to be specifically paid for them, or for his attendance in the Courts; being compensated therefor only by the fees which are allowed in the fee bill for the performance of other duties.

But if the clerk does charge for duties performed for which no compensation is provided in the fee bill, such as attending in Court, making dockets, indexes, &c., and those charges are allowed by the County Commissioners and paid to him, he is bound by the statute to account for the money, thus received, in the same manner as for that received for services where the fee bill does provide compensation.

The term of office of the clerks of the Judicial Courts was not terminated, and new appointments made by law, when the Revised Statutes went into operation, but they continued as clerks under their previous appointments.

Nor are the sureties of a clerk discharged by the provisions of Revised Statutes, c. 100, § 7, "in case he shall neglect or refuse to pay over any sum, for which he is accountable" by virtue of the Statute provisions, nor by a change by law in some of the duties of the office.

DEBT on a bond, dated April 20, 1841, given by Charles Fox, as principal, and by the other defendants, as his sureties, the condition of which recited, that Charles Fox had been appointed "Clerk of the Judicial Courts within and for the County of Cumberland," and then proceeded. "Now if the said Charles Fox shall well and truly do and perform the duties of said office, and fulfil all the requirements of the law touching the same, then this obligation shall be void," &c.

Mr. Fox was a member of the house of Representatives in the winter session of 1841, and having been appointed clerk in the place of Mr. Cobb, removed, entered upon the duties of the office on April 28, 1841. He held the office until January 26, 1842, when he was removed, and Mr. Cobb, who had been re-appointed, entered upon the duties of the office.

The statutes in force during the time provided, that each of

the clerks shall keep a true and exact account of all the moneys he shall receive, or be entitled to receive, for services by virtue of his office, and shall annually, on the first Wednesday in January, render to the treasurer of his county under oath, a true account of the whole sum thus accrued; and after deducting his own salary, pay over the residue, if any, of the gross amount, to the treasurer of his county, for the use of the county." The clerks were severally permitted to retain the sum of $1000, "if so much shall have accrued to them during the year preceding, and in the same proportion for any less time than one year; and in addition, one half of all the fees of office to them respectively accrued, over that sum or proportional part thereof, as their salaries."

The account, and the only one, rendered by Mr. Fox, was signed by him and under oath, was dated January 5, 1842, and was in these words. "Amount of fees received by the subscriber as clerk of all the Judicial Courts for the County of Cumberland, for the past year, for entries, continuances, ex'ons. copies, &c. &c., amounting to the sum of nine hundred twenty-seven dollars and forty cents." It was agreed, that Mr. Fox, during the time he was in office, preceding the first Wednesday in January, 1842, received the said sum of $927,40, and in addition thereto the sum of $780,79, "for services as particularly set forth and articulated in the three bills charged to the County of Cumberland, copies of which are hereunto annexed and make a part of this case, said bills were severally allowed by the County Commissioners for said County of Cumberland, and the several amounts thereof were paid to him, the said Charles Fox." And also in addition, the sum of $18,00, for "issuing venires, &c." It was admitted that said Fox, during the time he was in office, for services prior to January 5, 1842, received in the whole the sum of $1726,19, and had not paid over any part of it, and claimed the right to retain the whole for his own use. Of this sum $773,75, were for charges prior to August 1, 1841, when the Revised Statutes went into operation. Among the various items of charge in the "three bills" allowed by the County Commissioners, and the amount paid

to Mr. Fox, those for attending the Supreme Judicial Court, District Court, and County Commissioners, amounted to $236, those for making "dockets" to $209,29, those for "indexes to records," 31,00, one for issuing twenty-eight warrants to the assessors of the several towns to assess the county tax, at 20 cents, $5,60," one for "keeping account of Justice's attendance, April Term, $0,75," one "for calculating and making up jury districts and equalizing jurors, $6,00," "issuing venires for jurors, June Term, and keeping an account of time, &c. &c. and certifying the same to the county treasurer, $5,00,; Commissions on $62,50, costs in criminal prosecutions paid treasurer, $3,11; do. on $63,00, jury fees, paid do. $3,15"; with various other charges, some of the same character, and some of a different description.

If the plaintiff was entitled to recover, a default was to be entered and the Court was to assess the damages — otherwise a nonsuit was to be entered.

A. Haines, County Attorney, argued for the plaintiff, citing and commenting upon the statutes on this subject.

Codman & Fox argued for the defendants. The points of defence and the statutes referred to by the counsel are stated in the opinion of the Court.

The opinion of the Court was afterwards prepared by

Shepley J. — This is an action of debt brought by the Treasurer of the State against Charles Fox, formerly clerk of the Judicial Courts in this county, and his sureties, on his official bond. It appears from the agreed statement of the facts, that Mr. Fox was appointed clerk, and that he entered upon the performance of his duties on April 28, 1841, and that he continued to hold the office and to perform the duties until Jan. 26, 1842.

The statute, which authorized the appointment, c. 90, § 1, provided, that the person appointed should be clerk of all the Judicial Courts. The second section provided, that the clerks should "keep a true and exact account of all the moneys they shall receive by virtue of their office, and shall on the first

Wednesday of January annually, render to the treasurers of the respective counties, under oath, a true account of the whole sum thus by them received." Mr. Fox rendered his account to the treasurer of the county on January 5, 1842, of fees received as clerk of all the Judicial Courts for the past year; but did not include therein the fees received by him for services performed by him as clerk of the County Commissioners. It is contended, that they ought not to have been included, because his appointment as clerk of the Judicial Courts did not include that clerkship; and that those fees were not received by virtue of his office. It is true that by virtue of that appointment and commission only, without the aid of the law, he would not become the clerk of the County Commissioners. But in the act providing for their appointment, c. 500, § 2, it is declared, "and the clerks of the Judicial Courts within the several counties shall be clerks of the County Commissioners." And in the Revised Statutes, c. 99, § 9, is a like provision, that, "the clerk of the Judicial Courts in each county shall be the clerk of the Commissioners." He was therefore entitled to perform the duties and to receive pay as clerk of the Commissioners, because he was clerk of the Judicial Courts, and without doing it, by virtue of holding that office, he could lawfully have done neither. By virtue of the above statute provisions those duties became part of the regular and established duties of the office; and are therefore quite distinguishable from the duties of another office, such as the register of deeds, which the clerk in case of a vacancy is required to perform for a limited time only; not as a part of his own duties as clerk, but as the duties of the vacant office. The compensation, which he received as clerk of the Commissioners, could have been lawfully claimed and received by virtue of his office, and only by virtue of it; and the money so received should have been accounted for to the county treasurer.

It is also contended, that he ought not to have accounted for any fees or compensation not provided for in the fee bill; and that the amount received in payment for making dockets

and indexes was not received by virtue of the office, but as an individual employed to perform that business. Clerks may by virtue of their office claim and receive for fees more, than the law allows; but it appears to have been the design of the law, and such is its language, that they "shall keep a true and exact account of all the moneys, they shall receive by virtue of their office." The only question therefore is, whether the amount received for doing that business was received by virtue of the office. The statute provides, that the clerk "shall have the care and custody of all the records, files and proceedings," and that he "shall do and perform all the duties, services, acts, matters and things, which he as clerk of either of said Courts ought by law to do and perform." The statute does not profess to enumerate every duty which the clerk ought by law to perform; or in the fee bill to annex a compensation to every such duty. The omission thus to provide for a compensation for the performance of many duties, well known to have been always performed by the clerks, does not indicate an intention on the part of the legislature, that they should not continue to be performed by them as a part of their duties of office; or that they should be specifically paid for them, or for their daily attendance in Courts. All these matters were doubtless expected to be compensated by the fees, which are allowed for other duties. And hence it will be perceived, that it is very short sighted legislation to reduce the fees of such officers to the sums, which would only be a reasonable compensation for the performance of each act named in the fee bill. For the duties of the clerk are much more extensive and burdensome, than these would be. Many of his duties are not named in the statutes, but are imposed by the common law, which regards him as the assistant and servant of the Court, to enable it to perform its duties with more facility, economy, and usefulness to the citizens, as well as to make a record of its proceedings. Among other duties not enumerated in the fee bill he is required to examine the returns upon the venires and to make out a list of the jurors, to call and swear them, to take their verdicts, to impannel them for the trial of persons

accused of offences, to read the indictments, to produce papers from the files, to make out a list of the actions, or docket, for the use of the Court with an index and a notice of what has been the disposition of each action at the former terms of the court, to make indexes to the records, and to perform various other matters. These matters, although not named in the fee bill, are matters properly appertaining to the duties of the office of clerk; and the amount received for the performance of them must be considered as received by virtue of the office. And the larger portion of the amount contained in the accounts allowed by the County Commissioners should have been included in the account rendered to the county treasurer. If there should be any difficulty respecting the amount, it may be determined on a hearing in chancery.

But it is contended further, that as the act, under which he was appointed clerk, was among those enumerated as repealed by the Revised Statutes, that his former appointment as clerk terminated on the first day of August, 1841; and that the accounts should commence anew from that day upon a new appointment.

The fourth section of the repealing act provides, that "all the provisions of the laws" repealed, "which are contained in the Revised Statutes, shall be deemed to have remained in force from the time when such previous laws began to take effect, so far as they may apply to any office or trust, "notwithstanding the repeal of the statutes." The provision of the statute, c. 90, for the appointment of clerks, and most of its other provisions, are contained in c. 100, of the Revised Statutes. The first section of the chapter last named provides, that "the clerks now in office shall continue to hold their offices according to the tenor of their respective commissions." The effect of these provisions, considered together, is to continue the clerks in office in the same manner, as if the Revised Statutes had not repealed the former act. It is not indeed repealed so far as it respects the office of clerk. There is therefore no just reason for contending, that there was a new appointment made by law on the first day of August, 1841.

And of course the accounts should not commence anew on that day.

It is also contended, that the sureties were discharged by a clause in the Revised Statutes providing that "in case he shall neglect or refuse to pay over any sum, for which he is accountable under the provisions of this chapter, he shall pay interest thereon at the rate of twenty-five per cent. by the year until paid." The sureties were bound for the faithful performance of the duties of the office, that is, for the faithful performance of such duties, as the laws for the time being should require to be performed by the clerks of the judicial courts. If the sureties on the official bonds of persons holding offices created by law, and the duties of which are prescribed by law, were to be discharged by every change of the law relating to the duties, it would in these days of over frequent change, be to little purpose to trouble the officers to obtain sureties. There is little of similarity between such cases, and those arising out of offices or trusts, whose duties are assigned or regulated by contract.

Defendants are to be defaulted.

JOHN DAIN *versus* TURNER COWING.

One tenant in common of a chattel cannot maintain trover against his original co-tenant, while he remains in possession of the property; nor can he maintain such action against the vendee of the original co-tenant, so long as he continues in possession of the property, although claiming it as sole owner.

TROVER for a horse. At the trial, before WHITMAN C. J. it appeared, that one Wilson was the owner of a patent right in a thrashing machine; that he and the plaintiff agreed to go together to New York to dispose of rights in the machine there; that the plaintiff should find money and assist Wilson, and have one half of the proceeds of all sales they could make there; that they went to New York together and received the horse in question in payment of rights sold in the

machine, and brought him home with them to the State of Maine in 1836; that by an agreement between them, Wilson took the horse home with him to Berlin; that in the summer of 1838 Wilson went away, leaving the horse with one Edgcomb; that the horse afterwards, but in what manner does not distinctly appear, came into the hands of Cowing, the defendant; and that he was in the open possession of the horse for a long time, claiming him as his own. The plaintiff called one Andrews, who testified that in 1841, shortly before this suit was commenced, he heard a conversation between the plaintiff and defendant, in which the former told the latter that he should sue for the horse, to which the defendant replied, that he might sue, for he had bought the horse and paid for him, and that the plaintiff demanded the horse. On cross-examination the same witness testified, that the plaintiff told him, that he and Wilson were in partnership at the time they bought the horse, and bought him in partnership, and paid for him in a machine or something of the kind, and that Cowing bought the horse of Wilson; but that the defendant had told him, that he bought the horse of Kempton. The defendant had not introduced any evidence, when the presiding Judge, considering that the plaintiff had not made out a case entitling him to recover, ordered a nonsuit, which was to be taken off, if the action could be maintained.

F. O. J. Smith argued for the plaintiff, and cited and relied on *Weld* v. *Oliver*, 21 Pick. 564; and also cited 3 Johns. R. 175; 10 Johns. R. 172.

Codman & Fox argued for the defendant, citing 2 Johns. R. 469; *Weld* v. *Oliver*, 21 Pick. 564, cited for plaintiff; and, as identical with the present case, *Gilbert* v. *Dickenson*, 7 Wend. 449.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff contends that a nonsuit should not have been ordered, insisting that his evidence tended to establish a matter of fact, upon which the jury should have been allowed to decide. It has, however, been repeatedly

held in this State, that if the matter offered in evidence by a plaintiff is not, when taken to be true, sufficient to sustain his case, a nonsuit may be ordered. In this case the plaintiff may be considered as having proved, that he was, at the time of instituting his suit, the owner, as tenant in common, of one half of the horse in question, with the defendant; and that the defendant then had him in possession, denying any right of the plaintiff to any portion of him; and alleging that he had bought him of a third person. The Judge, at the trial, was of opinion that, in such case, trover would not lie, and ordered a nonsuit.

It will not be questioned, that one tenant in common cannot maintain trover against his original co-tenant, while he remains in possession of the property. It is equally well established, if one co-tenant has possession of the common property, and sells the whole of it as his, that his co-tenant may maintain trover against him for his half of the value. But no decision has gone so far as to authorize the maintaining of an action of that kind against a vendee of the original co-tenant remaining in possession of the article; or against any one in possession of the property by virtue of a sale under him; any one, being in possession of the property under such sale, being deemed a co-tenant with any other rightful owner of any portion thereof. But every successive sale of such co-tenants may amount to a conversion, so that trover might be maintained against each until satisfaction were obtained of some one of them. In the case of *Weld* v. *Oliver*, cited and confidently relied upon by the counsel for the plaintiff, the defendant was the vendee of the original co-tenant, and had sold the property to a second vendee. In the case of *Gilbert* v. *Dickerson*, cited for the defendant, it was expressly decided that trover would not lie against the vendee of the original co-tenant, so long as he continued in possession of the property, although claiming it as sole owner.

It does not appear, that any question was made at the trial, as to the derivation of title by the defendant under Wilson, the original co-tenant with the plaintiff. Wilson went off leaving the horse in the custody of one Edgcomb, and, after-

wards, Edgcomb went off leaving him in the custody of one Kempton, of whom the defendant alleged he had bought him. These facts were derived from the plaintiff's witnesses at the trial; one of whom stated that the plaintiff said the defendant bought the horse of Wilson. And in the argument of the plaintiff's counsel, no notice was taken of any want of regularity in the derivation of title by the defendant from Wilson. We therefore consider the defendant as properly a co-tenant with the plaintiff; and the action therefore not sustainable.

Exceptions overruled, and judgment on the nonsuit affirmed.

IRA MOORE *versus* JOSEPH GRIFFIN, *& al.*

The intention of the parties to a conveyance of land is to be carried into effect, if it be possible; and the deed should be so construed, if it can be, that all parts of it may stand together.

To give effect to the intention of the parties, general words may be restrained by a particular recital, which follows them, when such recital is used by way of limitation or restriction.

But if the particular recital be not so used, but be used by way of reiteration and affirmation only of the preceding general words, such recital will not diminish the grant made by the general words.

Thus, where the land conveyed was described as "one half of a tract of land formerly the estate of H. W. to wit, that part of said tract next to and adjoining Harrisicket river; said tract begins at a large rock by Little river, thence N. 45° W. to Harrisicket river, and bounded round by the shore to said rock," the land of H. W. extending to the river, in which the tide ebbed and flowed; *it was held*, that the land granted was not restricted to the shore, but extended to the river.

Neither the colonial ordinance of 1641, nor the common law, authorizes the taking of "muscle-bed manure" from the flats of another person between high and low water mark on tide waters.

Where an individual attempts "to establish a common right in all the inhabitants of" a town, to enter upon the flats of another, and take therefrom "muscle-bed manure," an inhabitant of that town is not a competent witness to establish such right.

THE facts in the case are stated in the opinion of the Court.

Mitchell argued for the plaintiff, and contended, that as the land of the plaintiff was bounded on Harrisicket river, and

began at a rock in the river, and run along that line, that the margin of the river and at low water mark was intended. The words at the shore, and by the shore, are equally applicable to the line at low or high water mark. This view is aided by the consideration, that this originally was a partition line of the point of land, and the deeds must have been intended to convey the whole of that side. 3 Kent, 427; 1 Sim. & St. 190; Col. Ord. of 1641; *Storer* v. *Freeman*, 6 Mass. R. 435; 2 Dane, 693.

The right set up was, that every inhabitant of the town had the right to take muscle-bed manure there, and of necessity, each must have an interest. *Lufkin* v. *Haskell*, 3 Pick. 356; *Odiorne* v. *Wade*, 8 Pick. 518.

Adams, for the defendants, said that there was a wide difference in the construction of grants of land bounded on rivers where the tide ebbed and flowed, and where it did not. On tide waters, a grant of land, bounded on the shore, extends only to high water mark. *Dunlap* v. *Stetson*, 4 Mason, 349; *Lapish* v. *Bangor Bank*, 8 Greenl. 85; *Nickerson* v. *Crawford*, 16 Maine R. 245; *Hatch* v. *Dwight*, 17 Mass. R. 289; *Parker* v *Cutler Mill-Dam Co.* 20 Maine R. 353. But the bounds also show, that high water mark was intended, as the oak tree must be on or above it, and the stone is on the shore, at high water mark. To, from and by are terms of exclusion. *Bradley* v. *Rice*, 13 Maine R. 198.

But if the grant of the plaintiff did extend to the sea, or low water mark, the public have the right to fish, fowl, and take sea manure on the flats. 2 Dane, 693 to 700.

The testimony offered, and rejected by the Judge, ought to have been admitted. 1. The verdict could not be evidence in any other suit between different parties, and therefore there was no interest. 2. If any interest, it was too minute, and remote to exclude the witnesses. 3. The witnesses were admissible from the necessity of the case. 3 T. R. 27; 4 Mass. R. 488; 7 Mass. R. 398; 13 Mass. R. 199; 18 Maine R. 49; 2 Fairf. 341.

The opinion of the Court was afterwards drawn up by

Shepley J. — This action is trespass *quare clausum.* The trespass alleged, is an entry upon the land of the plaintiff situated in the town of Freeport, and the taking and carrying away therefrom of six gondola loads of muscle-bed manure. The defendants admit, that they entered upon the shore of Harrisicket river within the flux and reflux of the tide waters opposite to and within one hundred rods of the plaintiff's farm, and took and carried away the manure; but they deny, that they committed any trespass upon the plaintiff's land. The farm of the plaintiff is on the westerly side of a point of land extending into Harrisicket bay, and the tide flows in the river on the westerly side of the farm about four hundred rods. The point of land appears to have been formerly within the limits of the town of North Yarmouth, and to have been anciently owned by Thomas Shepard, and at that time called Shepard's neck. The title to it was confirmed to Henry Woolfe, who appears to have been the heir of Shepard, by a committee of the proprietors of that township, August 24, 1733. The bounds were then ascertained, by a survey made by Edward King, to be southwesterly by Harrisicket bay, being the same body of water, which in subsequent conveyances was called Harrisicket river. Henry Woolfe, by his will approved October 1, 1759, devised the same to his daughters Mary and Rachel in equal halves. Rachel, by the name of Rachel Moxey, widow, conveyed her half to Solomon Loring and John Hayes on October 2, 1761, bounding the neck of land as it was originally bounded in the confirmation to her father. There would seem to have been a division between the owners of the neck, made after this conveyance, but no record of it is produced. On June 25, 1805, Jacob and Rachel Loring, reciting that they are the heirs of David Cushing Loring, who was probably the heir, devisee, or grantee, of Solomon Loring, conveyed the westerly half of the neck to George Lincoln. It is contended, that the land conveyed by this deed was bounded by the shore, and that such cannot be the true construction of the deed as to include it. The description of the land con-

veyed is as follows: — "One half and one acre more than half of a tract of land containing two hundred and sixty-five acres, more or less, in said Freeport, and was formerly part of the estate of Capt. Henry Woolfe, deceased, to wit, that part of said tract next to and adjoining Harrisicket river, with liberty to set a barn on the other part joining the dividing line; said tract begins at a large rock by Little river, then N. 45° W. to Harrisicket river, and bounded round by the shore to said rock; and said dividing line begins at a stake in the middle of said N. 45° W. course, then S. 44° & ¾ W. one hundred and seventeen rods and ten links, then N. 45° W. three rods and thirteen links, then S. 70°, 10′ W. one hundred and six rods, then S. 32° W. one hundred and two rods and twenty links, then S. 24° and ¼ W. sixty-five rods to an oak by the shore, with the buildings thereon." The rock by Little river was on the easterly side of the neck; the course N. 45° W. was across the neck to Harrisicket river; and being then bounded round by the shore to the rock, it is evident, that this is a description of the whole neck, bounding it by the shore. Then follows a designation of the line, which divides the western from the eastern half, and this line is not extended to the water, but to an oak by the shore. The preceding part of the description only relates to the land conveyed. And it is one half a tract of land formerly part of the estate of Henry Woolfe and "that part of said tract next to and adjoining Harrisicket river." The neck was not in fact bounded by the shore, but by the bay or river, while it was owned by Woolfe. And there can be no doubt, that it was the intention of the parties to convey the westerly half of the tract, which he owned; and this intention is clearly expressed by stating, that the tract conveyed is next to and adjoining the river. The fact, that the neck or whole tract was erroneously described as bounded on the shore, cannot control the boundaries of the lot conveyed. Nor can the fact, that the dividing line was not extended to the water, but terminated at an oak by the shore, have any influence to withdraw the whole westerly bound of the tract conveyed from the water to the shore line. And the land conveyed must be

considered as adjoining Harrisicket river according to the description of it in the deed.

The several deeds of conveyance from the heirs of George Lincoln to James Johnson, either refer to the description contained in the last deed for a description of the land conveyed, or describe it in the same manner.

James Johnson conveyed the farm to Alfred Soule on October 31, 1834, by a double description; one general, and the other by particular metes and bounds. The particular description bounds the farm by the shore. It commences "at the shore on Harrisicket river and extends the line easterly to the line dividing the neck into halves, and then it follows that line, "to an oak by the shore, then northeasterly by the shore to the first bounds mentioned." The general description, which precedes the particular one, is as follows, "a certain tract of land situated in said Freeport containing one hundred and thirty-five acres, more or less, being the same land I purchased of the heirs of George Lincoln, late of Freeport, deceased." This general description was sufficient to convey the estate, although the deeds from the heirs of Lincoln were not expressly referred to. For the land purchased of those heirs could be certainly ascertained, and the grant would thereby be made certain and effectual. *Whistler's case*, 10 Co. 63. The intention of the parties is not only apparent, but it is declared to be to convey the same land purchased by the grantor of the heirs of George Lincoln. This intention is to be carried into effect, if it be possible. A conveyance should be so construed, if possible, that all parts of it may stand together. To give effect to the intention of the parties, general words may be restrained by a particular recital, which follows them, when such recital is used by way of limitation or restriction. But if the particular recital be not so used, but be used by way of reiteration and affirmation only of the preceding general words, such recital will not diminish the grant made by the general words. And there can be no doubt, that the design of the particular description in this deed was to describe the land conveyed by the general description more perfectly, and

not to limit or diminish the grant. It is laid down in the case of *Swift* v. *Eyres*, Cro. Car. 546, as a rule, that the addition of a false thing shall never hurt the grant "for the addition of a falsity shall never hurt, where there is any manner of certainty before." The case of *Stukley* v. *Butler*, Hob. 168, as relieved by PARKER C. J. in the case of *Cutler* v. *Tufts*, 3 Pick, 278, of the erroneous statements of it as reported in other books, is to the same effect. He states the result of a careful examination to be, that *videlicets*, *provisos*, *habenda*, &c., "may explain doubtful clauses precedent, and may serve to separate and distribute generals into particulars; yet that they can never be suffered to restrain or diminish, what is expressly granted; if they can be construed to have no other meaning, they are void for repugnancy." It is true, that there is no *videlicet* in this deed between the general and particular description. But by reading the deed with one introduced there, it will be perceived, that the sense will not be altered, and that the particular description is of the character usually introduced by a *videlicet*. This deed must therefore receive such a construction as to convey the farm bounded, as it had been while owned by Lincoln, westerly adjoining the river.

Alfred Soule conveyed the farm to the plaintiff on May 10, 1840, by a similar description, substituting "the late James Johnson," his grantor, for "the heirs of George Lincoln, late of Freeport." And the same rules of construction and remarks are as applicable to this deed as to the last deed.

The plaintiff having thus established his title to the farm as bounded upon the river, the ordinance of 1641 declares, that "the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." Free fishing and fowling is therein reserved to every householder. And Mr. Dane says, c. 68, art. 3, § 2, that the ordinance has been constantly practiced upon "as to fishing and fowling, taking sand, sea manure, and ballast, as the right of soil in flats ground." No such right of taking sand, manure, or ballast is reserved in the grant made to the owner of the

adjoining land. And Mr. Dane does not refer to any authority or decision in support of that practice. No such practice can be recognized as depriving the legal owner of his rights according to his title, unless supported by proof, that would establish a common right. The language of the reservation in the ordinance cannot be extended beyond the obvious meaning of the words fishing and fowling. In the case of *Bagott* v. *Orr*, 2 B. & P. 472, although the right to take shell fish on the shore by the common law was admitted, the right to take shells was not. Neither the ordinance nor the common law would authorize the taking of "muscle-bed manure" from the land of another person.

The defendants attempted also to establish a common right in all the inhabitants of the town of Freeport and vicinity to enter upon the flats and take such manure. And offered two of the inhabitants of that town to prove it; but their testimony was excluded. It is provided by statute, c. 115, § 75, that the inhabitants of towns and certain other *quasi* corporations, and the members of certain incorporated societies, shall be competent witnesses, when the corporations or societies are parties, or interested in the event of the suit. But the town of Freeport in its corporate capacity is not interested in the event of this suit; and the inhabitants are not made competent witnesses, when they are interested in the event of the suit, as individuals. And they would be interested to establish a common right to take such manure in all the inhabitants of that town, because the verdict which should establish or deny such common right, when one only is a party, might be evidence for or against all others. *Lufkin* v. *Haskell*, 3 Pick. 356. The testimony offered was properly rejected. It is unnecessary to decide whether such a common right, as is alleged in the brief statement, could have been established by any proof.

Defendants defaulted.

OLIVER B. DORRANCE & *al. versus* EBENEZER HUTCHINSON.

It is not necessary that the notice to the adverse party that a deposition was to be taken, should be precisely in the form given in Rev. St. c. 133, § 11. It is sufficient, if it conforms thereto in substance.

Where the magistrate before whom a deposition is to be taken, adjourns the time of taking it because the deponent, although duly summoned, did not attend, under the provisions of Rev. St. c. 133, § 36, it is not necessary to give a new notice to the adverse party, where he had been duly notified of the time first appointed and did not attend.

If an attorney at law has been grossly negligent in the management of a demand entrusted to him for collection, and has promised to pay the amount to the creditor, an action may be sustained against the attorney without first making a demand of the money.

ASSUMPSIT to recover money collected by the defendant as an attorney, and to recover the amount of the debt on account of gross carelessness and negligence in the management of a demand in favor of the plaintiffs, left with the defendant for collection. Two suits were commenced in favor of the plaintiffs against Benjamin C. Atwood, and personal property was attached on each of the writs, sufficient to satisfy the judgments. The last judgment was recovered at June Term, 1835, and this suit was brought February 28, 1839.

The parties made a statement of facts in the form of a report of a trial, and agreed to submit the case for the opinion of the Court thereon.

The notice to the defendant that the deposition of Atwood was to be taken on February 23, 1842, to which objection was made by the defendant, was in the form prescribed in the statute, with the insertion of these words, in addition thereto, immediately preceding the words in the form, "You are hereby notified," &c. viz. "And if from any cause the deposition should not then be finished, I shall adjourn from day to day until it shall be finished." The caption to the deposition commenced thus: "Somerset, ss. February 28, 1842. On this 28th day of February, one thousand eight hundred and forty-two by adjournment from the 23d day of said February."

The facts in the case are found in the opinion of the Court.

Codman & Fox, for the plaintiffs.

Howard & Osgood, for the defendant.

The opinion of the Court was drawn up by

TENNEY J. — This is an action of assumpsit for money had and received; and also for not collecting and paying to the plaintiffs the amount of two notes of hand due to them from Benjamin C. Atwood, and which are alleged to have been sent to the defendant as an attorney at law for collection.

The deposition of B. C. Atwood is objected to because it is not taken according to the provisions of the statute; 1st, that the notice to the defendant is insufficient; and 2d that the deposition was not taken at the time appointed in the notice. The statute does not require that the form therein should be exactly pursued, but that it shall be in *substance* according to that form. The notice served upon the defendant is a compliance with the statute. The justice was present at the time and place appointed in the notice, but the deponent having neglected to appear although duly summoned, the justice adjourned the taking of the deposition to the day on which it was taken, and issued a capias against the deponent, who was brought in thereon. Every thing was done, which is required by the 36th section of chap. 133 of Rev. Stat. If the defendant had been present at the time he was notified to attend, he would have known of the adjournment; having neglected to be present at the time first appointed, he cannot complain, that he was not notified afterwards.

It appears from the records, that judgments were rendered in two actions in favor of the plaintiffs against said Atwood, at the June Term of the late Court of Common Pleas in the County of Somerset, in the year 1835, on notes of hand. Copies of the returns of the officer, who served the writs in those actions show, that a large amount of personal property was attached upon each. In a letter of the 19th Sept. 1836, to the plaintiffs, the defendant writes, that he will forward the balance of what may be due them as soon as obtained, or earlier by a convenient opportunity. And on January 28,

1840, after this action was commenced, he writes that he will arrange it as it ought to be before the first of May.

The deposition of Atwood shows, that he was called upon by the defendant, who told him, that Dorrance & Ross had sent the demands to him to collect, and said he supposed he must collect them. He further testifies, that he paid money to the defendant at different times, but is unable to state the amount; that he left with him three executions, without directing the appropriation of the money, when it should be received.

We are satisfied from this evidence, that the defendant was an acting attorney at law, and that he received the notes, as alleged in the writ, for collection. That the copies of the record, and the facts stated by Atwood are *prima facie* evidence, that Atwood was of sufficient ability to pay the notes. More than three years elapsed after judgments were recovered upon those notes before this action was commenced; and as no evidence is offered to show any reason for the delay, we think the defendant is liable on the second count. The sum claimed is much less than the amount originally due from Atwood, and there is no evidence of the precise sums paid by the defendant.

Judgment must be entered for the plaintiffs for the sum claimed, and interest from the date of the writ.

LUCY A. BRYANT *versus* EDWARD MANSFIELD *& al.*

Where the plaintiff in a bill in equity alleged, that the owner of certain land, being involved in debt, persuaded him to receive a deed thereof and to give his negotiable promissory note therefor, and assured him that payment of such note should never be enforced, and that as soon as a purchaser could be found the note should be given up on the re-conveyance of the estate; and that influenced by such persuasion and assurance, and being wholly innocent of any fraudulent or sinister design in the transaction, and desirous only to aid the owner as far as honestly he might, the plaintiff received a deed of the land and gave his promissory note therefor; and prayed that it might be decreed, that the note should be given up or cancelled on a re-conveyance of the estate; on demurrer to the bill, *it was held:* —

That such arrangement was fraudulent as to the creditors of the grantor, but that it might be good as between the parties to it, as neither of them could be permitted to allege a mutual fraud upon the rights of others, as a ground of relief from it: —

And that with reference to the parties to it alone, it presented but the case of a conveyance of real estate and a payment for it by note with an alleged verbal agreement that the note should be returned to the party giving it on his re-conveying the estate to the other, which parol agreement, to destroy the effect of the deed and note, could no more be received in equity than at law.

THIS was a bill in equity, by Lucy A. Bryant against Edward Mansfield and Daniel Bryant; and was heard on a demurrer to the bill on the part of Mansfield.

The substance of the bill is given at the commencement of the opinion of the Court.

W. P. Fessenden argued in support of the demurrer, and cited *Drinkwater* v. *Drinkwater*, 4 Mass. R. 357; *Worcester* v. *Eaton*, 11 Mass. R. 377; 1 Fonb. Eq. 373, note 8; *Bean* v. *Smith*, 2 Mason, 274; *Clapp* v. *Tirrell*, 20 Pick. 247; *Holland* v. *Cruft*, ib. 327; *Wearse* v. *Pierce*, 24 Pick. 145; 1 Story's Eq. § 296, 297, 298, 424; Roberts on Fr. Conv. note to page 495.

Fessenden, Deblois and *Fessenden* argued for the plaintiff, citing 7 Dane, 580; Story's Eq. Pl. § 452; Noy's Max. 2; 1 Cowp. 197; 2 Cowp. 790; 2 Dougl. 696; Buller's N. P. 132; 1 Ves. Jr. 916; 1 Story's Eq. § 61.

The opinion of the Court was drawn up by

Shepley J. — This bill alleges in substance, that the five children of Spencer Bryant, deceased, inherited from their father certain real estate of no greater value than fifteen hundred dollars; that it was also subject to the dower of his widow; that the plaintiff and Daniel Bryant, one of the defendants, were two of those heirs; that Daniel in the month of February, 1841, being involved in debt, or pretending to be so, persuaded the plaintiff to receive a deed, conveying all his interest in that estate, for the nominal consideration of seven hundred dollars, and to give her negotiable promissory note payable to him on demand for that sum, being influenced by his persuasion and assurance, that payment thereof should never be enforced, and that as soon as he could find a purchaser, it should be given up to her upon her re-conveying the estate to him. It alleges also, that she was wholly innocent of any fraudulent or sinister design in the transaction, and was influenced only by his persuasions and by a desire to aid him as far as she honestly might. That he has indorsed the note to the other defendant, Mansfield, without any valuable consideration, to be collected for his own benefit, and that Mansfield knew all the circumstances, under which the note was made, and that he, to carry into effect the design of defrauding the plaintiff, has commenced a suit upon the note against her, which is still pending. It also calls upon the defendants to disclose the facts relating to the time of the indorsement, the consideration for it, and the circumstances attending it.

The defendant, Mansfield, demurs to the bill for want of equity on the part of the plaintiff.

That the law will determine such an arrangement to be grossly fraudulent as against the creditors of Daniel cannot be questioned. But although fraudulent with respect to them, it may be perfectly good as between the parties to it. Neither of them can be permitted to allege a mutual fraud upon the rights of others as a ground for relief from it. It is true, that the plaintiff insists, that she was innocent of any fraudulent

design. But the bill admits her knowledge, that Daniel was involved in debt, that his purpose was to convey his estate without receiving any actual value for it, to enable him to sell it at some future time, and to divide the proceeds, when it should please him, equally among his creditors. The law will consider her, notwithstanding such denial, as intending to do what her acts were suited to effect. If her brother had induced her by falsehood and fraud to aid him in the perpetration of a fraud upon others, it might deserve consideration, whether by becoming thus a party to the intended fraud, she should be precluded from seeking relief from the fraud practiced upon herself. But it is not necessary to consider or decide that question, for the bill does not allege, that the arrangement was procured by any such means. The only allegations in this respect are, that she was ignorant and was persuaded by him to enter into that arrangement. It may be true, that she was unacquainted with the transaction of business, and was ignorant of the legal consequences attending her acts, but the law does not authorize contracts and conveyances to be set aside or annulled upon such suggestions. A nice moral sense would seem to have enabled any person to perceive, that the transaction was not an honest one. It is not unusual for one party to a contract or conveyance to be influenced to make it by the persuasions of another party, nor is there any thing, which the law will regard as illegal or incorrect in the use of such means, if there be no deception or falsehood connected with them. If the transaction be considered with reference to the parties to it alone, it presents the case on paper of a conveyance of real estate, and a payment for it by note, with an alleged verbal agreement, that the note should be returned to one party, and the estate be re-conveyed to the other. And such a parol agreement to destroy the effect of the deed of conveyance and of the note, could no more be received in equity than at law.

It is not perceived therefore, that the plaintiff, upon the allegations contained in this bill, could be entitled to relief, if the note were in the possession of the payee; and of course

cannot be entitled to call upon the defendant, Mansfield, to disclose the manner in which he became entitled to it.

The demurrer is allowed and the bill, as to Mansfield, is to be dismissed with costs.

HENRY GODDARD *versus* JEREMIAH S. PUTNAM & *al.* Exec'rs.

If one party send a letter to their attorney, saying that, "in our proposal to Mr. G. (the other party) we engaged to give up his note, he paying $175, as interest, and conveying or transferring," certain real estate and bank-stock, and, "if he complies with the above, you will please settle the business;" and the other party acknowledges on the letter the receipt of the note, he "having complied with the requirements therein expressed;" the paper containing the *proposal*, may be received in evidence, as explanatory of the actual agreement of the parties, in an after controversy between them.

Where the interest due on a note was paid in cash, and certain real estate and bank stock were received, "to settle the principal of the note," and as an "equivalent for the principal of the note," *it was held*, that an overpayment of that note, in that manner, occasioned by a mistake in the computation of the sum due thereon, might be recovered back, in an action at law.

ASSUMPSIT against J. S. Putnam and Paul Langdon, as executors of the last will and testament of Elizabeth Sewall, to recover the sum of $250, alleged to have been paid by mistake in supposing that a note from the plaintiff to the testatrix was on interest from its date, when in fact it was not on interest until it became payable. The note was for $2212,25, payable to William Goddard and by him indorsed, "without recourse," bearing date Nov. 5, 1835, and payable on March 24, 1837. There was nothing said in the note respecting interest. There were the following indorsements on the note. "Oct. 17, 1837. Received $265,45 for two years interest on this note." "July 26, 1839. Received interest to Nov. 5, 1839, ($232,27.)" "May 10, 1841. Received note for interest, $175."

The note was given up to the plaintiff on May 10, 1841, by direction of the executors, on his conveying to them certain

real estate and transferring certain stock in a bank at Portland. At the trial before WHITMAN C. J, the defendants introduced testimony tending to show, that the real estate and bank stock taken in payment thereof were of less value than the amount of the note. Letters from the plaintiff to Mrs. Sewall and to the executors, and from them to him, were read. The letters and evidence are stated at length, but sufficient appears to understand the *questions of law* involved in the case, without copying the whole here.

The report states, "that the defendants, by their counsel, contended that the house and lot conveyed to them was received by them in satisfaction of the amount due on the note of Nov. 5, 1835, at the time of the decease of the testatrix, and the note of $175, afterwards paid, was received for and in lieu of the interest which accrued subsequent to such decease — that the proposition in writing dated April 28, 1841, signed by one of the defendants and accepted by the plaintiff in writing under his hand, and carried into effect by the plaintiff May 10, 1841, is conclusive in this case as to what were the terms of the contract between the parties; that the letters of April 19, 1841, and April 26, 1841, though not objected to when introduced, which was before the letter from Paul Langdon to Judge Preble had been read, are not admissible or competent in law to explain or vary the terms of the proposition so made and accepted; and that neither are the letters of May 15 and May 25, 1841, competent or sufficient to modify or explain the aforesaid proposition of April 28, and acceptance thereof of May 10; and further, that the proposition on the part of the defendants being entire and as such carried into effect by the plaintiff, if it were founded upon a mistake of the parties, such supposed mistake cannot be corrected in this form of action by the plaintiff, but that the contract must be set aside by a bill in equity so that the parties may be respectively restored to their former rights and condition. And the defendants' counsel further contended that the payment of $265,45, Oct. 17, 1837, should be applied first to pay any interest actually accrued, and the balance towards the principal, and

could not, nor any part of it, be recovered back as paid by mistake. And the defendants' counsel moved the Court so to instruct the jury in these several particulars."

The presiding Judge declined so to instruct them; and instructed them, that they must determine from the evidence whether the $212,25 was for money actually received, or for the interest which would accrue on a loan of $2000, being the residue of the note until the time when it would become payable. That if the latter, then they must ascertain from the evidence whether the $212,25 had or had not by mistake been treated as a part of the principal, and whether the plaintiff and defendants had finally adjusted and settled the note upon the supposition that it was so. That if they should be satisfied in the affirmative, then the plaintiff, in the absence of any fraud practised on his part, was entitled to recover. But if in the final adjustment nothing more had been exacted and received than the $2000, and interest thereon, then the plaintiff ought not to recover. That if on the other hand the mistake did exist, yet if the circumstances attending the final adjustment were such as to authorize the belief that it was not the understanding of the parties, that the defendants were exacting payment of the note in full with interest on the $2212,25, and that in getting payment in the manner they did, they were merely compromising with the debtor, as if in doubtful or insolvent circumstances, and without receiving or calculating to receive the whole amount of $2212,25, with interest thereon, the plaintiff could not recover. The verdict was for the plaintiff for the sum of $212,25, with interest thereon.

The letter referred to, as dated April 28, 1841, was introduced by the defendants, was addressed to the attorney of the executors in Portland, and was in these words: "In our proposal to Mr. Goddard, we engaged to give up his note, he paying $175 as interest on his note, and conveying or transferring to the executors twelve shares in the Canal Bank, and house, land and appurtenances belonging to the same, which we viewed, with a good deed of the same. If he complies

with the above, you will please settle the business, and oblige your ob't serv't, Paul Langdon.

"April 28, 1841."

On the back of this letter, in the handwriting of the plaintiff, were these words.

"Portland, May 10, 1841.

"Received of Judge W. P. Preble the note within referred to, I having complied with the requirements therein expressed.

"Henry Goddard."

The defendants also moved that the verdict might be set aside and a new trial granted for the following reasons.

1st. Because the verdict is against law upon the facts offered in evidence and proved in the case.

2. Because the damages assessed by the jury are excessive, and not warranted by the rules of law.

3. Because the verdict is against evidence.

4. Because the Court left the legal construction of written evidence of contract as matter of fact to the jury.

5. Because the Court misdirected the jury in matter of law.

6. Because the Court and jury by the direction and disposition of the cause have made a contract for the testatrix which she never entered into.

7. Because the Court refused to direct the jury in matters of law as the defendants requested them to do.

Preble, for the defendants, argued in support of the positions taken by him at the trial, and in his motion.

W. P. Fessenden, for the plaintiff, said that if the verdict was for a sum greater than the amount received by mistake, that he would release it.

The mistake was in casting too much interest on the note. This interest was paid in money, and paid and received as interest. The principal was paid in a mode satisfactory to the parties, though not in money. If the parties had not agreed to the payment of the money as interest, the law would so have appropriated it. Too much money was paid, and it may be recovered back in this action. *Howe* v. *Bradley*, 19 Maine

R. 31; *Cremer* v. *Higginson*, 1 Mason, 307; 4 Cranch, 317; 6 Cranch, 8; 9 Wheat. 720.

There was no compromise, or contract of compromise, between the parties. No deduction was made in the amount, and no mention of any deduction is made by either party in the whole transaction. The debt was agreed to be paid, and was paid in real estate and bank stock instead of money.

But if it can be called a contract, we do not seek to disaffirm it, but to confirm it. By mistake there was an overpayment, which we ask to recover back. Payment is the execution of the contract. This contract, however, was the original contract by the note. The mere agreement to take property in payment, instead of money, is not the contract on which the payment was made.

The letter of Langdon of April 28, 1841, refers to certain other letters, as containing the proposition. These are clearly admissible, and as much so, as a deed is, which is referred to in another for a description of the land intended to be conveyed.

The opinion of the Court was drawn up by

Shepley J. — The suit is brought to recover back a sum of money alleged to have been paid under a mistake of facts. The case is presented on a report of the testimony and proceedings at the trial; and on a motion for a new trial. The alleged mistake arose out of the payment of a promissory note, bearing date on November 5, 1835, made by the plaintiff, and payable to William Goddard or order on March 24, 1837, for the sum of $2212,25. It was indorsed to Elizabeth Sewall, deceased, whose executors are the defendants. The testimony tending to prove, that there was a mistake, arises wholly out of written documents. That note was paid to the attorney of the executors on May 10, 1841, by the conveyance of certain property, and by a new note for the interest. And it is contended, that the property was not received in payment of any definite sum of money then estimated to be due; but was received by way of compromise for whatever might be due upon the note exclusive of the sum paid as interest. And that

the letter from one of the executors to their attorney, bearing date on April 28, 1841, with the receipt of the plaintiff upon it, is conclusive evidence, that it was so received. The object of that letter was not to make proposals, which being accepted would constitute the agreement between the parties. It was to communicate the terms of settlement and payment before agreed upon, and to authorize their attorney to settle the note upon those terms. For this purpose it was necessary, that the acts to be performed should be clearly stated. But it was not necessary, that the particular terms of the agreement, which led to the performance of those acts should be. If there were error or obscurity in reciting the terms of the agreement, that would seem to be properly corrected or explained by a reference to the proposal itself, referred to in the same letter. The receipt of the plaintiff upon that letter states, that he has "complied with the requirements therein expressed." Or in other words, that he has performed the acts required of him. It does not declare, that the agreement was therein correctly and fully recited. Such being the object of that letter, and "our proposal to Mr. Goddard," being referred to in it as the foundation of the recited engagement, the document thus referred to may, upon a strict application of the rules of evidence, be received as explanatory of the actual agreement between the parties. Upon looking into the documents there can be no doubt, to which one of them the reference was made. It was to the letter from one of the executors to the plaintiff, bearing date on April 26, 1841. In that letter the executor states, "we are willing to settle *the principal of the note* upon the terms proposed in your communication of the 17th;" but thought, "as the income was an entirely separate business, we being held to pay to the devisees all the income arising from the property of the estate, should request an extra consideration for that; for we do not think the property, you propose to convey, is more than equivalent for the principal of the note; nevertheless as you, so are we, desirous of bringing this to a close, we have concluded to accede to your proposal in your explanatory communication of the 20th; namely to con-

vey to us as executors by a warrantee deed that messuage, land, house and tenement, which we examined, transfer and convey to us twelve shares in the capital stock of the Canal bank, and the interest, amounting as you say to $189, now due upon the note, but of which you are only willing to pay $160. You must remember, that the devisees are entitled to all their interest in the property, and while Capt. Langdon is willing both as devisee and executor to relinquish a part, Miss Eliza will expect the whole, therefore $175 is the amount of interest, that should be paid to them either by note or in cash, as is most agreeable to yourself." This original proposal referred to, states most clearly, that the estate and bank shares were to be received "to settle the principal of the note" and not by way of compromise, or for an uncertain amount, but as "equivalent for the principal of the note." There was a compromise or relinquishment of $14 of the interest stated to be due. But that interest is stated to be applicable to a different purpose from that of the principal, and it therefore constituted a separate subject for consideration and arrangement. It is said, that the executor by the use of the word "principal," did not mean the sum for which the note was made, but the amount due upon it at the time of the decease of the testatrix. If this be so, it cannot be material in this case, for at the time when that letter was written, there was no interest due and unpaid, which had accrued before her decease. The principal, which was paid, was therefore the sum for which the note was made. Was that whole principal actually due? The documents shew, that the loan was $2000, and that interest, at a rate of more than six per cent. from the date of the note to its maturity, was included in it as a part of the principal. The note was erroneously regarded as bearing interest from its date, and the interest was paid and received accordingly. The amount paid and indorsed as interest, when no such amount of interest was due, could not be recovered back as an over-payment of interest by mistake, while the note remained unpaid, for the law would apply it in payment of a portion of the principal. And the result is, that by such an

application of it, the whole principal was not due at the time when the note was paid. The note having been paid, and the payment received upon the belief, that the whole principal was due on November 5, 1839, when in fact it was not; the mistake is clearly proved. And the amount of the over-payment becomes certain, requiring only a calculation of the amount due on that day, which being deducted from the amount, for which the note was made, shows the amount of the over-payment.

It is contended, that this sum should not be restored because payment was made in property, which was not then worth in cash so much as the amount really due upon the note. When a creditor consents to receive payment in specific property considered at the time as equivalent to the amount for which it is received, he cannot upon a discovery of an error in estimating the amount due, insist upon a new valuation of the property. In this case the executors appear to have examined the estate, and to have had an opportunity to ascertain the market value of the shares in the bank; and they considered the property equivalent to the amount of the principal of the note. It is doubtless true, that they came to that conclusion, because they found it difficult or impossible to obtain payment in cash; but it is not perceived, that the legal rights of the parties can be thereby varied. The judicial tribunals cannot correct errors in judgment; and yet they are required to aid in the correction of mistakes arising from a misapprehension of the true state of facts.

It is also contended, that this is not the proper remedy; that relief should be granted only in equity by setting aside the whole settlement and restoring the parties mutually to their former rights. Such would be the proper course, if the settlement had been produced by any misrepresentation or fraud. *Chase* v. *Garvin*, 19 Maine R. 211. But such a position is excluded by the finding of the jury. It is also said, that if the settlement is sustained, and the plaintiff recovers against the executors, they will be chargeable with the whole principal of the note, although the property received may be of much less

value. The amount of any judgment, which the plaintiff may recover, would seem to be a proper charge against the estate; and their position, so far as it respects the mode of payment of the note, would not be varied by these proceedings. It will be perceived upon a calculation on the principles before stated, that the verdict of the jury was for too large an amount; and it must be set aside and a new trial granted, unless the plaintiff will enter a *remittitur* for all over the amount of the errors, with interest on it from the time, when a demand was made upon the executors to have it corrected.

LEVI HAYES & *al. versus* RUFUS PORTER.

Although the statute regulating the inspection of beef and pork imposes a penalty upon the inspector for neglect of duty, one moiety thereof to the use of the town wherein the offence shall have been committed, and the other to the use of the person suing for the same, yet a person injured by the inspector's neglect of official duty may recover damages sustained thereby, in an action on the case.

And the inspector is still liable under the provisions of St. 1821, c. 148, if the owner employs the men by whom the work is done, and furnishes the barrels, where there is no collusion between the parties, and the defects could have been discovered by a careful examination.

If the declaration alleges, that the plaintiff sustained damages "by the neglect of the inspector in cutting, packing, salting and coopering the beef" inspected, it is sufficient to enable the plaintiff to recover damages, whether the loss is attributable to the unsuitable condition of the meat when it was packed, to the want of sufficient salt or pickle, to the want of faithful coopering, or to an apparent defect in the barrels.

CASE against the defendant, deputy inspector of beef and pork for the County of Cumberland, for neglect of duty in putting up and inspecting beef of the plaintiffs, whereby it became injured and worthless.

The testimony given at the trial is set forth in the exceptions, and is quite voluminous. It appeared that the plaintiffs, by an agreement with Porter, furnished the hands who performed the labor in cutting, packing, and salting the beef, and furnished the barrels wherein the beef was packed. The proof

was sufficiently clear, that the beef was unfit for use; and it became a subject of inquiry whether it was occasioned by the negligence of the defendant, or by the misconduct of the men employed by the plaintiffs, or by latent defects in the barrels furnished by them. The bill presented by the defendant and paid by the plaintiffs was as follows.

"Nov. 1840. Hayes & Barstow, Drs. to R. Porter
for inspecting beef, 323 barrels, for 15 cents, $48,45.
"Received Pay, Rufus Porter."

Thirty barrels of the beef were alleged to have been injured. They were marked by the defendant, "R. Porter, Inspector." The declaration alleged, that in consideration, &c. "the said Porter undertook to inspect, cut, weigh, pack, salt and cooper said beef in a careful, faithful and proper manner; yet not regarding the duties of his said office, nor the charge that he had taken upon himself as aforesaid, the said Porter so ignorantly, negligently and unskilfully inspected, cut, weighed, packed, salted and coopered said beef, that the same thereby became putrid, disgusting and worthless, and the plaintiffs have thereby wholly lost the same."

It was contended by the defendant, that the statutes of the State regulating the inspection of beef and pork for export were not applicable to and did not govern this case, where the parties made such an agreement or arrangement as appears from the testimony, so far as the parties to such agreement were concerned, although they might apply, and the duties and liabilities of the defendant be prescribed and determined thereby, so far as third persons and the public are concerned, and in a different form of action.

It was further contended that the defendant was not accountable for the conduct of the plaintiffs and the laborers and coopers employed by them, and that if the beef was improperly put up by them, or became damaged in consequence of their negligence, inattention, mistakes or wrongdoings, the defendant was not accountable therefor.

The defendant further contended that he was not accountable for barrels furnished by the plaintiffs, and that if the beef

became damaged in consequence of defects in the barrels, he was not accountable therefor; more especially if the barrels appeared to be good at the time they were used and had latent defects not known to him at the time, and which he could not discover by the use of ordinary skill and care, as was contended; and that he was not accountable for the conduct of the cooper who selected and coopered the barrels, and whose duty it was to select and cooper suitable barrels.

It was further contended for the defendant, that if the defendant was accountable for the barrels furnished and used, yet the plaintiffs' declaration was insufficient in this respect, and that under it the plaintiffs could not recover for any damage resulting from said barrels.

Upon the testimony, WHITMAN C. J. presiding at the trial, instructed the jury, that if the defendant had not conducted negligently to the injury of the plaintiffs they could not recover in this action against him; that they must look to the law to ascertain what his duties were; that the law requires, "whenever the inspector or his deputies shall have inspected and assorted beef and pork, as the law requires, the said inspector or his deputies, with his own laborers and coopers, or such other laborers and coopers as they shall employ, and for whose conduct in said business they shall be accountable, shall cut, weigh, pack, salt and cooper the said beef, which they have thus inspected." And that "every barrel and half barrel, in which beef or pork shall be packed and repacked for exportation, shall be made of good seasoned rift white oak, white ash or maple staves and heading, free from any defect:" That the manner in which the laborers were furnished in this case, as developed in the testimony, did not exonerate the defendant from his obligation to observe the provisions of the law: That he would at least be liable to a penalty if he had not observed them.

But that if the plaintiffs had colluded with him in violating the law, or had furnished him with barrels which were defective in such a manner that, with due care, he could not ascertain that they were unsuitable for the purpose, they could not

recover against the defendant for any injury they had sustained therefrom. But that the jury would consider whether the plaintiffs had or not conducted in good faith, and if they had, and had given the defendant to understand, that they relied upon him to have the beef properly packed and inspected, and he had been guilty of any neglect in doing it, whereby they had been injured, they would have a right to recover against him the amount of injury so occasioned. If he was aware when the beef was packed that the barrels were unsuitable for the purpose, he violated the law in using them, and if it was to the injury of the plaintiffs they had a right to recover for it in this action. And that the plaintiffs' declaration was sufficient to entitle them to recover upon this ground. That if they, the jury, were satisfied the plaintiffs were entitled to recover, they would ascertain the amount of the damages from the evidence; if not they would return their verdict for the defendant.

The verdict was for the plaintiffs, and the defendant filed exceptions to the ruling of the Judge; and also filed a motion for a new trial because the verdict was against evidence.

H. B. Osgood, for the defendant, contended that the duties and liabilities of an inspector of beef were regulated entirely by statute, and that no remedy existed against him, except such as the statute provides. This action therefore cannot be maintained. As it repects the public, the remedy is by enforcing the penalty. As it respects the plaintiffs, they made a special contract, and furnished the persons who performed the work, and received seventeen out of the thirty-two cents allowed by law for the inspection of a barrel of beef. The inspection was by the plaintiffs themselves, and they have no cause of action against the defendant.

The defendant is not liable for the negligence, or want of skill of the men furnished by the plaintiffs, or accountable for the damage sustained thereby. The instructions therefore were in this respect erroneous.

The instructions are also erroneous, because they make the

defendant liable for defects in the barrels provided by the plaintiffs, and coopered by men employed by them.

But even if any such liability existed, this declaration does not claim damages for that cause, and will not enable the plaintiffs to recover on that account.

Haines, for the plaintiffs, said that the penalty given by the statute furnished no remedy to persons injured by neglect of duty of the defendant. Any other person, equally with the injured, might sue for it, and besides, it might be wholly inadequate. Like the sheriff, his duties are mainly prescribed by statute, and like the sheriff, the inspector is liable at common law to the party injured by his official misconduct. *Barden* v. *Crocker*, 10 Pick. 383.

The St. 1821, c. 148, § 5, expressly makes the inspector liable for the acts of the persons employed in the business. The men were procured by the plaintiffs merely for the accommodation of the defendant, who might accept or reject them as he pleased. The object of the law was, that he should oversee the work, and cause it to be done well and according to law.

The defendant is liable for due care and diligence in seeing that the barrels are good; and the instructions to the jury make him liable for no more.

The declaration is sufficient; for the beef could not be well packed, if the barrels were bad.

The opinion of the Court was afterwards drawn up by

Tenney J. — Chap. 148, of the St. of 1821, requires, under the sanction of a penalty, that all salted beef and pork, before the same is exported from the State, shall be inspected and marked in the manner therein specified, by an Inspector General, appointed by the Governor, or by a deputy of said Inspector General; both Inspector and deputy are to give bonds and take an oath faithfully to perform their duties, and as an additional security, for any neglect or fraud in the discharge of their trusts, penalties are incurred.

The present action is not for the purpose of recovering a

penalty, but is an action of the case for the damages alleged to have been sustained by the plaintiffs, by the neglect of the defendant in not faithfully performing what he undertook, by virtue of his appointment and their request, for a full consideration.

It is insisted by his counsel that the action cannot be maintained; that he is the creature of the statute, and no common law remedy can be applied; that resort can be had only to the mode and to the penalty pointed out in the statute. Where the law has affixed forfeitures for certain infractions thereof or for neglects in not conforming to its requirements, whereby individuals are injured, they are not in consequence thereof deprived of the remedy, which would exist if no penalties were prescribed. If such penalties were not intended for individual protection, private loss may be remunerated by recourse to the same means, which are resorted to for other neglects. A sheriff, deputy sheriff, coroner or constable, are liable in an action at common law, for all official neglects and violations of duty, to the extent of the injury, notwithstanding their powers are all derived from an appointment, under the statute. When they are qualified as public officers, they still may be regarded as private agents of persons, who employ them to act officially in individual concerns, and as such are answerable like agents differently selected.

In cases, where the public have an interest in the faithful discharge of official duty, the penalty for neglect, unless the contrary appear, is for the protection of that interest, rather than to secure private rights; and in many cases the forfeiture is entirely inadequate for the latter purpose, and is not even certainly available to the injured party. In *Beckford* v. *Hood*, 7 T. R. 620, which was an action of the case for the publication of a work, without the consent of the plaintiff, who had secured therefor a copy-right, and for which publication a penalty was incurred, Lord Kenyon says, "nothing could be more incomplete as a remedy than those penalties alone; for without dwelling upon the incompetency of the same, the right of action is not given to the party grieved, but

to any common informer." And ASHURST J. in the same case observes, "Now I can only consider the action for the penalties given to a common informer, as an additional protection, but not intended by the Legislature to oust the common law right to prosecute by an action any person, who infringes this species of property. "In *Farmer's Turnpike Co.* v. *Coventry*, 10 Johns. R. 389, the penalty is decided to be an additional remedy. There can be no distinction in this respect between a positive invasion of another's right and the neglect of a manifest duty to another's injury. The eighth section of the chapter referred to, imposes a penalty on the inspector or his deputy for any neglect of official duty, and section 17 provides, that a moiety thereof shall go to the town where the offence was committed, and the other moiety to him or them who shall inform or sue for the same. This clearly shows that the penalty was not intended to secure the individual against loss, but to create in the officer an additional motive to fidelity.

It is insisted, that as the plaintiffs employed packers and coopers, the defendant is not liable for their want of skill or neglect; and that the barrels being furnished by the plaintiffs, they alone are to be affected by any loss occasioned by defects therein. "The inspector general and his deputies shall not, nor shall either of them, brand any packages of provisions, other than those which have been inspected and caused to have been weighed and packed as the law requires." Chap. 148, § 8. The case finds, that the defendant did brand the barrels containing the beef in question as the law requires. If he did not attend to every part of the business of cutting, weighing, packing, salting and coopering said beef with his own laborers and coopers, or such other laborers and coopers as he employed, and for whose conduct in said business he is accountable, he was guilty of a fraud upon the public, which we are not to presume. The branding the barrels was certainly *prima facie* evidence, that he took the responsibility imposed by law; the legal inference to be drawn therefrom is, that all who aided in the business were employed by him; and whether

they were his own laborers, or were furnished by the plaintiffs, is wholly immaterial. It was equally his duty to see that the barrels were in every way suitable for the purpose, so far as it could be done by an examination at the time they were used. If they were made of other materials and in another manner, than such as the statute requires, the Inspector has no more authority to pack in them beef or pork to be exported from the State, and affix on them the usual brand or mark, than to omit entirely any part of his duty in the business; and in an action for the penalty, it would be no defence, that the packers, coopers, and barrels were furnished by the owner of the beef or pork, if the neglects of the laborers or defects of the barrels at any stage of the process were obvious on a careful examination. He having, by the official act of marking the barrels, declared that all the requisites of the statutes have been observed, the burden rests upon him to show, that he is not liable to the plaintiffs for any injury sustained by them in the article inspected.

If however any of the work was known to the plaintiffs at the time, to be other than what was proper, or if the barrels were such, that they must have been aware that they were unsuitable, and they did not object thereto, but yielded their assent to the whole, or if by any argreement or understanding between the parties, any part of the inspector's duty was dispensed with and thereby the loss took place, he would not be liable to those who had caused it. This question was substantially submitted to the jury under all the evidence in the case, and their verdict has settled the fact that there was no collusion between the parties, but that the plaintiffs relied upon the inspector, to have the beef packed and inspected according to law, and in all respects properly secured.

This action is to recover the damages alleged to have been sustained by the plaintiff by the neglect of the defendant in cutting, weighing, packing, salting and coopering the beef in question, after being requested, and for a consideration paid, having undertaken to do it according to law. To whatever cause the loss is attributable, whether to the unsuitable con-

dition of the meat, when it was cut, and packed, to the want of sufficient salt or pickle, want of faithful coopering, or to an apparent defect in the barrels, any neglect in either particular is embraced within the allegations of the writ. Salting and packing are important parts of the operation and embrace many particulars. If the barrels were obviously unfit, the beef could not be packed and salted in the manner contemplated in the statute.

There was much evidence tending to show, that the injury took place from want of care or skill in the business intrusted to the defendant; and much also tending to show, that the loss was occasioned by a defect in the barrels, which could not be easily discovered, when they were used. The facts relied upon were important and were matter for the jury, on which they have passed, and their verdict is not so against the evidence as to justify the Court in interfering to set it aside.

Exceptions and motion overruled.

JOHN C. HUMPHREYS *versus* JOHN COBB & *al.*

So far as it respects the rights of the creditor, the effect is the same, if the execution be placed in the hands of the sheriff, within thirty days after judgment, as it would have been if it had been placed in the hands of his deputy who made the attachment, for the law regards the sheriff and his deputy the same officer.

When the sheriff has the execution in his hands for service, notice to his deputy who made the attachment, within the thirty days, that the attachment has been preserved and that the creditor claims to have the property attached applied to satisfy the execution, will be equivalent to a demand for the property.

If the attaching officer delivers the property to a third person, taking his receipt to re-deliver the same, and afterwards, before the expiration of thirty days after judgment, sends the receipt to the attorney of the creditor, without any request or agreement that it should be received as a substitute for the claim of the creditor upon the officer for a delivery of the property, and the attorney takes measures to obtain it from the receiptor; this does not discharge the officer from his liability.

This stipulation in a receipt to an officer for property attached, on the delivery thereof; "I further agree, that if no demand be made, I will, within thirty days from the rendition of judgment in the action aforesaid, re-deliver all the above described property as aforesaid at the above named place, and forthwith notify said officer of said delivery," appears to be a valid contract.

AT the trial before WHITMAN C. J. after the evidence was all introduced, the cause was by consent taken from the jury, and it was agreed that a nonsuit or default might be entered, as the Court might advise, upon a consideration of the evidence. All the facts necessary for understanding the questions decided, will be found in the opinion of the Court.

Haines, for the plaintiff, contended, that the officer who attaches personal property, is bound to keep it in safety, so that it may be had to satisfy the execution which may follow the attachment. He may perform this duty through the agency of others, but will be responsible for the value of the property attached, if lost through the carelessness or infidelity of his keepers. 19 Pick. 521; Story on Bailments, § 128.

True it is, that the judgment creditor should within thirty days from judgment demand the property attached of the deputy who attached it, or of the sheriff. But as between the

sheriff and his deputy no such demand is necessary. When the deputy is removed, or unable to discharge the duties of the office, he is, like other agents, bound without notice to afford his principal all the means and facilities in his power to finish up the unexecuted business. Story's Agency, 210.

If a demand upon Cobb within the thirty days were actually necessary, still the plaintiff is entitled to recover here, on the ground that Cobb actually waived a demand. 16 Maine R. 54.

The order of Cobb on the receiptor to deliver the property attached, to be taken on the execution, implies a demand. It is sufficient, if the attaching officer has notice, and no particular form of words is necessary. *Hapgood* v. *Hill*, 20 Maine R. 372.

The return of the officer on the execution of a demand on the attaching officer, is *prima facie* evidence, that it was made. 20 Maine R. 372.

Fessenden & Deblois, for the defendants, contended that the suit could not be maintained, because the execution recovered against the debtor had not been, within thirty days after the rendition of judgment, delivered to said Cobb to be by him executed, nor was the same ever in his hands for that purpose, or tendered to him; nor had the property been demanded of him within the thirty days. *Howard* v. *Smith*, 12 Pick. 202; *Norris* v. *Bridgham*, 14 Maine R. 429; *Bradbury* v. *Taylor*, 8 Greenl. 130; *Norris* v. *Blethen*, 19 Maine R. 348; *Webster* v. *Coffin*, 14 Mass. R. 199; *Carr* v. *Farley*, 3 Fairf. 328; *Tukey* v. *Smith*, 6 Shepl. 125; *Merrill* v. *Curtis*, ib. 272; *Morton* v. *White*, 4 Shepl. 53.

Asking and receiving the receipt from Cobb, and demanding the property of the receiptor, and omitting to demand it of Cobb, is a subsequent ratification of the taking of the receipt, and that is equivalent to a prior authority. If the property was delivered to the receiptor on the nomination of the creditor, the officer is not liable. *Donham* v. *Wild*, 19 Pick. 520; *Train* v. *Gold*, 5 Pick. 380; 4 T. R. 120; *Phillips* v. *Bridge*, 11 Mass. R. 248; *Rundlett* v. *Bell*, 5 N. H. R. 433;

Higgins v. *Kendrick*, 2 Shepl. 83. The attorney has power to fix the rights of his client in this respect. *Jenney* v. *Delesdernier*, 20 Maine R. 183.

As to the judgment against Humphreys, the defendants are not precluded by it, because it was an action between other parties; because every allegation of neglect was made as well against the sheriff as his deputy; because it was rendered on default; and because Cobb took no part in the defence. Parol evidence is inadmissible to prove the grounds of a regular judgment. *Legg* v. *Legg*, 8 Mass. R. 99.

The opinion of the Court was afterwards drawn up by

Shepley J. — This action is brought by the plaintiff, who was formerly sheriff of this county, against the defendant, Cobb, who was formerly his deputy, and against the other defendants as his sureties, upon his official bond. The deputy, on May 25, 1840, attached certain personal property on a writ in favor of Messrs. Upham and Eastman against Charles D. Bearce; and on the same day delivered it to William Bradbury, taking his accountable receipt therefor. Judgment was obtained in that suit, and the execution issued thereon, was placed in the hands of another deputy of the plaintiff; and also in the hands of the plaintiff within thirty days after judgment with written directions, indorsed thereon, to levy on the personal property attached on the writ. The creditors having failed to obtain satisfaction of their execution, brought an action against the plaintiff, and recovered judgment against him; and he has paid that judgment.

The defendants contend, that the deputy was not guilty of any neglect or default by not delivering the property attached, that it might be sold on the execution, because it was not demanded of him within thirty days after judgment. If the creditor cause his execution to be placed in the hands of the officer, who has made the attachment, he being still in office, within thirty days after judgment, that will be sufficient notice to him, that the creditor claims to have the goods, which were attached, applied to satisfy the execution; and that he is not

at liberty to restore them to the debtor. When the execution is not placed in the hands of that officer, but in the hands of another deputy, or in those of a constable or coroner, a demand should be made upon the officer, who attached the goods, within thirty days after judgment, or he, being without notice that the creditor has not obtained payment in some other mode, may be obliged to restore the goods to the debtor. And it is in cases of this description, that it has often been decided, that such a demand upon the attaching officer was necessary. The execution was in this case placed in the hands of the sheriff himself within the thirty days, after having been previously in the hands of another of his deputies, who did not make any demand upon the attaching officer. So far as it respected the creditor's rights the effect was the same, as it would have been, if it had been placed in the hands of the deputy, who made the attachment, for the law regards the sheriff and his deputy as the same officer. When the sheriff has the execution for service, notice to the deputy within the thirty days, that the attachment has been preserved, and that the creditor's claim to have the property attached, applied to satisfy the execution, will be equivalent to a demand for the property, because he will thereby be informed, that the debtor is not entitled to have the property restored to him. And if after such information he should restore it to the debtor, he would be unfaithful to his principal, and would manifest an intention to do him an injury. Such information appears to have been communicated by the sheriff to his deputy in this case. The plaintiff, having the execution and the receipt for the property, presented that receipt to the deputy within the thirty days with an order in writing upon it, which the deputy signed after being informed, as the witness says, "what the order was." That order was in these words. "William Bradbury, Esq. Please deliver the within described property, or amount of money herein named, to Gen. John C. Humphreys, sheriff of Cumberland County, that he may satisfy the *Execution* v. *Bearce* therewith. My illness prevents my personal attention to the same. Nov. 12, 1840." By this it appears that the deputy was not only in-

formed, that the attachment was preserved, and that the property was required to satisfy the execution, but he directed his bailee to deliver it to the plaintiff for that purpose. And it would have been a gross dereliction of his duty to have returned the property after this to the debtor. As between the sheriff and his deputy a more formal demand could not be required.

It is further contended, that the deputy was discharged by surrendering the receipt for the property to the creditor's attorneys, and by the subsequent proceedings in relation to it. There does not appear to have been any request or agreement, when the receipt was sent to the attorneys, that they should receive it as a substitute for the claim of the creditors upon the officer for a delivery of the property. They could not have injured the deputy by causing a demand to be made upon the bailee for the property; and if, through any neglect on their part, there was a failure to make a legal demand, the sheriff would not be responsible for it. The argument is, that the verbal demand for the property made at the dwellinghouse of the bailee, in his absence, was not sufficient. If this were so, he might have avoided his contract and all responsibility by leaving the town, in which the goods must be delivered and the demand made, for the space of thirty days. It is not however necessary to decide this point, for it does not appear, that the plaintiff or his other deputy, if they acted as the agents of this deputy, were guilty of any neglect while making the demand, or attempting to do it. And if there was no legal demand, it does not appear, that the right of the deputy to call upon his bailee to deliver the property, or for damages, has been destroyed. One stipulation in his receipt is, "and I further agree, that if no demand be made, I will within thirty days from the rendition of judgment in the action aforesaid, re-deliver all the above described property as aforesaid at the above-named place, and forthwith notify said officer of said delivery." There is nothing in this case to authorize the conclusion, that it was not a subsisting and binding stipulation. The deputy was informed within the thirty days, that the attachment had

been preserved, that the execution was in the hands of his principal, and that the property was wanted to satisfy it. He was responsible for its safe keeping and delivery for that purpose. If by reason of sickness his mind and body were disordered, so that he could not within the thirty days procure it from his bailee and deliver it for that purpose, his misfortune may occasion commiseration for him, and regret, that his bailee should not have felt more strongly, under such circumstances, the obligation to save him harmless by a delivery of the property. But these matters can have no influence upon the legal rights of the parties.

The defendants are to be defaulted.

LEVI WEYMOUTH *versus* INHABITANTS OF GORHAM.

In an action under the St. 1821, c. 111, to recover compensation for the support of a person lawfully confined in the *county house of correction* against the town wherein his settlement was, the plaintiff's claim accrues by virtue of his office as master, and proof of his having been such, is indispensable to the maintenance of the suit; but the indebtedness of the town is to the plaintiff for his individual benefit, and not in trust for others, and the suit should be in his name, whether he continues master or not.

It is necessary that the account should first be allowed by the County Commissioners; but this is not in the nature of a judgment, so that the suit should be brought thereon, but the remedy is in assumpsit for the expenses incurred and services rendered.

It is no valid objection to the support of such action, that no account was kept of *the earnings* of the person committed, where it does not appear that there has been *earnings*.

Where the demand made is not such as the statute requires, yet if it be treated by the other party as a legal demand, and payment is refused for other causes, the right afterwards to make this objection is waived.

The limitation in Rev. St. in relation to houses of correction, c. 178, § 21, does not apply to cases under St. 1821, c. 111, on the same subject, where the cause of action had accrued before the Revised Statutes went into operation.

ASSUMPSIT by the plaintiff, described in the writ as "master of the house of correction situate in Portland," for the sup-

port of Harding Lombard in the county house of correction from March 1, 1837, to April 23, 1839. The writ was dated January 26, 1842.

It appeared on the trial before WHITMAN C. J. that Lombard had a legal settlement in Gorham, and had been duly committed to said house of correction, June 9, 1832, as a dangerous and insane person, by two justices of the peace and of the quorum; that he was supported there until April 23, 1839, when he was duly discharged on the petition of the defendants; and that, during the time, the plaintiff was master of the county house of correction. The defendants had settled and paid for the support of Lombard until March 1, 1837, and had paid afterwards one hundred and fifty dollars, leaving a balance of $116,04, unpaid. It did not appear that any account of work of Lombard had been kept, or that he had done any. The house of correction was established in 1823, and the County Commissioners had passed an order, "that the master of the house of correction shall be entitled to the same fees for committing disorderly persons to said house of correction, as the jailer receives for criminals who are committed to the county jail." This was objected to by the defendants. The accounts of the plaintiff, as master of the house of correction, for the support and maintenance of Lombard, were presented to the County Commissioners at their June and December sessions of each year, and were by the Commissioners examined, allowed and certified. Objections by the defendants were made to these acts of the Commissioners. To prove notice to the defendants, the plaintiff produced in evidence an account wherein the board was charged, and the credits given. Also a letter, December 15, 1840, from himself to the overseers of the poor of Gorham, and received by them, wherein he says. "There is a balance due me for board and expenses of Harding Lombard in the county house of correction, which you are requested to call and settle immediately, or I shall be under the necessity of leaving it with an attorney for collection. Your bill is with Mr. R. E. at the Mutual Insurance Office." And also a letter directed to him

and signed by the selectmen of Gorham, dated January 9, 1841, wherein they say, "We have received the bill which you have made against our town, and take this time to inform you, that we do not owe you any thing on account of Lombard, he having labored when in your custody for which no account has been rendered." A "nonsuit was hereupon entered," which was to be set aside if the plaintiff is entitled to recover.

W. P. Fessenden, for the plaintiff, insisted that the nonsuit should not have been directed. Every essential requisite of the statute of 1821, c. 111, has been complied with. The suit is by the keeper of the house of correction; the amount was shown to be due; the account was duly allowed by the County Commissioners; and demand thereof has been made, or excused.

The plaintiff is described sufficiently as suing as master of the house of correction, and if there is any informality, the remedy was by plea in abatement. Day's Com. Dig. Abatement.

This action was seasonably brought. The cause of action had accrued before the Revised Statutes went into operation, and this case depends on the law as it before stood. The second section of the repealing act expressly excepts a case like this from the operation of the Revised Statutes. A statute must clearly appear to have a retrospective operation, or it will be considered prospective. *Hastings* v. *Lane*, 3 Shepl. 134.

It is no objection to the allowance of this account, that others were allowed with it. And if the original order as to compensation was informal, it cannot prevent the plaintiff from recovering. *Boston* v. *Westford*, 12 Pick. 16; *Wade* v. *Salem*, 7 Pick. 333; *Robbins* v. *Weston*, 20 Pick. 112.

It is immaterial whether the demand was or was not sufficient, had no reply been made; for the reply waives all objection of that sort, and places the refusal to pay on entirely different grounds. *Boston* v. *Weston*, 22 Pick. 211; *York* v. *Penobscot*, 2 Greenl. 1.

Codman & Fox, for the defendants, contended that the proceedings must be strictly conformable to the provisions of the statute, in order to maintain the action, and that this had not been done.

The suit should be brought as master of the house of correction. This has not been done. He is merely described as such, but the promise is alleged to have been made to him individually. There is no necessity for pleading in abatement, as the suit must fail, unless the plaintiff brings himself within the law.

The action should have been brought upon the adjudication of the County Commissioners. For this reason, as well as because there was no valid adjudication upon the account, or allowance of it, the action cannot be maintained. There was no such account kept as the statute requires, in the total omission to keep an account of the earnings of Lombard.

The statute requires that a demand should be made as preliminary to bringing a suit. All that was done was merely sending a letter requesting payment of a demand, without stating the amount, and by one having no authority to receive payment.

But if there ever was any legal claim against the defendants, it was barred by the statute of limitations. The statute, 1821, c. 111, was repealed by the Revised Statutes. The Rev. St. limit the time for commencing the action to two years, and this suit was therefore brought too late. *Smith* v. *Morrison*, 22 Pick. 430.

The opinion of the Court was afterwards drawn up by

TENNEY J. — The cause of this action arose in virtue of c. 111, § 12, of the statutes of 1821, but the proceedings in the prosecution of the suit must conform to the provisions of the Revised Statutes, c. 178, § 21. The plaintiff can recover only by showing a strict compliance with the statutes applicable to the case, unless there has been a waiver by the defendants of some of their rights.

The town of Gorham is called upon to answer to the plaintiff, "master of the House of Correction situate in Portland." It is contended that the action should have been in the name of the master as such, and that not being the case, the nonsuit was properly ordered therefor. The plaintiff's claim accrues by virtue of his office; and proof of his being the master is indispensable in support of the action therefor. But the indebtedness of the town for the board and clothing of Lombard, who had his legal settlement therein, is to the plaintiff for his own private benefit, and not in trust for any other. If he had ceased to be the master he could as well sustain the action as he can while he continues in the office; the right of action in such an event would not vest in his successor. He is called the master of the house of correction in the writ, and proof was introduced, that he was such by due appointment, while Lombard was under his charge. This objection fails.

It is insisted, that an action brought upon the doings of the County Commissioners in allowing the plaintiff's account, is the only one which can be sustained. The Revised Statutes provide that the suit may be prosecuted at law as upon an implied promise. In the statute of 1821, it is provided, that whenever there shall be due to any keeper of the house of correction, for the care, trouble and expense of keeping, supporting and employing any person committed by virtue of that act, any sum or sums of money, and the same shall have been allowed and certified by the Court, he shall have a right to demand and recover the same of the town wherein he is lawfully settled; and if the town shall refuse or neglect to pay such sum for the space of fourteen days after the same shall have been demanded in writing, the keeper shall be entitled to an action, and may recover judgment for such sum as shall be found due to him, with legal interest from the time the same was demanded and costs. The allowance by the County Commissioners and a demand are necessary steps to be taken, and conditions to be fulfilled before an action can be commenced; but the allowance by the commissioners is by no means in the nature of a judgment; and by the Revised Stat-

utes is not even presumptive proof, unless notice was given to the town previous to the allowance. In all cases, the whole matter is subject to revision in the trial of the action. The expenses incurred and services rendered are the cause and basis of the action.

There is nothing in the case, which shows that there were any earnings by Lombard, when he was in the plaintiff's charge, and the objection, that no account thereof was kept, is not well founded.

Again it is contended that the plaintiff made no such demand as the statute requires. The demand was certainly very informal, and perhaps of itself was insufficient. But the overseers of the poor of the town of Gorham, treated the plaintiff's letter as a legal demand, and returned an answer thereto, stating that they had received the bill, and refused payment, on the ground that nothing was due, Lombard having labored, and no account having been rendered for the value of his labor by the plaintiff. The case of *York* v. *Penobscot*, 2 Greenl. 1, is in point to show that the objection, which might otherwise have been taken, was waived.

But the objection much relied upon is, that the suit was not seasonably commenced. The statute under which the cause of action arose was repealed by the general repealing act, but by the same act, § 2, there is saved, "also to all persons, all rights of action in virtue of any act repealed as aforesaid, and all actions and causes of action, which shall have accrued in virtue of or founded on any of said repealed acts, in the same manner, as if said acts had not been repealed." To the cause of action in this case, the repeal of the statute of 1821 has no application. But as the proceedings in the prosecution of the suit are to conform to the Revised Statutes, if they have limited the time within which the action can be commenced to two years from the allowance by the County Commissioners, even if it deprives the party of the remedy, we cannot disregard such limitation. But by the 21st section of chap. 178 of the Revised Statutes, it is for the liability incurred by the *preceding section*, that the action must be commenced within two years

from the time of such allowance. For the liability under the old statute, which for this purpose is unrepealed, there is no other limitation, than that contained in the general statute of limitations.

There are other objections, which are matters in defence rather than such as go against the maintenance of the action upon the plaintiff's proof, which it is unnecessary to consider.

Nonsuit taken off,

and the action to stand for trial.

JOSEPH ALLEN JR. *versus* DANIEL W. G. HUMPHREY.

The provision in the militia act of 1834, § 19, (Rev. St. c. 16, § 14) which requires that, when any person shall enlist into any volunteer company, "the commanding officer of the company, into which such person may enlist, shall give notice thereof in writing to the commanding officer of the standing company, in which such person is liable to do duty, within five days," is not applicable to an enlistment by a petitioner for the volunteer company at its first formation prior to the choice of officers.

WRIT OF ERROR to reverse a judgment of a justice of the peace imposing a fine of $9,00, for the neglect of Robert Allen, a minor son of the original defendant, to appear at a company training on Sept. 21, 1842, and at the annual review on Sept. 28, 1842. Robert Allen resided at the time within the limits of the standing company in Gray of which Humphrey was clerk, and Hall commanding officer, and all proper measures had been taken to render him liable to the penalties for absence, if he was subject to perform militia duty therein. The defence was, that he was then a member of a volunteer company.

A petition dated April, 1842, signed by thirty-seven persons, among whom was Robert Allen, stating that in each of the companies in Gray and Windham there were more privates than the number required by law, and requesting that the petitioners might be organized into a volunteer company by the name of the Gray and Windham Cadets, was sent to the Gov-

ernor. The Governor and Council granted the request of the petitioners, and created a new volunteer company under the name of the E. company of light infantry, and ordered the Major General of the division to carry this order into effect. On August 6, 1842, Robert Allen and thirty-one others duly enlisted into this volunteer company. D. P. Baker, one of the petitioners, was elected captain of the company, on August 6, 1842, received a commission as such, bearing date August 25, 1842, and was duly qualified under it Sept. 14, 1842. Capt. Baker on Sept. 20, 1842, handed to Capt. Hall a list of the members of the volunteer company who had belonged to Hall's company, and among the names was that of Robert Allen. R. Allen performed duty in the E. company at the annual review. The several papers mentioned are referred to in the exceptions, but none of them appear in the copies.

The following was assigned for error:—

Because said Justice decided, that notice of the enlistment of said Allen in said volunteer company should have been given to the commanding officer of the standing company within five days of the enlistment, being at the formation and organization of said volunteer company, and the law in such cases not requiring any other notice than the one given pursuant to the order of the Adjutant General and the order of council aforesaid as proved in the case.

Codman & Fox, for the plaintiff in error contended, that the provision in the militia act of 1834, § 19, applied only to cases of new enlistments into existing volunteer companies, and not to cases of original enlistment into a newly organized one. It was within the legal powers of the commander in chief to organize the petitioners into a new independent company. Having done it in conformity to the provisions of the statute, and the defendant's son having regularly enlisted, he was discharged from all liability to duty in the standing company. Here it was impossible to give the notice. *Carter* v. *Carter*, 3 Fairf. 291. The cases in 17 Maine R. 32, 18 Maine R. 21, and 20 Maine R. 401, are where the enlistments were into companies previously organized.

O'Donnell, for the original plaintiff, contended that the original defendant was liable to the fines imposed, because he was a member of the standing company, and because the notice given of his enlistment was a nullity, not having been seasonably given, and not stating the time of the enlistment. The militia act of 1834, § 19, expressly requires that notice in writing of the enlistment into a volunteer company, by the commander thereof, to the captain of the standing company to which he belonged, with the time of the enlistment, within five days after such enlistment, or that it shall be void. Here the notice was not given until more than a month after the enlistment, and was then defective, as no time of enlistment was mentioned. More than five days elapsed after the captain was commissioned and qualified before any notice was given. The case of *Carter* v. *Carter*, 3 Fairf. 291, was *decided* merely on the ground, that the defendant was not an able bodied man. In *Whitcomb* v. *Higgins*, 18 Maine R. 21, the defendant was an original petitioner, but this point was not made in the case. Other cases are direct, that the enlistment is void, unless notice is seasonably given. *Gowell* v. *True*, 17 Maine R. 32; *Lowell* v. *Flint*, 20 Maine R. 401, 405.

The mere fact that Allen was one of the petitioners, does not constitute him a member of the company. He must first enlist, and if he does enlist, it becomes a void act, unless notice is given as the statute requires.

The opinion of the Court was afterwards drawn up by

Shepley J. — By the sixth section of the act of 1834, the Governor, with the advice of the council, was authorized to organize and arrange the militia and to grant petitions or applications for raising companies at large. Such companies were to be raised by voluntary enlistment. The members constituting such a company on its first organization must have been determined, before they could have proceeded to the choice of officers, who were to be chosen in the same manner as those of other companies by the written votes of the members of the company. The tenth section of the act required,

that the electors or members of the company should have had ten days notice of the time and place of election. More than five days after their membership had been determined by enlistment or otherwise must have elapsed before a commanding officer could be legally chosen. And although he would become an officer, as soon as he had been elected and accepted, and when commissioned would take rank from that day; yet by the provisions of the eleventh section he could not enter upon the performance of his duties, until he had been commissioned and qualified. It would ordinarily require more than five days after his election to have the proper return thereof made to the Governor and to have the commission returned to him through the prescribed channel. If the members of the company on its first organization were necessarily enlisted before the choice of the commander, it would usually be impossible for him to give the notice required by the nineteenth section to the commanders of the standing companies within five days after their enlistment. And if a new enlistment after he was chosen and commissioned should be required to enable him to comply with such provision, the effect must be to dissolve the company at the pleasure of the members; for the first enlistment or form of membership would not be binding upon them without such a notice. It cannot be believed to have been the intention of the legislature to require an act, which could not possibly be performed without a dissolution of the company, which had been just organized and had elected its officers. The provision contained in the nineteenth section requiring the notice from the commander of the company raised at large to the commander of the standing company, implies the existence of an organized company and of a commander at the time of enlistment; and it would seem therefore not in terms applicable to the case of an enlistment before the election of any officer. That a voluntary agreement, signed by the persons to constitute the company without any engagement with any officer, would operate as a legal enlistment, appears to have been decided in the case of *Carter* v. *Carter*, 3 Fairf. 285. It was obviously proper, if not neces-

sary, that the commander of the standing company should have information of the names of the persons belonging to his company, who had become members of a company raised at large on its first organization. And this may have been one of the reasons, why the commander in chief required notice to be given to such officer before he would proceed to organize a company raised at large. It is true, that the nineteenth section of the act speaks of an enlistment by an officer of a company raised at large "for the purpose of forming or recruiting his company." But if by the word forming, a first designation of members to form such a company were intended, the implication would be, that the officer existed before the members first composing the company were determined. The intention doubtless was only to declare that all enlistments when and however made should be void, if thereby the standing company should be reduced to a less number than forty effective privates. It appears, that the son of the plaintiff in error was one of those, who composed the company on its first organization, and that he enlisted on the day when the officers were first chosen. Notice of such an enlistment within five days being ordinarily impossible, the statute is not considered as requiring it; and the judgment of the magistrate is reversed.

NATHANIEL BLAKE *versus* HANNAH W. PARLIN.

An action cannot be maintained upon a *special verbal agcement* to pay rent for real estate.

Where an agreement to pay rent is but collateral to a prior promise of another to pay the same rent, such agreement is void unless it be in writing.

An erroneous decision of an immaterial point by a District Judge, is no sufficient cause for grating a new trial.

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

The form of the action, and general bearing of the testimony appear in the opinion of the Court. Thaxter, a witness called by the plaintiff, went with him to the house, and states the conversation thus. "Capt. Blake told the defendant

she must be accountable for the rent. She replied, George always pays his rent, to which the plaintiff made answer, they should not have the house unless she would see the rent was paid and she agreed to do it. The rent agreed upon was $60, per annum. This conversation was at the house when they were about moving into it, had then moved but a few things in." George I. Parlin, son of defendant and called by her, testified, that he saw the plaintiff, and "asked him if he had a house to rent, plaintiff said he had, told where it was, and that it was at the rate of $60, per annum. He asked who I was, and I told him, and he asked of whom I had hired before, and I told him. Blake told witness to come down the next afternoon, and he would give him an answer. Witness went and Blake told him he had inquired about him, and he might have the house and move in any time he had a mind to and that he moved in the next day. He agreed to pay rent at $60, per anum, to be paid quarterly, had no lease, and the plaintiff required no security. Did not hear the conversation with the defendant and knew nothing of it."

The plaintiff's counsel contended, that there was an original undertaking by the defendant to be responsible for the rent; and if that was not the case, that if the defendant agreed to be responsible for the rent, when only part of the furniture was moved in by the occupants, the defendant was responsible in this action, there being no written lease of the property by Blake.

The Judge instructed the jury otherwise, and ruled that unless there was an original undertaking by the defendant to pay the rent, the plaintiff could not recover; that if George I. Parlin made the original bargain and entered into possession under it, and the credit was given to him, he was tenant at will, and would be entitled to three months notice to quit, and that the plaintiff could not then put an end to the arrangement at once; and that if he had taken possession of the house and begun to move in his furniture, at the time of the conversation testified to by Thaxter, they would judge whether the promise of the defendant to pay the rent was an original

or collateral promise, and if collateral, the plaintiff could not maintain his action.

The verdict was for the defendant, and the plaintiff filed exceptions.

Codman & Fox argued for the plaintiff, citing *Ellis* v. *Paige*, 1 Pick. 43, and *Davis* v. *Thompson*, 1 Shepl. 215.

Howard & Osgood argued for the defendant, and cited 8 Johns. R. 23; 13 Wend. 114; *Tileston* v. *Nettleton*, 6 Pick. 509; *Cahill* v. *Bigelow*, 18 Pick. 369; *Stone* v. *Symmes*, ib. 467.

The opinion of the Court was by

WHITMAN C. J.—This is an action of assumpsit, in which the plaintiff counts upon a special agreement, on the part of the defendant, to pay rent for a certain dwellinghouse, owned by the plaintiff; and also upon a general indebtedness for the rent of the same tenement. The cause comes before us upon exceptions taken to the instructions to the jury, upon the trial in the District Court. The evidence detailed in the exceptions tended to show, that the son of the defendant had hired the house, and that she lived in the family with him; that, while he was moving his furniture into the house, the plaintiff called upon the defendant, and told her they should not go in, unless she would be accountable for the rent; that she, after some hesitation, finally promised, verbally, to see the rent paid. From the manner in which the cause was put to the jury it is manifest, that they must have found, that the son was the lessee, and that the defendant's promise was but collateral to his undertaking to pay rent. This being but a parol promise to pay the debt of another, and not in writing, was void under the statute of frauds. *Cahill* v. *Bigelow*, 18 Pick. 369.

And if the evidence had tended to show, that the defendant was the lessee of the plaintiff, no recovery against her could be had upon any special verbal agreement to pay rent. The statute in force at the time of the alleged agreement, provided, that no action should be maintained "upon any contract for the sale of lands, tenements or hereditaments, or any interest

in, or concerning the same, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith." All verbal demises, therefore, create but tenancies at will. *Ellis* v. *Paige & al.* 1 Pick. 43.

If the defendant could have been proved to have been the lessee and tenant at will, and had actually enjoyed the use of the tenement for a length of time, an action for use and occupation might have been sustained against her to recover a reasonable amount of rent therefor. But the evidence fell, evidently, very far short of proving any such tenancy. It may be that the Judge erred, and probably he did, in saying, that the son, at the time of the demise, was entitled to three months notice to quit. As the law then stood, no such notice was necessary to give the lessor a right to resume possession. *Davis & al.* v. *Thomson*, 1 Shepl. 209. But the remark was immaterial. The cause having been decided as it evidently must be, if a new trial were granted, the exceptions are overruled, and judgment on the verdict is affirmed.

JOHN WELCH *versus* MOSES CHESLEY *& al.*

At common law, on forfeiture of the condition of a recognizance to prosecute an appeal, judgment is rendered for the whole penalty. By the Revised Statutes, c. 115, § 78, "in all actions in the Supreme Judicial Court on a recognizance entered into in the District Court to prosecute an appeal with effect," if the jury shall find the condition has been broken, "they shall estimate the damages the plaintiff has sustained," and execution is to issue for that sum and costs; but neither this, nor any similar provision, appears to have been found in relation to actions of the same description in the District Courts.

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

At the June Term of the District Court for this County, 1841, Welch recovered judgment against Chesley, and the latter appealed to the next term of the S. J. Court, and entered into a recognizance, with the other defendant as his surety, to

prosecute the appeal. The appeal was entered at the November Term of the S. J. Court and continued to the April Term, 1842, when Welch recovered judgment against Chesley for his costs of suit, taxed at $41,68, of which sum $22,18 were for costs since the appeal. This latter sum was demanded of Chesley on the execution but was not paid. The plaintiff then brought an action of debt on this recognizance in the District Court. The defendants were defaulted, and, on a hearing in damages, the District Judge ruled, that the plaintiff was not entitled to recover the amount of the recognizance, but only the amount of the intervening costs, $22,18.

To this ruling the plaintiff filed exceptions.

The case was submitted without argument.

Codman & Fox, for the plaintiff.

Dunn, for the defendant.

The opinion of the Court was by

TENNEY J. — This is an action of debt upon a recognizance taken upon an appeal from the District to this Court to prosecute the same with effect, and to pay intervening damages and costs. The defendants consented to be defaulted and to be heard in damages. They thereby admitted their liability, and the Court limited the damages to the costs, which accrued after the appeal, the plaintiff insisting that he was entitled to the full penalty.

Formerly the conusors were liable to that extent on the breach of the condition in a recognizance. *Paul* v. *Nowell*, 6 Greenl. 239. By the statute of 1831, c. 497, the rigor of the law was so far mitigated, that the Supreme Judicial Court had the same power in actions on recognizances, to make up judgment for such a sum as should be due in equity and good conscience as upon bonds and other contracts under seal, where there had been a forfeiture; and chap. 115, § 78, of the Revised Statutes, provides that in all actions in this Court on a recognizance, entered into in the District Court to prosecute an appeal with effect, if the jury shall find, that any of the

conditions have been broken, they shall estimate the damages, the plaintiff has sustained. This action was commenced in the District Court, to which no such power is given by the Revised Statutes in actions on recognizances, as was given to it in actions upon bonds by c. 50, § 2 of the statutes of 1821.

The action of *scire facias* instead of *debt* is often resorted to in such cases, and such must be brought in the Court to which the appeal is made. *Vallance* v. *Sawyer*, 4 Greenl. 62. It may have been from such practice, that this Court alone are vested with the power given by the Revised Statutes and the statute of 1831. We can hardly suppose, that the Legislature intended that different rules for estimating the damages should be applied to the same subject matter in the two Courts. But the statute alone authorizes damages for a less amount, than the sum named in the recognizance, and it confines the power exclusively to this Court; and therefore the exceptions are sustained.

The action is now pending in the Supreme Judicial Court, which has authority to render judgment for such damages, as the plaintiff has actually sustained. This must be the costs, which have accrued since the appeal.

ERASTUS HAYES *versus* JOHN KINGSBURY *& al.*

If the execution creditor, after the debtor has been arrested and given a poor debtor's bond, becomes a bankrupt, but the debtor has received no notice thereof, a citation to the creditor is good, without notice to his assignee.

DEBT on a poor debtor's bond.

On January 10, 1842, Kingsbury was arrested on an execution in favor of Hayes, and on that day gave the bond in suit to procure his discharge. On February 2, 1842, Hayes filed his petition to be declared a bankrupt, and he was decreed to be such on March 2, 1842, and an assignee of his estate was duly appointed, but Hayes did not receive his discharge until subsequent to June 18, 1842. On the day last

mentioned a citation that Kingsbury desired to take the poor debtor's oath on July 6, 1842, at a time of the day and the place named, directed to Hayes, was duly served on him, and was by him sent to the assignee on the 30th of the same June, but no service of the notice was made on the assignee. There was no evidence that Kingsbury knew that Hayes had become a bankrupt. At the time and place appointed in the citation the poor debtor's oath was duly administered to Kingsbury. It was agreed, that the Court should detemine the matter in the same manner as if it came before them on a petition for a writ of *certiorari*. If the notice was sufficient, the plaintiff was to become nonsuit.

Rand, for the plaintiff.

Haines for the defendant.

By the Court.

The debtor was not bound to know, without being specially notified of the fact, that any other person than the plaintiff of record, he being in full life, had any interest in or control of the suit. The notice therefore was properly directed and served.

Jabez C. Woodman *versus* Albert Valentine.

Where the defendant is defaulted in the District Court by his own consent, he cannot take exceptions to the ruling of the Judge.

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

During the trial the Judge ruled that certain testimony offered was inadmissible. The bill of exceptions states, that "the defendant thereupon excepting to said rulings consented to a default, and that judgment should be entered on said default to the amount of twenty dollars, if the foregoing ruling of the Judge is correct; otherwise the default is to be stricken off, and the case is to stand for trial."

By the Court.

This cause is not properly in the Court here, and must be dismissed from the docket. Upon a default consented to, exceptions cannot be taken.

Woodman, pro se.

Haines, for the defendant.

William Wescott *versus* James McDonald & *ux.*

The St. 1823, c. 229, authorized the sale of non-resident *improved land, taxed to persons within the State*, for the payment of taxes thereon.

But the St. of 1826, c. 337, does not provide that the return of the collector on the warrant, stating his proceedings in advertising and selling the estate, should be received as evidence that he had complied with the requisitions of the statute, when the sale is of improved land of proprietors living within the State.

By the St. 1821, c. 52, an administrator, on being duly licensed, was authorized to make sale of the real estate of the deceased for the payment of his debts which had been conveyed away by him in his lifetime, if the creditors of the estate were by law entitled to consider such conveyance fraudulent as to them, although there was no actual premeditated fraud.

This was a writ of entry, demanding against James McDonald and his wife a farm lying partly in Gorham and partly in Standish. The evidence reported, and the papers referred to, cover much space, and are not necessary for the proper understanding of the points decided. Sufficient appears in the instruction of the Judge at the trial, and in the opinion of the Court.

At the trial before Whitman C. J. the demandant offered in evidence a deed from Eli McDonald, administrator, to himself of the premises in controversy, dated Nov. 12, 1841, and acknowledged before a justice, the certificate bearing date of Oct. 12, 1841. The tenants objected to the admission of this deed: 1. Because the date of the acknowledgment was antecedent to the time of sale: 2. Because it purported on its face to convey to the demandant property which had been conveyed

by the deceased in his lifetime to Mrs. McDonald, one of the tenants. The objections were overruled, and the deed was read.

The tenants, to show a title under a collector's sale, offered the return of the collector of his doings as such upon his warrant, as evidence of a compliance with the requisitions of the statute, in advertising and posting notices of the intended sale. This evidence was objected to, and the Judge ruled that it was inadmissible, and it was excluded.

The report of the case states, that among other things, the Judge presiding instructed the jury, that the present action against husband and wife was unadvisedly commenced, and that they must return a general verdict for the wife, that she did not disseize, &c.; and that they must return a like verdict for the husband, if they found he was in possession under a legal title in his wife to the demanded premises; that the proceedings of the administrator were conformable to law and vested title and property of demanded premises in the plaintiff, if they were satisfied property therein was in James McDonald, deceased, at the time of his death; that there appeared in evidence no valid objection to the deed of January 10, 1833; that if at the time of his death, the deceased was insolvent or greatly indebted, the deed of April 12, 1836, would be inoperative and should be deemed a voluntary conveyance unless a sufficient consideration was proved; that plaintiff claiming under administrator's sale for the payment of debts, the estate being insolvent, had the same legal right to contest the validity of this deed, that a creditor would have had who in the lifetime of deceased, had levied an execution on it after the conveyance; that the deceased being manifestly greatly indebted, a voluntary conveyance, while so indebted, made by him in his lifetime, would be void, as against creditors, and an administrator, duly licensed therefor, might rightfully sell it; that the administrator's deed was good notwithstanding it purported to convey land which had been conveyed by deceased in his lifetime to the defendants; that the collector's deed must be considered inoperative, and void, because it was not proved that the

collector posted up notices in the town of Standish, before the sale, conformably to law, his return thereof though made under oath, pursuant to statute requisitions, not being legal evidence of the fact; that if they were satisfied that the land sold for taxes was connected with the homestead for purposes of fuel and pasturing, it should be considered improved land and not liable to be taxed and sold as non-resident land, unless the owner lived out of the State; that it was not necessary for the plaintiff to prove an entry before action was commenced, a right of entry being sufficient to enable him to maintain it; that parol admissions in regard to title to real estate, were of very little consequence, and could avail little in opposition to written instruments.

The defendant's counsel requested the Judge to instruct the jury that the lands of a person deceased were not liable for the payment of his debts, unless he died seized of them, or had fraudulently conveyed them, or was colorably and fraudulently disseized of them with the intent to defraud his creditors; and that the deceased at the time of his decease was not seized of the demanded premises, his deed of April 12, 1836, having vested the legal seizin of them in the defendants, and that the sale therefore by the administrator was inoperative and void, and nothing passed by his deed to the plaintiff. The Judge so far declined to give these instructions as to instruct the jury, that if they were satisfied that the deceased's estate was insolvent, or that he at the time of his decease, was greatly indebted, the deed of April 12, 1836, must be considered a voluntary conveyance and void, and that the administrator had legal right to sell the premises thereby conveyed, pursuant to the statute provisions, as the property of the deceased.

The jury returned a general verdict against the tenants, for so much of the demanded premises as lies in the town of Standish, and in their favor for the residue.

Codman & Fox argued for the tenants, citing St. 1821, c. 116; St. 1823, c. 229; St. 1826, c. 337; 21 Pick. 187; St. 1821, c. 52, § 1; 5 Mass. R. 244; 2 Greenl. 318; 4 Greenl. 195; 5 Greenl. 471.

Preble and *Adams* argued for the demandant, citing 2 Com. Dig. 97, 108; 5 Com. Dig. 550; Yelv. 166; 7 Peters, 204; Co. Lit. 357, (b.); 1 Jac. Law Dic. 283; Strange, 1167; 1 Ld. Raym. 443; 16 Mass. R. 480; St. 1831, c. 501; 4 Greenl. 195; 3 Mass. R. 523.

The opinion of the Court was drawn up by

SHEPLEY J. — It appears, that James McDonald, deceased, was formerly the owner of the farm demanded in this action. And that it contained about thirty acres of land situated in the town of Gorham, and about fifteen acres adjoining thereto, situated in the town of Standish. The latter was called the wood lot and "used for pasturing." The demandant claims title under a sale made in October, 1841, by the administrator of the deceased. The tenants are a son of the deceased and his wife. They claim title to the thirty acres situated in the town of Gorham by a conveyance from the deceased to the wife of his son, bearing date on January 10, 1833. They also claim title to the whole by a conveyance from the deceased to the wife of his son, bearing date on April 12, 1836. And they claim title to the lot in Standish under a sale made on June 11, 1838, by a collector of taxes to Phineas Ingalls, and by a conveyance from him to the wife of the son, bearing date on July 5, 1841.

The presiding Judge instructed the jury, "that if they were satisfied, that the land sold for taxes was connected with the homestead for purposes of fuel and pasturing, it should be considered as improved land, and not liable to be taxed and sold as non-resident land, unless the owners lived out of the State." The act concerning the assessment and collection of taxes, St. 1821, c. 116, § 30, provided that "the unimproved lands of non-resident proprietors, or improved lands of proprietors living out of the limits of this State," might be advertised and sold in the manner therein prescribed to obtain payment of the taxes assessed upon them. By an additional act, St. 1823, c. 229, the assessors were authorized to assess improved lands to the tenants in possession or to the owner

resident within the State or elsewhere. This provision follows. "And the collectors of taxes for the several towns and plantations within this State are hereby authorized to collect such taxes in the manner pointed out in the thirtieth section of the act to which this is in addition." This provision, authorizing the sale of improved land taxed to persons residing within the State, appears to have been overlooked; and the jury were not therefore instructed as to the effect of the proceedings in making the assessment and sale of the lot of land in the town of Standish. The tenant will be entitled to have these matters considered and decided.

It is also insisted, that the return of the collector on the warrant, stating his proceedings in advertising and selling the estate, should have been received as evidence, that he had complied with the requisitions of the statute. By another additional act, c. 337, § 8, it was provided, that the notice of sale required by the thirtieth section of the first act should be published three months prior to the time of sale. Then follows the provision, that the collector shall record and return his particular doings in the sale of improved lands of non-resident proprietors, or improved lands of proprietors living out of the State within thirty days after the sale. But this record and return are not required on the sale of improved lands of proprietors residing within the State. It would seem, that this distinction must have been designedly made; for it would have been more easy to have provided for such a return of all sales made under the thirtieth section, than to have specially limited it in the manner before stated. Whatever may be the law, considered independently of the provision of the statute, that would seem to create a distinction, which would by implication exclude such a record and return in those cases not provided for in the statute.

It is contended also in defence, that the administrator of the father was not authorized to sell the estate under a license for the payment of his debts; because he neither died siezed of it nor had he fraudulently conveyed it, nor been colorably or fraudulently disseized of it. This argument assumes, that the

language of the statute, c. 52, authorizing an administrator to convey all such estate, as the deceased "had fraudulently conveyed," must be limited to cases of premeditated fraud. The object of the statute was to enable creditors, through the action of the administrator, to obtain their debts out of the estate in all cases, when they were by law entitled to consider the conveyances fraudulent as against them. And conveyances may be fraudulent as against them without proof of actual fraud, when made without any valuable consideration received therefor. And there is no reason to believe, that those terms were used by the legislature with the intention to include actual only, and not constructive fraudulent conveyances. And how is it to be decided before the license is granted, and the sale is made, that the conveyance was or was not fraudulent? There is no mode provided by law; and the statute must of necessity be so construed, as to permit a license and sale, when the conveyances are alleged to be fraudulent, for the very purpose of having that matter legally decided. If the conveyance prove to be fraudulent as against creditors, the sale was authorized, and may be valid; and if not fraudulent, it was not authorized, and no title can be acquired under it. The other points may not arise again on a new trial, and it is not necessary to decide them.

Exceptions sustained,
and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK,

ARGUED AT APRIL TERM, 1843.

JOHN SPRING *& al. versus* ELISHA HIGHT *& al.*

That a husband, when creditors will not thereby be defrauded, may voluntarily, and without pecuniary consideration, convey a portion of his estate in trust for the benefit of and by way of advancement to his wife, there can be no doubt in a court of equity.

And if he thinks proper to pay for an estate, and to direct the conveyance of it to be made to her, in the absence of any intention, manifested at the time to the contrary, it will be presumed to be for an advancement to her.

Where a conveyance of land was made to a third person, by order of one in trust for his wife, although not so expressed in the deed, and afterwards the estate was by the verbal direction of the husband transferred to the wife, *it was held*, that after the death of the wife, the estate could not be reclaimed from her heirs by the husband, or his heirs.

THIS was a bill in equity, brought by Seth Spring, and was heard on bill, answer and proof. After the answer was made, the proof taken, and an argument thereon, Seth Spring died, and the heirs at law did not come in until the Judges who had heard the argument, had gone out of office without coming to a decision. The case was again argued at the April Term, 1843.

The bill asserted that the plaintiff bargained with one Adams for a tenement; that he requested E. Hight, one of the de-

fendants, to become surety for him for the purchase money; that he did so; that Adams, on August 19, 1831, conveyed the tenement to E. Hight, at the request of Seth Spring, as security for signing the note as surety, and in trust for Spring; that before this Spring had married Hight's mother, and that she has since died, leaving the defendants her heirs at law; that Spring paid the consideration money; that during the life of Mrs. Spring, E. Hight conveyed the tenement to his mother, Mrs. Spring, to hold the same to her and to her heirs and assigns; that in October, 1834, Mrs. Spring died; that the defendants, her heirs, refuse to convey the tenement to the plaintiff, or to account to him for the profits thereof; and prays that they may be compelled to convey to him.

The several defendants, excepting E. Hight, merely allege, that their deceased mother appeared to have good title to the premises from E. Hight; and that as to all the other matters alleged, they are ignorant; and pray that the said Spring may be held to prove them, and to maintain his bill.

E. Hight, in his answer, alleged that Spring requested him to be his surety to Adams for the purchase money, and informed him, that the tenement should be the property of his mother, and wished him to take a deed of the same to hold for his mother's use; that he did sign the note to Adams and take a deed to himself at the request of Spring, with the verbal agreement that he should hold the premises for his own security and for the benefit of his mother; that afterwards, on Dec. 19, 1834, at the express request of Spring, and in pursuance of the original intent and declared design of said Spring, and with his full knowledge and approbation at the time, he, the said Hight, conveyed the same to his mother, to hold to her and to her heirs and assigns; that although Spring paid the note, that said Hight expended a large sum of his own money with the knowledge of said Spring in repairs upon the premises, fully believing the same to be the property of his mother; that during the life of his mother, who was many years younger than said Spring, the latter always spoke of the property as belonging to her; and wholly denied that there

was ever any agreement or understanding, that the premises should be held in trust for Spring, or that he should ever have any interest in the premises, unless such as the law gave him, as her husband, on the conveyance to her.

The proof is sufficiently stated in the opinion of the Court.

Fairfield, for the plaintiffs, among other grounds, contended:

E. Hight did not hold for himself, but for some one. Seth Spring paid the consideration money, and the conveyance was made to E. Hight at his request. The law in such case raises a resulting trust to him, who paid the consideration. No trust can be raised by law in her favor, and there was none in her favor by deed or writing. The case of *Buck* v. *Pike*, 2 Fairf. 9, is directly in point, and conclusive in our favor.

When the deed was given to Mrs. Spring, she knew all the facts, and of course had knowledge of the trust. She then took the estate as her son had held it, in trust for her husband. 1 Sch. & L. 379; 2 Vern. 271; 1 Johns. C. R. 566; 1 Cranch, 100; 2 Mad. Ch. 127; Jer. Eq. 20; 2 Story's Eq. 242.

The wife may be a trustee for her husband. 2 Story's Eq. 600; Reeves' Dom. Rel. 120; 2 Johns. C. R. 537; Jer. Eq. 21.

The trust fell with the estate to her heirs. 2 Story's Eq. 242.

J. Shepley, for the defendants, said that on the plaintiffs' own allegations the bill could not be maintained. It insists that the conveyance was made to Hight, to secure him for becoming surety to Adams for the whole purchase money. The attempt then is to change an absolute conveyance into a mortgage by parol proof. This cannot be done by the parties, where no creditors are defrauded; and neither that, nor any other fraud is pretended here. *Thomaston Bank* v. *Stimpson*, in Lincoln, (21 Maine R. 195.) The bill does not allege, or pretend, that the conveyance by E. Hight to his mother, and to her heirs, was made without the knowledge and approbation of Spring.

But however this may be, the answer, which is fully supported by the proof, furnishes a complete defence. The property was given by the husband to the wife. This was done first by the conveyance to E. Hight to hold for her, and then by the conveyance directly to her by direction of her husband. Such gift cannot be reclaimed by Seth Spring, nor by his heirs. A similar conveyance by the husband and wife of the land of the wife, as a gift to the husband by the wife, has been held good. *Durant* v. *Ritchie*, 4 Mason, 45.

It would be difficult to defend all that is said in the opinion in *Buck* v. *Pike*. But there is nothing said, which supports the position contended for in this case, and which is necessary to enable the plaintiff to prevail. Even that case requires, in order to raise a resulting trust by parol in favor of him who pays the consideration money, when the conveyance is to a third person, not only that he should pay it, but that the conveyance should be made by the grantor, and accepted by the grantee, to hold for the benefit of the person thus paying. There is nothing in that case, conflicting with the well settled principle, that a man may give away his money or his land, to his wife, or to his child, or to a stranger, provided that creditors do not interfere, and require it for the payment of debts.

The opinion of the Court, SHEPLEY J. not sitting in the case, was drawn up by

WHITMAN C. J. — The answer of the defendant, Elisha Hight, if true, is sufficient to bar the plaintiffs' right to prevail in this suit. That a husband, when creditors will not thereby be defrauded, may voluntarily, and without pecuniary consideration, convey a portion of his estate in trust for the benefit of, and by way of advancement, to his wife, there can be no doubt. And if he thinks proper to pay for an estate, and to direct the conveyance of it to be made to her, in the absence of any intention, manifested at the time to the contrary, it will be presumed to be for an advancement to her. 2 Story's Eq. § 1204.

The answer of Elisha Hight is explicit, that the conveyance

was made to him, by order of the plaintiffs' ancestor, in trust for his wife, and that by his direction afterwards, the estate was transferred to her. This answer must be taken to be true, unless it be overcome by controlling evidence. Until the death of the wife nothing transpired, that could, in the slightest degree, tend to show that the conveyance was not intended to be in accordance with the implication of law, and the statement in the answer of Elisha Hight; but, on the other hand, much appears in confirmation of it. The declarations of the husband were often reiterated, that the conveyance was to secure a home for her after his decease.

If on making the conveyance, in the first instance, to Hight, nothing had been said to the contrary, and it should appear that the consideration moved wholly from the plaintiffs' ancestor, a trust for his benefit would have been implied; but this was not the case; the consideration did not come wholly from him; and the object of the conveyance was declared at the time; and the declaration was inconsistent with any implied trust for the benefit of the ancestor. The testimony of the witness, Goodwin, would seem to render it unquestionable, that the ancestor must have designed what the conveyance to the wife imports. He says the ancestor had requested him to prepare a deed, conveying the estate to his wife; and that, when so prepared, the delivery of it to her took place in her husband's presence; who did not intimate, it seems, that the conveyance was to be made in any part to himself, or for his benefit. If it had been intended that it should convey only a life estate to her, and a reversion to him, or his heirs, how could it have happened, that he should have omitted so to express himself to the scrivener? If it had been intended to be for his benefit, as well as for hers, the deed should have been made to him and her jointly, with the proper reservations and limitations. But he did not apply for a deed to be made running to any one besides his wife. Having been present also at the delivery of the deed, and having then made no question of the propriety of what was done; there cannot remain a reasonable doubt that the conveyance was as he intended it should

be. The answer, therefore, of Elisha Hight is very far from being controlled by the balance of testimony in the case. His conduct, after the decease of the wife, cannot be allowed to have any effect, by way of impairing the title vested in her, although he may be one of her heirs. It is not uncommon for persons to misapprehend their rights in reference to their titles to real estate, and to express themselves, and even conduct unadvisedly in regard thereto; and such expressions or conduct are by no means to be allowed to be conclusive upon them.

Bill dismissed.

JOHN K. PICKERING & *al. versus* PAUL LANGDON & *al.* Ex'rs.

In the construction of wills, the rule that the general intent to dispose of the whole property should prevail in preference to any particular intent, applies to cases where there is an intention exhibited to make a certain disposition of the property, and the mode of executing that intention is erroneously, defectively, or illegally prescribed in the will, and not to cases where there is a clear intention to effect another purpose, distinct and differing from the more general object.

If the testator uses language which could be employed to carry the general intent and purpose into effect, it would be the duty of the Court to make use of it to accomplish that object; but the Court is not authorized to supply omissions by adding words, even for such purpose. The testator must execute his intentions, or by the use of some language, give the Court the power to execute them, to make them effectual.

And in these respects there is no distinction between the rules as to real and personal property.

Where a clause in an original will and one in a codicil thereto are entirely inconsistent, and both cannot be executed, the latter clause must prevail.

If the devisee, or legatee, have the absolute right to dispose of the property at pleasure, a devise over of the same property is inoperative.

A testatrix made a will, wherein after giving several legacies, she used these words. "The residue of my property, after paying my just debts, I give and bequeath to P. L. and E. L. constituting them residuary legatees to all my property not otherwise disposed of, whether real or personal, for their use and benefit, and after the death of E. L. what remains of her part to be put at interest for the benefit of E. S. L. and A. P." Afterwards she made a codicil, wherein she says, "Having made and executed my last will and testament, and now thinking it fit and expedient to

make some alterations therein, additional or as amendments to my said original will. First, The one moiety or half of my estate which in said will I devised to P. L. I do by this codicil devise jointly to said P. L. and his wife A. S. L. as a life estate, to hold, possess and enjoy by them or either of them who may survive the other during his or her natural life. Second. The moiety or half of my estate which, in said original will, I devised to my niece E. L. by this codicil my will is, that after the decease of the said E. L. said moiety is to descend to E. S. L. and A. P. and W. L. G. equally."

It was held that, as to the one moiety, P. L. and A. S. L. took but a life estate, in the real estate, and the income only of the personal estate, and that the reversionary interest was to be considered as undevised property of the testatrix, and to be distributed to her next of kin by the statute of distributions.

Although such request was specially made in the plaintiff's bill in equity, the Court declined to appoint trustees to take charge of the property, saying, that as to the real estate the law would determine the rights of the parties and protect them, and that as to the personal property the executors themselves became trustees for those entitled.

And as it respects the other moiety, it was held, that E. L. took an estate in fee in the real estate, and an absolute right to the personal property.

On July 25, 1834, Elizabeth Sewall, widow of the late Judge David Sewall of York, made her will. This was in her own handwriting. A Copy follows: —

"I, Elizabeth Sewall of York, in the County of York and State of Maine, widow, knowing the uncertainty of life and the necessity of being prepared for death, being by the blessing of Almighty God, of a sound mind, do now direct the disposition of my property, in the manner following. viz: —

"*Imprimis.*—I give and bequeath to my nephew, Richard Langdon of Smithville, North Carolina, one thousand dollars to be appropriated to the education of his children.

"Second.—I give and bequeath unto my four nephews, William, Charles, Warren and Richard Langdon Goddard, a gold ring to each.

"Thirdly.—I give and bequeath one thousand dollars, the interest of which to be applied to the education of Elizabeth S. Langdon, the infant daughter of my nephew Paul Langdon.

"Fourthly. — I give and bequeath to my nieces, Lucy M. Pickering and Anna W. Clark, twenty-five dollars each.

"Fifthly. I give and bequeath five hundred dollars to the ministerial fund of the first Congregational Society in York.

"Sixthly.—The residue of my property, after paying my just debts, I give and bequeath to Paul Langdon, aforesaid, and Elizabeth Langdon, my niece, constituting them residuary legatees to all my property not otherwise disposed of, whether real or personal, for their use and benefit, and after the death of Elizabeth what remains of her part to be put at interest for the benefit of Elizabeth S. Langdon and Anna Pickering. And I do appoint William Goddard, Executor to this may last Will and Testament."

On July 11, 1838, she made a codicil to her will. This was in the handwriting of a gentleman, who was not of the legal profession. A copy follows. —

"I, Elizabeth Sewall of York, in the County of York, widow of Hon. David Sewall L.L. D. late of said York, deceased, having on the twenty-fifth day of July, A. D. 1834, made and executed my last will and testament; and now thinking it fit and expedient to make some alterations therein, have and do by this present codicil, which is annexed to the original, make the following alterations, additional or as amendments to my said original will.

"First. —The one moiety or half of my estate which in said will I devised to my nephew, Paul Langdon of said York, I do, by this codicil, devise jointly to my said nephew Paul Langdon, and to his wife Abigail Sarah Langdon, as a life estate, to hold, possess and enjoy by them or either of them who may survive the other during his or her natural life.

"Secondly. — The moiety or half of my estate, which, in said original will, I devised to my niece Elizabeth Langdon, by this codicil my will is, that after the decease of the said Elizabeth Langdon said moiety is to descend to Elizabeth Sewall Langdon, Anna Pickering and William L. the oldest son of William Goddard, M. D. of Portsmouth, equally.

"Thirdly. — The Portrait picture of my late husband, Hon. David Sewall, L. L. D. by this codicil, I give and bequeath to Bowdoin College.

"Fourthly.—My library I leave to the discretion of William Goddard, my Executor, to dispose of as he with the advice and consent of my heirs, named in the original will and in this codicil, shall think proper."

On August 20, 1838, the testatrix made another codicil, in a still different handwriting, of which this is a copy.

"Whereas I, Elizabeth Sewall of York, in the County of York and State of Maine, widow, having made and executed my last will and testament and having also added a codicil thereto, do hereby make and execute this instrument as a second and additional codicil to said will, and hereby direct the same to be annexed thereto and taken as part thereof, and whereas in my first codicil abovementioned, I have used the expression "life estate" with reference to my legatees and devisees, I do hereby declare that my intention and meaning is, that the income only of my property shall be used and appropriated so far as is necessary for a comfortable support and maintenance during life, and I do hereby direct my executor to carry and put this my will and meaning into operation and execution; and secondly, I do hereby give and bequeath to William Goddard of Portsmouth, my nephew, and his heirs forever, all such sum or sums of money as may be due me from said William on notes, account or otherwise, and hereby order and direct that any and all securities which I may hold as evidence of my said nephew's indebtedness to me, immediately after my decease shall be cancelled and destroyed by my executor, and I do also hereby direct my executor to hand to my said nephew any property which he may have given me in pledge as collateral security for payment of his debts to me. I do also hereby give and bequeath to my said nephew such sums as now remain due to me on notes of hand, signed by Theodore I. Harris and John Floyd, late of Kittery."

On the next day, August 21, 1838, the testatrix made a third codicil, of which a copy follows.

"To all persons to whom these presents shall come; Know ye, that whereas I, Elizabeth Sewall of York, in the County of York and State of Maine, widow of Hon. David Sewall, Esq.

late of said York, deceased, having some years ago and since the decease of my said husband, made and executed a certain instrument as my last will and testament, and having more recently, namely, in the month of July last past, made and executed a certain instrument purporting to be a codicil to my said original will, which said codicil was annexed to my said will, which said instruments were made with great caution and mature deliberation. And whereas on the twentieth day of August, A. D. 1838, while I, the said Elizabeth Sewall, the said testatrix, was exercised with much bodily weakness, by the pressing importunities of Doctor William Goddard of Portsmouth, my attending physician, was induced to sign a certain instrument by him prepared, the import and bearing of which I am not fully aware, but which, as I was informed by him, the said Goddard, was merely to guard and strengthen the provisions made in the aforesaid instruments. Now be it known, that I, the said Elizabeth Sewall, do hereby revoke, annul, abrogate and make void and of no effect the aforesaid instrument made and executed on the said twentieth day of August, A. D. 1838, and do hereby ratify and confirm the said will and codicil thereto annexed aforenamed; and I do hereby order and direct that this instrument be annexed to my aforesaid will and codicil, as codicil thereto."

Her nephew, Paul Langdon, and Doctor J. S. Putnam were made executors, instead of William Goddard.

The testatrix deceased, without making any other change in the disposition of her estate, and the original will, and the first and third codicils were duly proved and allowed, in the Probate Court, on December 3, 1838, as her last will and testament.

At the time of the death of the testatrix, she had no brother or sister living, and her heirs at law were six children of her deceased sister, Mary Goddard, of whom Dr. William Goddard and the wife of J. K. Pickering were two; one child of her deceased brother, Samuel Langdon, being the Elizabeth Langdon named in the will; and the seven children of her deceased brother, Paul Langdon, one of whom was Paul Langdon,

named in her will and who lived in the same house with her. Elizabeth Sewall Langdon was the daughter of her nephew, Paul Langdon; Anna Pickering was the daughter of her neice, Mrs. Pickering, and William L. Goddard, mentioned in the codicil with the two preceding, was the son of her nephew William Goddard.

The representatives of Mrs. Goddard brought their bill in equity against the executors and Elizabeth Langdon, wherein they, "as heirs at law, claim to be seized of a remainder in fee simple of that part of the real estate devised by said will and codicils to said Paul Langdon and Abigail S. Langdon as a life estate, and also that part of the personal estate given and bequeathed by said will and codicils to Paul Langdon and Abigail S. Langdon for life, and to have the same carefully preserved for them and the other heirs at law," and pray that trustees may be appointed to take care of the same; and William L. Goddard and Anna Pickering also joined as plaintiffs in the bill, claiming two thirds of the estate, real and personal, devised and bequeathed, "to said Elizabeth Langdon for life," to be placed in the hands of trustees.

The second codicil was not offered for probate, and on their refusal to produce it, a cross bill was filed by the defendants, and the Court ordered it to be produced. (19 Maine R. 214.) The amount of the estate in controversy was supposed to be about twenty thousand dollars.

W. P. Fessenden, for the plaintiffs, proceeded to show, that the rights and interests of all interested in the estate might be ascertained and declared by the Court. This power was conceded, for the present case, by the defendants.

Before submitting his views on the construction to be given to the will and codicils, he would state a few well recognized and familiar principles.

With regard to real estate, "where no words of limitation are added to a devise, and there are no other words from which an intention to give an estate of inheritance can be collected, the devisee will only take an estate for life." 4 Cruise, 305.

It is not so with regard to personal estate, but an opposite rule prevails. "In a devise of real estate words of limitation are required to give more than an estate for life; as are words of qualification to restrain the extent and duration of the interest in personal property." *Adamson* v. *Armitage,* 19 Ves. 418.

Under a devise of all the real and personal *estate* of the testator, the devisee takes a fee in the realty. 13 Johns. R. 537; 16 Johns. R. 537. And the same effect is given to the words *my property.* 6 Binney, 94; 17 Johns. R. 281; 11 Johns. R. 365; 5 Burrow, 2638. It is not so where the devise is specific. 4 Kent, 540. A devise of all the remainder of a person's estate, after paying, &c. is not specific. 6 Mass. R. 149.

Chattels or money may be limited over after a life estate, but not after a gift of the absolute property. 11 Wend. 259.

There is no distinction between the devise of the use of personalty, and a devise of personalty itself. And a devise of the use of personalty, and of the personalty during life, has the same effect. 2 Kent, 352; 2 Story's Eq. § 844; 17 Pick. 183; 2 Pick. 468; 3 Metc. 187.

It follows from these principles, that whether specific personalty, or personalty generally, is given, or the use or income of such property during life, and whether the remainder is specifically devised, or not, yet that remainder at once vests, in one case in the devisee, and in the other, in the heirs at law.

The will is now to be examined. It is contended, that by the sixth clause, the whole estate is disposed of both to Paul and Elizabeth. Had the words of the devise to Elizabeth been "her part," instead of "what remains of her part," it would have been an estate for life only, with remainder to Elizabeth S. and Anna. Here the words necessarily imply a power of disposition. The words import an "absolute and uncontrolable ownership," and carry a fee. 2 Story's Eq. 1070; 4 Cruise, Tit. 38, c. 13, § 6.

The first codicil was then read, and thereupon, the counsel contended, that it was clear, that the codicil revoked the residuary clause in the will.

One universally acknowledged rule in the construction of wills is, that when two parts of a will are wholly irreconcilable, the last is to govern. 2 Bl. Com. 381; 6 Peters, 84; 3 Metc. 202; 12 Wend. 602.

A codicil is a part and continuation of a will, and they will operate as one instrument. 1 Ves. 178, 186; 2 Atk. 86. And if estate be bequeathed in the codicil in a manner inconsistent with the first will, the last disposition will revoke the first. 1 Eq. Abr. 409. And where the intention is manifest the Court will imply the necessary words. 3 Paige, 27.

The first clause in the codicil gives an estate for life in express terms, "as a life estate," and it charges the persons by a devise to Paul and his wife, with a right of survivorship; and gives to the survivor only during his or her natural life. This is clearly inconsistent with the residuary clause.

But there is no remainder limited, and what then?

If there is not sufficient in a will to take the case out of the rule of law, that all the estate which is not legally and sufficiently devised to some other person, must go to the heir, the heir will take, whatever may have been the intention of the testator. 2 Wend. 13.

The second clause in the codicil clearly gives but a life estate to Elizabeth Langdon. In the codicil she omits the words, "what remains of her part," and inserts "said moiety is to descend," &c. and adds a third devisee to the remainder. The words, "said moiety to descend," &c. carry a fee. 2 Vern. 690. And no weight is laid in the want of the words for life, where the intention of the testatrix has otherwise appeared. 2 Atk. 648.

The second codicil cannot be admitted, for it is no part of the will. Evidence *dehors* is only admitted in case of a latent ambiguity, or to rebut a resulting trust. 14 Johns. R. 1; 1 Johns. C. R. 251. But if held a part of the will, it proves nothing of her intentions.

It remains to see what order the Court will take for the protection of those entitled to the remainder. It is said in *Homer* v. *Shelton*, 2 Metc. 405, that although the former practice was to require security of tenant for life of personal property, yet now an inventory only is required, unless in cases of danger. This however applies only to personal chattels, where the tenant for life is entitled to the use of the specific articles. In pecuniary legacies, the old practice was to compel the executor to give security, but the modern practice is to order it paid into Court. 1 Story's Eq. § 603; 2 Story's Eq. § 843; 2 Paige, 131.

But this is a different and peculiar case. It is the bequest of a residue, including all sorts of articles. They must be sold, and the proceeds invested, and the income only paid to the legatee for life.

J. Shepley, for the defendants, said that he had prepared himself to attempt to show, that the bill should be dismissed, because in this mode and in the present condition of the estate, the Court had no power over the subject matter, and also because there were not proper parties to the bill; but from the great desire of the defendants to have an early decision he was now instructed to waive those objections.

The bill however should be dismissed as to those who claim as heirs at law, because they have no interest in the estate. It was all given to others. They claim only a reversionary interest in the half given to Paul Langdon, and this half will, therefore, be first considered.

By the original will, made by madam Sewall herself, Paul Langdon clearly took an estate in fee simple in the real estate, and had the entire disposition of that half of the personal estate. So far as it respects Paul, the words are, "The residue of my property, after paying my just debts, I give and bequeath to Paul Langdon aforesaid, and Elizabeth Langdon, my niece, constituting them residuary legatees to all my property not otherwise disposed of, whether real or personal, for their use and benefit." The intention to give the whole estate is clearly expressed, and in such case, in a will, the word ***heirs***

is not necessary to pass a fee. The cases in support of this position are so numerous, that it would require too much time to call them severally to the attention of the Court. A long list will be found in 4 Kent, (3d Ed.) 535 and 270. The subject was very fully considered by the counsel and by the Court, in *Wait* v. *Belding*, 24 Pick. 129, where authorities in abundance will be found. It was there conceded on all sides, that words like these would pass the fee. If no codicil had been made, as it respects this half, there could have been no dispute under *her will.*

The first codicil does not change the devise of the entire half, given to Paul, from an absolute ownership into a mere life estate, and leave the reversion to go to the heirs at law, as undevised estate.

This codicil bears on its face evidence that it was written by one who had no knowledge of law, and was wholly unacquainted with technical terms. This appears in every part of it. Here the several provisions of the will were examined, and among the instances shown, was the fourth provision of this codicil. "My library I leave to the discretion of William Goddard, my executor, to dispose of as he, with the advice and consent of my heirs named in the original will and in this codicil, shall think proper." A majority of the legatees and devisees were not heirs at law, and a majority of the heirs at law, were not named in the will or codicil. As technical terms are used in other parts of the codicil without meaning, and obviously contrary to their legal meaning, the words, "life estate," and "natural life," should not have any technical meaning attached to them, and should have no particular influence above other words in giving a construction to the instrument. The general and well established rule is thus laid down by Chancellor Kent, (4 vol. 3d Ed. 534.) "The intention of the testator is the first great object of inquiry; and to this object technical rules are, to a great extent, made subservient. The intention of the testator, *to be collected from the whole will,* is to govern, provided it be not unlawful, or inconsistent with the rules of law." And a general intent in a will,

is to be carried into effect at the expense of any particular intent. *Inglis* v. *Sailors' Snug Harbour*, 3 Peters, 117. The general intent of the testatrix, in the case now under consideration, *was to dispose of her whole property by her will, and to leave none to her heirs at law.* This intention is found in the preamble, and in the conclusion, where "the residue of the property," not otherwise disposed of, "whether real or personal," is given to residuary devisees and legatees; in the consideration, that she could never have intended that Elizabeth Langdon should have had a share of Paul's half as heir at law, as she would if the reversion was undevised; she could not have intended, not only to take the property from Paul, but to prevent its going to his daughter Elizabeth, brought up in the house with her, and the special object of her regard, and to go to strangers; she could not have supposed she was giving but a life estate to Paul and his wife, and at the same time leaving one share of the reversion to go to him as an heir at law; and when she thus speaks of William Goddard in her latest expression of her will, she could not have intended that he should have inherited a part of her property, taken from Paul, in whom she showed her continued confidence by appointing him executor in the place of Goddard. And as immediately afterwards she made a devise over of the other half, if any should be left undisposed by Elizabeth, to be put on interest, she considered it already given away, or she would have also disposed of this half.

The words themselves do not imply that any diminution of the estate was intended. It is the same "moiety or half of my estate," which "I do by this codicil devise jointly to my said nephew, Paul Langdon, and to his wife Sarah Abigail Langdon." The remaining words were used without meaning, or without understanding their meaning, as is not uncommon with those who make use of technical words, on any occasion, when they do not understand them. He actually intended to say, and thinks he has said, that Paul's wife should come in equally with him, jointly, and that the survivor should have the estate as Paul had it in the original will. The words are

all in one sentence, "as a life estate, to hold, possess and enjoy by them or either of them who may survive the other during his or her natural life." There is no devise over to others. The same words are used as to both real and personal estate. No one, who understood what he was saying, would have spoken of a life estate in horses, neat cattle and provisions. If this had consisted of such personal estate alone, it would have been an absolute absurdity to suppose, that an estate for life only, in its technical sense, was intended. She manifestly intended that the real and personal estate should go together, and there is no pretence of restriction of the personal property to the income of it. They take this absolutely. These words, thus used, should not be permitted to control the manifest intention exhibited in every part of the will. Rather than that this should be done, the words should be wholly rejected. The rule that what is last said in a will, is to govern, does not apply, for we rely on the whole will and codicils, against these words alone.

Goddard's codicil makes the testatrix say, that her intention was to give but a life estate to Paul Langdon and his wife, and that the reversion should go to the heirs at law. By her revocation of that codicil the testatrix repudiates that construction. And had she not expected this estate was already devised to Paul and his wife, she would have disposed of the remainder.

The two minor plaintiffs claim the reversion of two thirds of the whole half of the estate given to Elizabeth Langdon. To sustain the bill as to that part, they must show that Elizabeth Langdon had no power to dispose of any part of it. If this power existed, it could not be ascertained, whether any thing would be left by her until after her death.

But by law this half of the estate was given absolutely to her and to her heirs, to be at her disposal, and the devise over of "what remains of her part," is wholly inoperative. The devise over is not of what remains after the death of the testatrix, but in the words of the will, "*after the death of Elizabeth, what remains of her part*, to be put at interest for the

benefit of Elizabeth S. Langdon and Anna Pickering." The codicil merely brings in William Goddard to share this with them without making any change in the nature of the estate. Without these words, she is placed precisely like Paul Langdon in the original will, and the argument to show that by the will as first made, he took the entire half of the estate to his own use, applies here. The intention of the testatrix seems to have been to give one half of her estate to Elizabeth, and to authorize her to dispose of it as she pleased during life, and if any thing should be left by her at her decease not disposed of, the testatrix intended to give it to the children named, instead of leaving it to be disposed of by Elizabeth ***by will.*** But this last the law will not permit to be done. If property is devised and bequeathed to one, with the absolute power over it, to sell and dispose of at pleasure, there cannot be a vested interest in the same property given to another. Here the estate is given to Elizabeth Langdon "for her own use and benefit," and "after the death of Elizabeth, what remains of her part" only is devised over. I propose to cite but a few authorities, and those will be the latest in Massachusetts and Maine. *Merrill* v. *Emery*, 10 Pick. 507, where the words were — "all the family stores my said wife may leave at her decease," and "whatever money my wife may have in her possession at the time of her decease," and also a devise over of the same. The devise over was held to be void. *Harris* v. *Knapp*, 21 Pick. 412. The words here were, "what remains of said real and personal estate (at the death of the testator) I give and bequeath as follows: one half thereof to my said daughter, Mary Harris, *for her use and disposal during her life;* and *whatever shall remain at her death*, I give the same to her two daughters, Dorothy and Sarah, in equal shares." They are nearly the same words used in Mrs. Sewall's will. It was held, that Mary Harris took an estate in fee in the land, and the absolute ownership of the personal property. And in *Burbank* v. *Whitney*, 24 Pick. 146, the same principle is recognized. The subject came under the consideration of our own Court, in ***Ramsdell*** v. ***Ramsdell,*** ar-

gued in Kennebec, in 1842, in which the opinion has recently been given. (21 Maine R. 288.) The question was fully discussed in that case. This single extract will show, that it establishes the ground I take in the present case. "That it was the intention to authorize her to dispose of the property, named in the second clause, absolutely and without any limitation, is clearly implied by the words, "*if any remains*," in the devise over." The bill, then, should be dismissed as to these two plaintiffs, because they have shown no interest in themselves, present or reversionary.

But although the defendants are desirous that the rights of all under the will may be declared, I do not perceive how any thing beyond this can be done by the Court, under this bill, even if the construction contended for by the plaintiffs be correct. The real estate cannot be destroyed, and if the tenants for life, as they are called in the bill, commit waste, there is a complete and adequate remedy at law, and they certainly should not be at the expense of trustees, nor should the reversioners who have not joined in the bill be made to do so. And on the plaintiffs' construction, the tenants for life are to have the complete use and advantage of the whole of the personal estate, without deduction of the expense attendant on its being placed in the hands of trustees. Nor is there any necessity for it. For where the interest is given to one for life, and the principal is given over, and an executor is appointed, and no trustee, the executor is trustee, and no new bond is required. *Dorr* v. *Wainwright*, 13 Pick. 328.

Preble argued on the same side, and replied to the argument in behalf of the plaintiffs.

Fessenden replied.

The opinion of the Court was drawn up by

Shepley J. — The plaintiffs are certain of the heirs at law and of the devisees of the late Elizabeth Sewall, and they seek by this bill to obtain such a construction of her will, as may declare their rights; and to have those rights, when

ascertained preserved and secured to them. All objections to matters of form and for want of proper parties have been waived. The will and codicils have been very unskilfully drawn. Clauses in the will and in the first codicil are so opposed to each other, that they cannot be reconciled. There would be no difficulty in deciding, which must prevail, were it not perceived, that the same general purpose and intention modified and varied in the codicil, is discoverable in both, while the language is utterly repugnant. To exhibit any satisfactory conclusion it will be necessary to endeavor to ascertain the intentions of the testatrix; and to inquire, whether it be possible to carry those intentions into effect. Some of the parties plaintiff present their claims only in the character of heirs at law. Was it the intention of the testatrix to leave any of her real or personal estate undisposed of by her will? She gave certain legacies by the original will, and then follows this clause. "Sixthly, the residue of my property after paying my just debts I give and bequeath to Paul Langdon aforesaid and Elizabeth Langdon, my neice, constituting them residuary legatees to all my property not otherwise disposed of, whether real or personal, for their use and benefit; and after the death of Elizabeth, what remains of her part to be put at interest for the benefit of Elizabeth S. Langdon and Anna Pickering." This language exhibits her intention very fully and clearly to dispose of all her real and personal estate by her will; and it is sufficient to enable the Court to carry that intention into effect. There is nothing in the codicils to authorize the inference, that this intention was in the least degree altered. There are however such intentions disclosed in the first codicil, and such language is there used, that it may be impossible to give effect to her intention to dispose of her whole property without an entire disregard both of the language and intentions exhibited in that codicil. If such should be the result, still the intention to dispose of the whole must be admitted to be fully and clearly discoverable by an examination of the will and codicils together. The only ground therefore, upon which her heirs at law can rest their

claim to any portion of her real or presonal estate, is, that it is impossible according to the rules of law to carry her intentions fully into effect. By the clause in the original will there can be no doubt that Paul Langdon would take an estate of inheritance in the moiety of her real estate, and a moiety of the residue of her personal estate absolutely. In the first codicil the testatrix says, "the moiety or half of my estate, which in said will I devised to my nephew Paul Langdon of said York, I do by this codicil devise jointly to my said nephew Paul Langdon and to his wife Abigail Sarah Langdon, as a life estate, to hold, possess and enjoy by them, or either of them who may survive the other, during his or her natural life." Here is a very clear devise of that moiety to the husband and wife for life and to the survivor for life. And there can be no doubt, that such was the intention of the testatrix. Was it then her intention to deprive Paul of an estate of inheritance and of the full dominion over the personal estate and thereby cut off the hopes of his children? There is no devise over of the reversion after the death of Paul and his wife. She did not mean to leave it undevised. Her purpose doubtless was to prevent the property from being wasted by Paul by diminishing his interest in it to a life estate, and to give his wife a life estate in it. And she either did not know or it did not occur to her, or to the one who drew this codicil, that by accomplishing these purposes she had withdrawn from Paul an estate of inheritance and the absolute right to the personal estate, so that their children on their decease could take by heirship from them no part of that moiety. By comparing the will and the codicils the intention will be perceived to give Paul and his wife the enjoyment of the property during their lives, and to preserve it for their children or heirs after their decease. Can these intentions be carried into effect? Neither in the will nor in the codicils is there any devise over of that moiety to the children, and they cannot take the property upon the decease of their parents by virtue of any language used by the testatrix. Nor does it appear to have been her intention, that they should take it in any other

manner than by inheritance from their father. If she had used any language, which could be employed to carry her purpose of permitting it to become beneficial to the children into effect, it would be the duty of the Court to make use of it for that purpose. But the Court is not authorized to supply omissions by adding words even for such a purpose. The intention is one thing, and the execution of that intention by the testatrix another. She must execute her intentions, or by the use of some language give to the Court the power to execute them, to make them effectual. In *Blamford* v. *Blamford*, 3 Buls. 103, Mr. Justice Dodderridge is reported to have said, "to add any thing to the words of the will, or to relinquish and leave out any of the words is *maledicta glossa.*" In the case of *Chapman* v. *Oliver*, 3 Burr. 1634, Lord Mansfield is reported to have said, "a court of justice may construe a will, and from what is expressed necessarily imply an intent not particularly specified in the words; but we cannot from arbitrary conjecture, though founded on the highest degree of probability, add to a will, or supply the omissions. Lord Hardwicke, though generally liberal in construing the intent of testators, would not supply a contingency omitted in the most favorable case, that could exist." When the intention of the testator is incorrectly expressed, and it is apparent, that he intended to have used other words, they will be supplied; but the Court cannot supply words, that would carry that intention into effect without being satisfied, that it was his intention to have used them. *Covenhoven* v. *Shuler*, 2 Paige, 122. There being no words in the will or codicils to give to the children of Paul Langdon any beneficial interest in that moiety, and no evidence or indication, that the testatrix intended to have used any such words, they cannot be supplied. And the children can take nothing by the will. Nor can Paul Langdon take such an estate, that they can inherit it from him without an entire rejection of that clause of the codicil, which gives the property to him and his wife for life; for that clause cannot be so construed as to give it effect, without depriving Paul of an estate of inheritance. And that clause cannot

be rejected without disregarding the intentions of the testatrix clearly expressed, and without depriving the wife of Paul of her estate for life in the property. That estate may be a valuable one to her, and no such construction can be adopted, as would wholly deprive her of it, for the purpose of carrying into effect another intention of the testatrix, not more clearly exhibited and not executed. To do so would be to defeat entirely one of the main purposes of the testatrix in making that codicil, viz. that of diminishing the interest of Paul in that moiety to a life estate and of giving to his wife a life estate in it. Nor are the Court authorized to reject the words, by which their interests in that property were limited for life. In *Sims* v. *Doughty*, 5 Ves. 247, it is said, "I cannot reject any words, unless it be perfectly clear, that they were inserted by mistake." The clause in the will, by which an estate of inheritance in this moiety is devised to Paul, and the clause in the first codicil, by which an estate for life is devised to him and his wife, and to the survivor for life in the same property, are entirely inconsistent, and both cannot be executed. In such case the latter clause must prevail. *Constantine* v. *Constantine*, 6 Ves. 100; *Wykham* v. *Wykham*, 18 Ves. 421; *Homer* v. *Shelton*, 2 Met. 202. It is contended, that the general intent to dispose of the whole property, should prevail in preference to any particular intent. That rule applies to cases, where there is an intention exhibited to make a certain disposition of the property, and the mode of executing that intention is erroneously, defectively, or illegally prescribed in the will; and not to cases where there is a clear intention to effect another purpose distinct and differing from the more general intent or object. The general intent to dispose of the whole of her property, cannot therefore authorize the Court to destroy or disregard the other and different purpose to give to Paul and his wife estates for life. Nor is it perceived, that any distinction can be made between the real and personal estate in this particular. For although it was anciently held, that a bequest of personal property for life passed an absolute property to the legatee, it has long been the established doc-

trine, that a life estate only in it may be devised, and that a devise over may be good by way of executory devise. If there be no devise over, it has been decided, that the reversionary interest in it will be considered as undevised property of the testator, and be distributed to his next of kin according to the statute of distributions. In the case of *Daveis* v. *Dewes*, 3 P. Wms. 40, the testator gave to his wife all his plate for her life, five thousand ounces of it to be at her disposal, stating that he intended to dispose of the residue by a codicil. And he gave her the goods and furniture in Cheevely house for life, stating that he intended to dispose of them after her death by a codicil. But he made no such disposition of the residue of the plate, or of the furniture. The case states, that the "Lord Chancellor was of opinion, that the goods and furniture in Cheevely house, and the surplus of the plate beyond the five thousand ounces, were undisposed of by the will, and should go to the next of kin according to the statute of distributions." In the case of *Ferson* v. *Dodge*, 23 Pick. 287, the testator gave to his wife the use and improvement of all his estate, both real and personal, so long as she remained his widow, ordering her to pay all the legacies given to others; and gave to a nephew one half of his personal estate after the marriage of his widow. There was no devise over of the other half of the personal estate. There was a devise of the real estate, which it is not important in this case to notice. The Court say, "the whole tenor of the will tends to show a desire to dispose of all his property." And "that it is not improbable, that the testator supposed, that he had included all his estate, personal as well as real, in the first clause," and that "it is probable, that the testator intended to give to his favorite nephew all his personal as well as his real estate, diminished only by the amount carved out for his wife." The decision was, that one half of the personal estate did not pass by the will; that it remained intestate property; and that it was to be distributed among the heirs at law of the testator, according to the statute of distributions.

The Court can make no order or decree in this case respect-

ing that moiety of the real estate. The law will determine the rights of the parties. But as Paul Langdon and his wife have only life estates in this moiety of the personal property, the law will protect the interests of those entitled to it, after their decease. The executors themselves become trustees for those thus entitled, and they should retain in their hands one half of the residue or balance of the personal property remaining after payment of the debts, legacies, and charges, and invest it safely, and pay the interest accruing upon it to Paul Langdon and his wife during their lives, and then to the survivor during life; and after his or her decease, the principal sum should be distributed to the next of kin of the testatrix according to the statute of distributions.

With respect to the other moiety of the residue, it appears to have been the intention of the testatrix in her original will to give it to her neice, Elizabeth Langdon, for life, with the right to expend so much of it as should be necessary or convenient, and to give what should remain at her decease, to Elizabeth S. Langdon and Anna Pickering. In the first codicil she says, "the moiety or half of my estate, which in said original will I devised to my niece, Elizabeth Langdon, by this codicil my will is, that after the decease of the said Elizabeth Langdon, said moiety is to descend to Elizabeth Sewall Langdon, Anna Pickering, and William the oldest son of William Goddard, M. D. of Portsmouth, equally." It was not the intention of the testatrix to provide for Elizabeth Langdon by this clause of the codicil. There is no devise of any thing to her unless by implication in it. She takes by the will, which, as well as this codicil, is confirmed by the third codicil, wherein the testatrix speaking of them says, "which said instruments were made with great caution and mature deliberation." In neither of them are there any words of limitation of this moiety to Elizabeth for life. There is no indication in this codicil of any intention to make a change with respect to her rights over this moiety. But if it be doubtful, whether the testatrix intended to continue to her the power to dispose of so much of it, as might be necessary; or if it be conceded, that

she did not intend to continue that power, it is not perceived, that the result could be affected by it. For the legal effect of that clause in the will must be the same with or without such a power to dispose of the property. If the words, "what remains of her part," had been omitted, Elizabeth would have taken by that clause in the will, an estate in fee in the real estate and an absolute right to the personal estate. *Grayson* v. *Atkinson*, 1 Wil. 333; *Hogan* v. *Jackson*, Cowp. 299; S. C. 7 Bro. P. C. 467; *Wall* v. *Langlands*, 14 East. 370; *Thomas* v. *Phelps*, 4 Russ. 348; *Fraser* v. *Hamilton*, 2 Desau. 578; *Jackson* v. *Housel*, 17 Johns. R. 281. The devise over of her moiety after her decease must therefore be inoperative, as this Court has already decided in the case of *Ramsdell* v. *Ramsdell*, 8 Shepl. 293. And to this moiety neither the heirs at law, nor the devisees can have any legal rights.

The Court in this case may well adopt the language of the Master of the Rolls in the case of *Constantine* v. *Constantine*, 6 Ves. 101, and say, "I am at last under the disagreeable necessity of giving judgment upon a case, in which the judgment cannot be satisfactory to the Court, and by which I must be sure, I am not performing the intention."

INHAB'NTS OF CORNISH *versus* INHAB'NTS OF PARSONSFIELD.

The Stat. 1821, c. 122. § 15, (Rev. Stat. c. 32, § 35) does not authorize the removal, to the place of their lawful settlements, of those persons who might be considered as likely to become chargeable as paupers at some future and as yet uncertain time; but authorizes their removal only, when the fact whether they were likely to become chargeable, would not depend upon a contingency, but upon an ascertained necessity.

THIS was a writ of error, brought to reverse a judgment of the District Court, wherein the plaintiffs were complainants and the defendants were respondents, originally commenced before a justice of the peace. In that complaint the inhabitants of Cornish alleged, that one Thomas Parsons, his wife

and certain of his minor children, who were named, had their legal settlement in Parsonsfield; that they were then resident in Cornish; that "they were poor and likely to become chargeable to said town of Cornish through the infirmity of said Thomas Parsons, he being subject to fits, and otherwise infected with disease;" and prayed that their settlement might be adjudged to be in Parsonsfield, and that they might be removed thither.

At the trial in the District Court at May Term, 1840, before WHITMAN J. it was proved, as appears by the record, that Thomas Parsons, named in said complaint, removed from Parsonsfield to Cornish about four years before that time, and for ten or twelve years has been subject to epileptic or convulsive fits. He and his family received assistance from the town of Parsonsfield, as paupers, about three or four years to the amount of sixty dollars each year, before he moved from that town. He is a man of good habits and steady, his wife is able and smart and capable, and attends to out door and other business; their oldest son is fifteen years old, and is hired out for seven months at five dollars per month; they have only one child at home at present, a lad five years of age; their children are healthy; Parsons now lives in a house hired for him at nine dollars per year, which his neighbors have in charity agreed to pay for one year, and at that rate for any less time; he and his family are charitably assisted to wood and provisions by their neighbors and friends in various ways, but not to the amount of the twentieth part of their support; he would not be able without the aid of his wife to support himself, but could do something towards it by laboring on the land, although his ability to do so has been gradually declining from the repitition of his fits; that they have had four children, and two, a boy eight years old and a girl eleven years old, are put out to live with a good man and a farmer, where it is hoped they will remain and be provided for, the man having agreed to keep them if he should like them.

The Court adjudged, that they were not likely to become

chargeable to said town of Cornish, within the true meaning and intent of the statute in such case made and provided.

Jameson, for the plaintiffs, said that the decision of the case depended upon the construction to be given to the statute c. 122, § 15. This statute expressly provides for the removal to the place of their settlements of such as "are likely to become chargeable to the places wherein they are found," from the causes mentioned, one of which is infirmity. The infirmity of Parsons is most clearly shown. He had been "subject to convulsion or epileptic fits for ten or twelve years," and "been gradually declining from the repetition of his fits."

The liability to become chargeable was impending, and he must soon actually become chargeable. This is all that the statute requires for the removal.

He had been supported by Parsonsfield as a pauper for years and until he left that town; at the time the complaint was filed, he was unable to support himself, and his own family were unable to do it; his house rent and a portion of his wood and provisions were paid for and gratuitously furnished by his neighbors and friends. Take away these charities, and he will be found houseless, helpless, and again a town pauper. The statute does not require, that the person should have actually become chargeable. It provides for the removal of two classes, those actually chargeable, and those likely to become so. This is believed to be a very clear case of the latter description.

McIntire argued for the defendants, and contended, that the true meaning of the latter part of the clause of the statute is, that to authorize the removal of individuals, not actually chargeable, that such individuals must necessarily immediately become so. There must be a strong and almost inevitable certainty of immediate expense to the town, and not a mere contingency that such may be the case at some future indefinite time.

The construction contended for by the plaintiffs tends strongly to increase pauperism by intermeddling with the pursuits and voluntary location of families, when supporting themselves; breaking in upon their daily avocations; breaking down the moral feeling of self dependence; destroying the means of

self support; and actually making paupers, and creating pauper expenses, when none is afforded to the alleged paupers.

The abuse of the power which might, and probably would take place by the town officers, especially in warm political party times, on the construction contended for by the plaintiffs, was strongly exhibited, and strenuously urged, to show that the legislature never intended to grant so extensive and indefinite a power.

The opinion of the Court was afterwards drawn up by

SHEPLEY J. — This is a writ of error sued out according to the provisions of the former statute, c. 122, § 16, to correct an error alleged in a judgment of the District Court. The decision must depend upon a construction of that clause in the fifteenth section of the statute, which declares, "that all persons actually chargeable, or who through age or infirmity, idleness or dissoluteness, are likely to become chargeable to places, wherein they are found, but in which they have no lawful settlement, may be removed to the places of their lawful settlements, if they have any within the State." If the intention was to authorize the removal of those persons, who might be considered as likely to become chargeable at some future and as yet uncertain time, the persons named in the complaint, or some of them would seem to be included. But if the intention was to authorize their removal only, when the fact, whether they were likely to become chargeable, would not depend upon a contingency, but upon an ascertained necessity, then they should not be considered as included.

The argument is not without weight, that the phrase, likely to become chargeable, cannot properly be restricted to cases of ascertained necessity. It might, if considered alone, well receive a construction more comprehensive. It must however be considered in connexion with other language used in the section. And the whole should be so imperative, as necessarily to require it, to authorize a construction, which might subject persons to the loss of present rights and comforts; place them under restraint, and occasion present suffering, for fear, that

they might sooner or later be brought to that condition. In the form of the warrant for a removal of the person, the overseers of the poor of the town to which he is removed, are "required to receive and provide for him as an inhabitant of that town." And then follows in the enacting clause the provision, "and such overseers shall be obliged to receive and provide for such person accordingly." There is in this respect no distinction between those, who are actually chargeable, and those, who are likely to become chargeable. Both classes, as soon as they are removed, are regarded as the proper subjects for support or assistance from the town. The person is by the very act of removal, deprived of his rights and made a pauper. And there must be an ascertained necessity to subject a person to the control of the overseers, and to impose an obligation upon the town to provide for him. For the plaintiffs in error it is contended, that the family without the aid of charity, would be houseless and helpless, and unable to obtain a support. That there was an impending liability to charge, neither remote nor contingent. And that inability to support themselves makes them paupers. Opposed to this, is the fact, that they had not received assistance from any town for the four preceding years. Although they had at an earlier period received assistance, when the children were younger and more helpless, they had proved the possibility of obtaining a subsistence without it. While the father by age and increasing infirmity was becoming less able to contribute, the children were becoming more useful and their services more valuable. Under such circumstances the Court cannot conclude, that there was an ascertained necessity for assistance from the town. And they should not be deprived of the privilege of selecting their own place of residence, and of enjoying the rights and comforts connected with a support obtained by their industry and exertions without such an ascertained necessity.

Judgment affirmed.

BENJAMIN H. GERRISH *versus* WILLIAM NASON *& al.* Ex'rs.

Where the will is not in the handwriting of the deceased, and the witnesses are present and competent to testify, it is incumbent on the party who would establish the will to satisfy the jury from the proof, that the testator knew, at the time of the execution of the instrument, that it was his will; and this must appear either from positive testimony, or from circumstances furnishing satisfactory proof of the fact.

Where a will is to be proved, the law does not presume that the party signing it was sane at the time, as in the case of the making of other instruments; but the sanity is to be proved.

THIS was an appeal from a decree of the Judge of Probate, approving an instrument as the last will and testament of Elizabeth F. Gerrish. Two of the subscribing witnesses were present and testified on the trial before the jury, SHEPLEY J. presiding, and the testimony of the other was read from the minutes of the Judge of Probate by consent, the witness having since deceased. There were no persons present at the time of the signing but the testatrix, the three witnesses, and the person who wrote the instrument, and who was a legatee and an executor. It appeared from the statements of these witnesses, that they were present, and saw the deceased sign a paper which they witnessed, and which they now know to be the instrument produced as a will; that she requested them to see her sign her name. It did not appear from the testimony, that the instrument was spoken of by any one present as a will, or that its character was then mentioned; but that nothing was said about it. When they had all signed, the person who wrote the will asked her, "what he should do with the paper, and she replied, that he must keep it." The witnesses severally stated, that they did not know, that the paper they had witnessed was a will, while they were present at that time.

The appellant, who was the brother of the deceased, and her heir at law, denied that she was of sound and disposing mind at the time, and also that she knew the contents of the instrument, and executed it as her will.

The counsel for the appellees contended, that if the testatrix

was of sane mind at the time of the execution of the instrument, the production of it, purporting to be her will, with her signature thereto, duly attested by the three witnesses, would afford *prima facie* proof that she executed the instrument as her will, and that she would by law be presumed to have known its contents.

On this point the presiding Judge instructed the jury, that they must be satisfied from the proof in the case, that the testatrix knew at the execution, that it was her will; and that this fact must be proved, either by positive testimony, or by circumstances furnishing them satisfactory proof.

The verdict was in favor of the appellant, and the respondents filed exceptions to the ruling of the Judge.

They also filed a motion for a new trial, because the verdict was against evidence.

Howard, for the respondents, argued that the jury should have been instructed, as was contended for at the trial on behalf of the respondents; and that the instructions actually given were erroneous, the law presuming every man to be sane, when he does an act, unless the contrary be proved; and cited St. 1821, c. 38, § 1, 2; Rev. St. c. 92, § 1, 2; 2 Stark. Ev. (in two vol.) 929, 919; 1 Stark. Ev. 60; 2 Hill. Abr. 483; 1 Phil. Ev. 438; 6 Bingh. 310; 7 Bingh. 457; 4 Kent, 516; Com. Dig. Title Est. by Dev. E.; Greenl. Ev. 311; 1 Metc. 349.

Appleton and *Hubbard*, for the appellant, contended that the presiding Judge was correct, both in withholding the instructions requested and in instructing the jury in the manner he did. They cited 1 Mass. R. 258; 4 Dane, 568; 4 Mass. R. 593; Greenl. Ev. 17, 49, 89; 2 Stark Ev. 679, 684; 20 Maine R. 47; 14 Pick. 461.

The opinion of the Court was drawn up by

WHITMAN C. J. — Elizabeth F. Gerrish, the sister of the appellant, executed a paper, purporting to be her last will and testament, devising her estate to persons other than the appellant, who was her heir expectant. He contends, that, at the

time she executed the instrument, she was insane and unconscious of what she did; and the jury would seem to have so found. But the appellees have taken exceptions to the instructions of the Judge, presiding at the trial, to the jury; and have also filed a motion for a new trial; averring that the verdict is against law, and against evidence, and the weight of evidence. In the argument of their counsel, however, the motion for a new trial, as at common law, aside from the grounds relied upon in the exceptions, was not much pressed upon our attention. There was at the trial, on the question at issue, much evidence on the one side, and on the other; and it may be that the preponderance of it was in favor of the appellees; but it has been decided otherwise by the appropriate tribunal; and we do not see that the decision was so glaringly erroneous, that we could be justified in setting it aside, unless the exceptions are sustainable.

The Judge instructed the jury, that they must be satisfied from the proof, that the testatrix knew, at the time of the execution of the instrument, that it was her will; and that this must appear either from positive testimony, or from circumstances furnishing satisfactory proof of the fact. There would seem to be no question, that the jury must be satisfied that she was conscious of what she was about, when she executed the instrument, in order to constitute it a will. But the counsel for the appellees insist, that the legal presumption is, in the first place, that she was sane; and secondly, that, having executed it in the form in which a will, by law, is required to be executed, she must be presumed to have known what it imported. The Judge, however, was not specifically requested so to lay down the law to the jury. Yet if what he did say to them was inconsistent therewith, and not in conformity to law, the exceptions must be sustained.

In reference to instruments in writing, the position of the counsel may be regarded as in general well founded; but whether the execution of wills does not furnish an exception to them may be questionable. The power to make wills, and the manner of executing them, and their efficacy, depend upon

certain special provisions of statute law. One of which is, that every person of sound mind, and of the age of twenty-one years, may dispose of his estate by will. Another is, that a will shall be attested and subscribed by three credible witnesses, in the presence of the person making it. In Powell on Devises, 46, it is said, "In the application of the word attested to the act of executing the will, the legislature has been considered, in the construction of it, as having called the attention of the persons attesting to three several objects; one of which applies to the testator himself; the other two to the instrument. First, that which relates to the testator, is with regard to his sanity; an attention to which, in the witnesses, is a necessary inference; as well from the nature of the transaction as from the objects of the statute." And again, "In the construction of this statute, therefore, it has been held that the legislature, when it required the witnesses to attest the signing, must, by implication, have required them to attest the capacity of the person signing." The same author considers the mental power of willing, as equally necessary with the physical power of signing. Hence it is of course, in proving a will, to ask the attesting witnesses if the testator was, at the time of its execution, of sound and disposing mind and memory. In *Brooks & al.* v. *Barrett & al.* 7 Pick. 94, Mr. C. J. Parker says, "these witnesses are to testify, not only to the execution of the will, but as to the state of mind of the testator at the time." The presumption, therefore, that the person making a will was, at the time, sane, is not the same as in the case of the making of other instruments; but the sanity must be proved.

The next question is, if the testatrix were proved to be sane was it necessary to be proved that she knew the instrument, which she executed, to be an expression of her will in the disposition of her estate? These instruments are often prepared for persons, in the last stages of existence, to execute; and at a time when both body and mind have become more or less enfeebled; and when great anxiety and depression have been superinduced; and even, sometimes, when there is but a glimmering of reason flickering in the socket. What can be

more reasonable than that in such case there should be something more than a mere legal presumption, arising from the act of signing, that a testator knew the paper signed by him to be his last will? In the case of *Swett & al.* v. *Boardman & al.* 1 Mass. R. 258, the Judges delivered their opinions individually; and each stated it was necessary it should appear, that the testator knew that it was his will he was signing; and Mr. Dane, vol. 4, p. 568, recognizes the same principle. If the testatrix, in this case, had written the instrument herself, it would have been apparent that she knew it was her will; but it was not in her handwriting; and it does not appear that she had ever read it or heard it read; and nothing was said in the presence of the attesting witnesses, whether the writing they were attesting was a will or not. If these witnesses were all dead, it might be reasonable to presume, that all was said and done at the time, which might be requisite to uphold the will; but such is not the case. They being alive, and the transaction recent, nothing is to be presumed, without evidence, to have transpired beyond what they state.

We on the whole, therefore, are well persuaded that the instructions of the Judge to the jury were correct. The bill of exceptions, and motion for a new trial are overruled; and judgment must be entered on the verdict.

JEREMIAH GORE *versus* JOSEPH ELWELL.

If a record be destroyed or irrecoverably lost, parol evidence is admissible to show, that it once existed, and the purport of it.

The writ, with the officer's return of his doings in virtue of it, is to be regarded as appertaining to, and indeed a part of the record.

THIS case came before the Court on a statement of facts by the parties, from which it appears, that the action is a writ of entry on a mortgage of certain land in Buxton, from one Staples, bearing date Feb. 13, 1828, and recorded on Feb. 15, 1828. This mortgage was not contested, but the defendant claimed priority of title under an attachment and levy of

an execution on the premises against said Staples in favor of Charles Bradley and others, whose title the tenant has. A judgment was rendered at June Term, 1829, in the County of Cumberland in favor of Bradley and others against Staples; and an execution issued thereon, and was levied on the premises in due form on July 23, 1829, within thirty days of the judgment, and recorded in the registry of deeds within three months. The execution was returned into the clerk's office from whence it issued.

The statement then proceeded as follows. The judgment in said suit is recorded in the clerk's office of said Court, but on diligent search of said office, and records, and files, the original writ, which was founded on several promissory notes, and other original papers on which said judgment was founded, are not to be found. The record of said judgment does not contain the return of the officer of any attachment on the writ which was the foundation of the suit on which the said execution issued; but a deputy sheriff, Edmund Coffin, would testify, if the proof be admissible, to the admission of which the demandant objects, that on his record of services of writs, made by him, he finds, that on Sept. 15, 1827, he served a writ in favor of Charles Bradley & al. against said Staples, and returned on the same that he had on that day attached the premises. The Court shall determine the case in such manner as to law and justice will appertain.

Fessenden, Deblois & Fessenden argued for the demandant, that no attachment of the property by the grantors of the tenant had been proved by any legal testimony. The judgment was after the mortgage, and as the record now stands, the title of the demandant has the priority. The testimony of Coffin, the officer, is inadmissible to supply the deficiency in the record. *Lamb* v. *Franklin M. Co.* 18 Maine R. 187. This cannot be done by parol. *Boody* v. *York*, 8 Greenl. 272; *Morton* v. *Chandler*, 7 Greenl. 44; *Moody* v. *Moody*, 2 Fairf. 253; *Legg* v. *Legg*, 8 Mass. R. 99. Nor can the Court give aid by ordering the deficiency in the record to be supplied. *Kirby* v. *Wood*, 16 Maine R. 81. Without the

writ it cannot appear, that the Court had jurisdiction, and this must appear by the record. *Libby* v. *Main*, 2 Fairf. 344. No amendment of the record can be made which would, as in this case, affect the rights of third persons. *Freeman* v. *Paul*, 3 Greenl. 260; *Emerson* v. *Upton*, 9 Pick. 167; *Williams* v. *Brackett*, 8 Mass. R. 240. An officer cannot be permitted to explain or alter his returns. *Putnam* v. *Hall*, 3 Pick. 445.

Bradley, for the tenant, said that this was not an attempt to supply what the record ought to have contained, but never did contain, but to supply that which the record did once contain, but which is now wanting by the loss and destruction of it.

Because a part only of the record is lost, it is no less a case for the admission of parol evidence to supply it. *Cady* v. *Eggleston*, 11 Mass. R. 282.

If this is but evidence in the case, as it would seem from the case *Kirby* v. *Wood*, 16 Maine R. 81, it is equally competent to prove its loss, and the contents of it. And whether it is record or evidence, as it is lost and destroyed, parol evidence of its contents is admissible. *Stockbridge* v. *West-Stockbridge*, 12 Mass. R. 402; *Cady* v. *Eggleston*, 11 Mass. R. 282; Greenl. Ev. 553; *Pruden* v. *Allen*, 23 Pick. 184.

The writ not being found in the clerk's office, is sufficient evidence of its loss. *Jones* v. *Fales*, 5 Mass. R. 101.

The evidence offered is the best the nature of the case admits of, and that is sufficient. 6 Cowen, 404; 10 Mass. R. 333.

The opinion of the Court was drawn up by

WHITMAN C. J. — The authorities cited by the counsel for the defendant are clearly in point to show, that, if a record be destroyed or irrecoverably lost, parol evidence is admissible to show, that it once existed, and the purport of it. The writ, with the officer's return of his doings in virtue of it, is to be regarded as appurtenent to and indeed a part of the record. That it has, in this instance been casually lost is not contro-

verted; and the rights of the defendant cannot be allowed to be affected by the loss. Writs and the returns of officers thereon, are never entered verbatim and at length on the records of the doings of the Court, consequent upon their being returned into Court. They remain on the files of the Court. They are, therefore, liable to be casually lost and destoyed; more so than the volumes of records of judgments. Deplorable indeed might be the condition of many of the titles, under levies on real estate, if parol evidence were inadmissible to show the existence of an original writ, and the return of the service thereon, in case of its loss. We think the plaintiff should become nonsuit.

INHABITANTS OF KENNEBUNKPORT *versus* TIMOTHY R. SMITH.

The right of the inhabitants of a town who have incurred expense for the support of a person as a pauper, given by Stat. 1821, c. 122, § 19, to recover the same against such person, is barred by the statute of limitations, unless an action for the recovery thereof shall have been commenced within six years from the time the cause of action accrued.

THIS action was assumpsit, and was commenced on Oct. 22, 1841, to recover the sum of eighty dollars and eighty-four cents paid by them to the inhabitants of the town of York, on Oct. 14, 1831. The declaration was upon the statute, 1821, c. 122, § 19, and averred that the plaintiffs were entitled to recover by virtue thereof. The statute of limitations was pleaded.

It was agreed by the parties, that the defendant had his legal settlement in the town of Kennebunkport, and that the plaintiffs were legally bound to pay and did pay that sum to the inhabitants of York, on Oct. 14, 1831, for the support of the defendant in York as a pauper, he being then in prison. If the action is not barred by the statute of limitations, judgment is to be entered for the plaintiffs for the amount paid and interest; and if so barred, the plaintiffs are to become nonsuit.

The arguments were in writing.

J. Shepley, for the plaintiffs, contended that this action, being founded solely on the Stat. 1821, c. 122, § 19, and not on any promise express or implied, is not barred by the prior statute of limitations.

The legislature could never have intended, that when the action is given against a man, then too poor to pay the expenses of his support, that a suit should be forthwith brought against him, or that the statute of limitations should begin to run against the claim. The words of the statute are general, that towns "who have incurred expense for the support of any pauper," may recover it against him. There is no limitation in the statute, and this is wholly independent of the prior statute of limitations, and not affected by it.

The action is not barred by the Revised Statutes. The section, which must be relied upon, has reference only to causes of action which shall accrue after the act took effect, "within six years after the cause of action shall accrue;" and is confined to such actions as are "founded on any contract or liability express or implied." But however this may be, this case is excepted by the second section of the repealing act, Rev. Stat. p. 790. How can all actions and causes of action, be saved, if at the very instant the act went into operation, these same causes of action are barred by the statute of limitations, taking effect at the same time. All such causes of action are continued in the same manner, as if the Revised Statutes had never been enacted.

The "actions of the case" barred by the statute, are either actions of tort, or actions upon contracts of the parties, express or implied; and the words were never intended to reach a liability created by statute merely. Here the right, and the remedy to enforce it, are given in the same sentence. It is a complete statute liability, both in substance and form. The remedy by action of assumpsit, was not given to take away any advantages the town might have, but with the view of giving the most simple and familiar form of action. Had the statute been silent as to the form of action, or given the action of debt, there could have been no ground to pretend, that the

statute of limitations applied. That the latter statute was never intended to apply to a mere statute liability, is supported by the consideration, that penal actions are not considered as included within the provisions of the seventh section, but are taken up in a separate section. The case, *Bullard* v. *Bell*, founded on the statute liability of the defendant to pay bills of the Amherst Bank, and commenced after a lapse of more than six years, 1 Mason, 289, was cited, with comments, and relied on. Also *Hodsden* v. *Harridge*, 2 Saund. 61, 65, and Angell on Lim. 163, and cases there cited.

W. P. Haines, for the defendant, contended that as this action was not commenced until Oct. 1841, the Revised Statutes must govern.

It is provided by the Rev. Stat. c. 32, § 50, that "any town, which *has incurred* expense for the support of any pauper, whether legally settled in such town or not, may recover the amount of the same against such person, his executors or administrators, in an action of assumpsit." And it is declared in c. 146, § 1, that "the following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, namely:" "Fourth; all actions of assumpsit or upon the case, founded on any contract or liability, express or implied."

It is a well settled principle of law, that all statutes of limitations, unless otherwise expressed, apply as well to causes of action past as to future. In this case, if the suit were not barred by the Stat. 1821, c. 62, it is barred by the Revised Statutes above cited. *Beal* v. *Nason*, 14 Maine R. 347. This action is assumpsit, and falls within the express language of the statute, and is "founded upon any contract or liability, express or implied," for it is expressly created by statute.

It is said, for the plaintiffs, that if the statute was silent as to the form of action, that the plaintiffs could have brought debt, which would not have been barred by the statute of limitations. But the statute expressly says, that the form of action shall be assumpsit. In *Bullard* v. *Bell*, the action was debt, and therefore the case does not apply here.

It is said, that this case is to be determined by the laws in force previous to the Revised Statutes. If this were so, which is not admitted, the action is barred by the old statute of limitations, c. 62, § 7. All actions of the case must be commenced within six years next after the cause of action accrues, and "*not afterwards.*" In § 9, certain parties are specified, who shall not be barred. Towns are not of the number.

The case of *Crosier* v. *Tomlinson*, 2 Mod. 71, shows that assumpsit is within the meaning of the term, "actions on the case."

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of assumpsit under the statute of 1821, c. 122, § 19, which provides that "the inhabitants of any town, within this State, who have incurred expense for the support of any pauper, whether he was legally chargeable to them by means of his settlement or not, may recover the same against such person, his executors and administrators, in an action of assumpsit for money paid, laid out and expended for his use." By the agreed statement of facts in the case it appears, that the claim of the plaintiffs comes within this legal provision; but it appears also that the cause of action accrued more than six years before the commencement of the suit; and that it is barred by the statute of limitations, if the provisions of that statute can be extended to a case of this kind. It does not seem to be material to determine whether the statute of limitations of 1821, or of 1841, should be relied upon in the defence. Either, in the literal import of its terms, would seem to embrace this case. The statute of 1821 bars all actions of the case, and an action of assumpsit is an action of the case; and the statute of 1841 bars "all actions of assumpsit or upon the case, founded upon any contract or liability express or implied."

But it is contended, that although the case may be embraced in the terms of the statutes, yet that it is not within the purview of either of them. And the argument of the counsel for the plaintiffs, upon the point, is ingenious and somewhat plausible,

but, on the whole, not entirely satisfactory. The statute authorizing the maintenance of this action is remedial, and not penal. It gives to the inhabitants of towns a right to be reimbursed for an expenditure, incurred by authority of law, against the recipient of the benefit. It merely creates an implied promise on his or her part to make the reimbursement. Prior to the passage of the statute it had been held that, at common law, no such action would lie, to recover for supplies furnished to one, who was at the time actually a pauper. *Deer Isle* v. *Eaton & wife*, 12 Mass. R. 328. This decision, although technically correct, was doubtless supposed, by the legislature, to sanction a principle, which might operate in some cases unreasonably; and therefore provision was made doing away its effect. If the statute had provided a penalty for a misfeasance, and had ordered that it should be recovered by an action of debt; or had given an action of debt for any cause, not grounded on a lending or contract, the statute of limitations of 1821, would not have been pleadable; for the case would not have been within its terms. *Bullard* v. *Bell*, 1 Mason, 289. In determining in any case whether the statute of limitations forms a bar, the forbearance of the creditor to sue, by reason of the poverty of the person liable, is never to be taken into the account. By the statute, giving a remedy like the one sought in this case, no such provision was in the contemplation of the legislature. If it had been, they would, undoubtedly, so have expressed themselves. On the contrary, the liability created is instantaneous, upon having occasioned the expenditure; and the limitation must begin to run accordingly. As the statute provides, that the limitation shall extend to all actions of the case, and as this is an action of the case, it would be exercising an undue latitude of construction to determine that it did not come within the purview of the statute. The plaintiffs therefore must become nonsuit.

WILLIAM CHADBOURNE *versus* ENOCH STRAW *& al.*

Where the owner of land had been disseized thereof for twelve years, and at the end of that time had made an entry thereon, and brought his writ of entry and recovered judgment therein for the land, and the tenant had put in his claim for betterments, and had the same allowed upon the trial; it was held, that an action of trespass *quare clausum*, commenced while that suit was pending, for cutting trees on the premises during its pendency, could not be maintained.

And it would seem that an action of trespass *quare clausum* cannot be maintained against one who has become legally entitled to his improvements upon the premises, for cutting trees thereon, after he has become thus entitled.

THE parties agreed to the following statement of facts to be submitted to the Court; and if, on a consideration of the facts, the plaintiff could maintain his action, the defendants were to be defaulted; and if the Court shall adjudge that the action is not maintainable, the plaintiff is to become nonsuit.

The plaintiff's action is trespass *quare clausum* for breaking and entering his close situated in Hollis, on the third day of Jan. 1841, and between that day and the date of the writ, April 15, 1841.

One of the defendants, William West, obtained actual possession of the premises described in the writ by a disseizin, in the year 1828, and continued in possession, occupying and improving the premises, and taking the annual profits, from said time until he was removed by a writ of possession, issued on a judgment of this Court, recovered by the plaintiff at Sept. Term, 1841, against West, commenced for the Court of Common Pleas, holden Feb. 1839, the plaintiff having previously thereto, entered upon the premises and notified West to quit; the writ bearing date, Nov. 19, 1838, wherein the plaintiff demanded seizin and possession of the above described premises, and complained that the said West had disseized him and forcibly kept him out. Said action came on for trial at the Sept. Term of this Court, 1841, at which time and in which action, the said West, among other matters in his defence, filed his plea of betterments, and had the same allowed in said ad-

judication. The other defendant, Enoch Straw, merely acted under West in removing some logs from the land.

Caverly argued for the plaintiff, making these points.

1. The defendants, having cut the trees after the service of the writ in the first suit, and pending that action, are liable in this suit under the statute. Stat. 1821, c. 35, § 4; Rev. Stat. c. 129, § 11; *Pierce* v. *Spring*, 15 Mass. R. 489.

2. But if the plaintiff's suit, having been commenced before final judgment in the former suit, cannot be sustained under the statute, it is maintainable at common law. 6 Dane, c. 196, art. 1, § 20, art. 2, § 8, art. 5, § 5; 13 Johns. R. 416; 15 Johns. R. 401; 11 Mass. R. 519; 15 Mass. R. 489; 4 Mass. R. 26; 1 Chitty's Pl. 137; 7 T. R. 13; 16 Mass. R. 4; 5 Mass. R. 341.

McArthur, for the defendants, contended that the action could not be maintained.

1. Because after a disseizin has been committed, and an action has been commenced to recover the possession, trespass cannot be maintained by the owner against the disseisor for any act committed while that action is pending. 3 Bl. Com. 210; 3 Woodeson, 193; 6 Bac. Abr. 566; Com. Dig. Trespass, B. C.; *Taylor* v. *Townsend*, 8 Mass. R. 411; *Starr* v. *Jackson*, 11 Mass. R. 519; 1 Johns. R. 511.

2. The action cannot be maintained by virtue of the statute. The declaration is not on the statute, and the case does not come within the statute provisions.

3. The plaintiff has received payment in the former suit. The betterments are allowed up to the time of trial, and the balance only is allowed to the tenant, after deducting all benefits received.

The opinion of the Court was drawn up by

SHEPLEY. J. — It appears, that William West, one of the defendants, entered into possession of the lot of land, on which the trespass is alleged to have been committed, and disseized the owner in the year 1828; and that he continued that pos-

session until after the plaintiff recovered a judgment against him in an action of entry in the month of September, 1841. The plaintiff made a formal entry upon the premises before the commencement of that suit. While it was pending this action of trespass *quare clausum* was brought against West and the other defendant, who was acting under him, to recover damages for cutting and carrying away trees standing on the premises. The trespass is alleged to have been committed between the third day of January and the fifteenth day of April, 1841.

The owner of the land must have had possession, actual or constructive, to enable him to maintain this action. The disseisee cannot maintain such an action against his disseisor until after he has regained the possession; when he may have his action of trespass for the mesne profits.

The plaintiff, at the time of the commencement of this suit, had not been in the actual possession of the premises for more than a dozen years; and during that time they had been in the exclusive possession of West. A mere formal entry, which did not disturb that possession, made two years before this suit was commenced, was not equivalent to that actual or constructive possession required by law to enable the plaintiff to maintain it.

It is contended, that it may be maintained by virtue of the provision of the former statute, c. 35, § 4, which subjected the person in possession and others to treble damages for waste done by cutting wood and timber trees on the premises after service of the writ to recover possession. If this could be considered as such an action, as is authorized by that statute, it could not be maintained by virtue of it, for it does not authorize the plaintiff to commence such an action, until after "he has recovered his title and possession of such estate sued for."

It appears also, that West, on the trial of the action of entry, claimed to have held the premises for more than six years by virtue of a possession and improvement; and that he filed a claim to have the increased value by virtue of such improve-

ment assessed, and that he prevailed in that claim. By the statutes the intention is clearly perceived, that one entitled to his improvements should not be deprived of the benefit of them by any course, which the owner of the land may pursue; for if he enter and withhold the possession from the tenant, he is made liable to pay him for their value. If the owner might by a mere formal entry maintain trespass *quare clausum* against one so entitled, he could, by commencing a new suit for each act of the tenant upon the land, compel him to abandon the premises without affording him an opportunity to have the value of his improvements assessed in a real action, and without subjecting himself to an action for their value by withholding the possession after an actual entry; and thus destroy those rights of the tenant, which were designed to be protected by the statutes. *Plaintiff nonsuit.*

JEREMIAH GOODWIN *versus* JAMES APPLETON.

It was held that the printed volume of Massachusetts Revised Statutes which went into effect on May 1, 1836, wherein was found a reference to a prior statute, as Stat. 1824, c. 130, and a repeal of Stat. c. 130, describing it as "an act to allow grace on bills of exchange and notes, according to the custom of merchants," was competent and sufficient evidence from which a jury might infer, that by the laws of Massachusetts, grace was allowed on promissory notes, on Feb. 6, 1836.

It is not competent for the *defendant*, under the provisions of Rev. Stat. c. 69, § 3, to testify to any facts, but such as go to establish the defence of usury.

The verdict of a jury is not valid and final until pronounced and recorded in open Court.

If the jury return a verdict into Court, which is not such as the issue requires, the Court may send them back to reconsider their verdict, with appropriate instructions, at any time before it is received and recorded as a verdict.

Courts take notice of the local divisions of the State into counties, cities, and towns; but they are not bound to take judicial notice of the local situation and distances of places in counties from each other.

ASSUMPSIT against Appleton as indorser of a promissory note, dated Feb. 6, 1836, for $3750, and payable in one year

with interest to Selden Huntington, or order, signed by Henry A. Breed of Lynn in Massachusetts, and indorsed by Huntington and by the defendant. With the general issue, there was a brief statement, signed and sworn to by the defendant, setting forth specially certain facts, and averring that he had sold and indorsed the note, and that the plaintiff took $467, as usury on the indorsement and sale of the note to him. The demand was made on Feb. 9, 1837, and the notice given on the tenth day of Feb. 1837, at half past nine of the clock in the forenoon; and to show that the payer was entitled to grace, the plaintiff introduced in evidence the volume entitled the Revised Statutes of Massachusetts, which went into operation after April 30, 1836. The writ bore date Feb. 9, 1837, and it was in evidence that it was made in the County of York, but the time when did not appear. The return of the officer on the writ, was made at Portland in the County of Cumberland, on the ninth of the same Feb. at half past ten in the forenoon. There was no testimony in the case showing the distance of Portland from Alfred. To prove usury in the negotiation of the note, his counsel offered the defendant, as a witness. He was objected to by the plaintiff, but admitted, and testified, that about a month after the date of the note he passed the note to the plaintiff and received for it thirty-three hundred dollars, and indorsed the note to the plaintiff; that he made no minute at the time of this transaction, of the amount received by him, but that from a calculation made by him in Sept. 1841, he has now no doubt that $3300, was the true sum received by him of Goodwin for the note; that at the same time he let Goodwin have another note for $1250, and received for it $1100, that this last note had then but a short time to run; that he received for both notes $4400, that this sum was paid in cash, except about $900, for which he took the plaintiff's note payable in 60 days with interest; that he was at that time holden on Huntington's paper, which was over due, and was pressed for payment, and that Huntington gave him those notes and authorized him to turn them into money to relieve his liabilities; and that he was interested in

the notes, for he was interested in the result, being then liable for Huntington as indorser, and pressed for payment. The defendant also introduced evidence tending to show, that by a bargain with the plaintiff, he was entitled to have the avails of certain logs deducted.

The counsel for the defendant contended:

1. That the action could not be maintained, because it was commenced before the plaintiff's cause of action, if any, accrued.

2. That the demand of payment of the maker of the note was not seasonably made, as there was no legal evidence that the note was payable with grace by the laws of Massachusetts.

3. That the facts testified to by the defendant, and which were not contradicted by the plaintiff's oath, sustained the defence of usury, so far as to have the deduction made according to the provisions of the statute.

Shepley J. before whom the trial was, instructed the jury upon the first point, that it was for them to find whether the writ was made before half past nine o'clock on the day it was dated, that if it was so made by the attorney and passed out of the hands of the plaintiff and his attorney, as a complete and valid writ, the action was brought too soon.

Upon the second point, the jury were instructed, that a demand of payment on the 9th of February was seasonably made by the laws of Massachusetts, and a notice to the defendant as indorser put into the post office in season to go by the first mail was in season.

Upon the third point the jury was instructed, that the deduction from the note when it was transferred to the plaintiff of the sum of $467, if proved to be usurious, was to be allowed to the defendant and taken from the note, if they found for the plaintiff. That the negotiation between indorser and indorsee may be usurious, or it may be a sale of the note; that if a sale only it is not usurious, but if the transaction was a loan by which it was intended to secure more than six per cent. interest, it was usury, although taking the form of a sale. That the facts testified to by the defendant, as to this

transaction upon their face, unless disguised to cover up a loan for usury, do not make it usurious, and if they were satisfied that there was no usury, under the above instructions, then the testimony of the defendant was to be laid out of the case.

The jury returned into Court with a verdict for the defendant, and that the plaintiff owed the defendant the sum of $2242,72. The Judge remarked to them, that their verdict was inconsistent and that the defendant had no claim against the plaintiff, and did not claim to recover against him, and again instructed them, that if they found for the plaintiff, the defendant's claim for an allowance under the contract at Norridgewock, for which he contended, should be allowed to the defendant, by deducting it from the note in suit; and if they found for the defendant, their verdict should be, that he never promised, and nothing more; and the jury were directed to retire again and consult further on the case. The jury did retire and afterwards returned into court with a verdict for the plaintiff for $3252,70 damages. The paper, first presented by the jury, stated that the defendant did not promise, and that the plaintiff was indebted to the defendant in the sum of $2242,72.

To the instructions of the Judge, upon the points above stated, and to his directions to them, on their returning their first verdict into court, to retire and consult further, the defendant excepted.

N. D. Appleton and *Howard* argued for the defendant. In support of their views, they cited on the first point, that the action was prematurely brought, 1 Greenl. Ev. 8; 1 Strange, 469; 10 Pick. 45.

On the second point, that there was no sufficient evidence, that grace was allowed by the laws of Massachusetts, they contended that the laws in existence in that State when the contract was made must govern, which was before their Revised Statutes took effect. The volume of Revised Statutes was no evidence of what the law was prior to that time.

On the point that the contract was usurious, they cited 4 Mass. R. 156; 12 Pick. 565; 3 Pick. 185; 15 Mass. R. 460; 10 Mass. R. 502; 1 Greenl. 167; 2 Camp. 599; 8 Mass. R.

257; 2 Pick. 145; Dougl. 736; 7 Wend. 569; 1 Stark. R. 385; 21 Wend. 285; 24 Wend. 230. And even if the contract was not usurious, the plaintiff can recover no more than he paid, with interest. 3 Shepl. 166; 15 Johns. R. 44; 7 Wend. 569; Chitty on Con. (8th Ed.) note (a).

On the point, that the course taken by the Judge, when the jury came in was erroneous, they cited 2 Saund. 252; 11 Mod. 64.

Bradley argued for the plaintiff.

There is no evidence in the case as to the distance from Alfred to Portland, and the Court cannot, *ex officio*, take notice of it. And the law will presume that the writ was made at any time before service. 15 Mass. R. 364; 2 Pick. 128.

The note was dated at Lynn, and the contract is to be governed by the laws of Massachusetts. 1 Pet. 25. What the laws were is to be proved as matter of fact, and the evidence offered was admissible. 3 Pick. 293; 9 Pick. 130. Without any statute, grace is allowed on negotiable promissory notes. Bayley on Bills, 256.

The defendant could testify to no facts, but such as are set forth in the brief statement. He there says, that he indorsed and sold the note to the plaintiff, and he would not be competent to testify to other facts inconsistent with it. Nor can the defendant himself testify to any facts other than such as go to prove that the contract was usurious. The sale of the note for less than its face did not constitute usury. *French* v. *Grindle*, 3 Shepl. 163; *Lane* v. *Steward*, 2 Appl. 104.

The course of the Judge was entirely correct in sending the jury out, after bringing in the first paper. The statement brought in varied wholly from the issue they were to try, and was not a verdict on which a judgment could be legally rendered. 2 Wheat. 221.

The opinion of the Court was afterwards drawn up by

TENNEY J. — We are satisfied, that in Massachusetts where the note in suit was given, three days of grace was allowed upon all negotiable paper from the year 1824, when the statute,

chap. 130, on that subject was enacted. But it is insisted for the defendant, that there was no competent evidence of this introduced at the trial. In the margin of chap. 33, § 5, of the Revised Statutes of that Commonwealth, which was introduced as evidence, the statute of 1824, chap. 130, is referred to, and in the act to repeal the acts, which had been revised, page 828, there is under the year 1824, the repeal of chap. 130, being stated to be "an act to allow grace on bills of exchange and notes according to the custom of merchants." By the same Revised Statutes the new statutes and the repeal of the old were to take effect simultaneously. We think there was sufficient to authorize the instruction to the jury in this respect.

To establish usury, the oath of the defendant under certain circumstances is allowed. Chap. 69, § 3, Rev. Stat. This statute is a change of the common law, which denies to a party in a suit, the right to be heard as a witness, and must be construed strictly. It cannot however on the most liberal construction extend beyond that object. If the testimony of the defendant fails to establish the fact, for which it is allowed, it must be disregarded. It could not have been the intention of the Legislature, under a plea of usury to permit facts, coming from a party, tending to prove another issue, to have any influence upon the jury. When by the statute, a party may be introduced for this special purpose, on no principle can his testimony affect the case for another which is totally distinct.

The course taken by the Judge, when the jury returned with their first verdict, was proper. The finding was not such as the issue required ; it not having been received and *recorded*, it was no verdict, and the jury had a right to alter it. *Root* v. *Sherwood*, 6 Johns R. 68. Before a verdict is recorded, the jury may vary from their first offer of their verdict, and the verdict which is recorded, shall stand. The verdict is not regarded as valid and final, until it is pronounced and recorded in open Court. The Court may also of its own accord send the jury back to reconsider their verdict, if it appears to be a

mistaken one, and before it is received and recorded. *Blackley* v. *Sheldon*, 7 Johns. R. 32.

From the sum returned in the verdict as damages, and the evidence as reported we infer, that the jury did not find the contract declared on affected by any usurious taint. The jury have also passed upon the question, at what time the writ in this case was made, and found that it was not too soon according to the instruction of the Judge on that point, to which there is no exception taken. Courts take notice of the local divisions of the State, as into counties, cities, towns, &c. and of the relative position thereof, but not of the precise boundaries and distances. Greenl. Ev. 8. And they are not bound to take judicial notice of the local situation and distances of the different places in counties from each other. 4 B. & Ald. 243. The writ, which was made in Alfred, was in the hands of an officer of the county of Cumberland in one hour after it could have been a valid writ. But what was the distance between the place where the writ was purchased and that where the attachment was made, or the mode adopted to transmit the writ to the officer, does not appear. We do not think that the verdict is so manifestly against evidence on either of these accounts as to justify us in disturbing it.

The amount of the note in suit would depend upon mere calculation upon precise and well known rules. If usury was not proved, the deductions to be made from this amount would be the result of testimony, concerning which there was no controversy. It is evident, that there was an error in computation, in making up the damages, which should be corrected. And the verdict is to be set aside, and the action to stand for trial, unless the plaintiffs shall cause a remittitur of $633,69, to be entered of record, which his counsel have offered to do; in which case, exceptions and motion overruled.

NOAH HOOPER *& al. versus* LEVI BRUNDAGE.

Where mutual demands exist between the parties, one of them cannot by an assignment of his cause of action, defeat the right of the other to set off the judgments rendered thereon.

And if one judgment is recovered in the Supreme Judicial Court, and the other in the District Court, this does not prevent the set-off.

But the attorney may have made advances for his client in the progress of the cause, and if he has, he should have his lien therefor; and the Court in the exercise of its discretion may require an exhibit on the part of the attorney, showing the extent to which his equitable lien goes, and protect him to that extent. But this cannot, in any event, extend further than to fees legally accruing, and advances made by way of disbursements for the accruing costs.

If money has been paid into Court, and taken out by the attorney in part satisfaction of the demand sued, and has been paid over to his client, without deducting his fees, this will not avoid the lien of the attorney.

HOOPER & BICKFORD recovered a judgment in this suit for debt and costs, and had previously recovered a judgment for costs of a suit brought by Brundage against them, and recovered judgment against Brundage in a writ of entry, the costs of which remain unpaid. Brundage had brought a suit against them, wherein they had brought into Court $275,00, which was taken out by his attorney. The action was referred and the referees awarded a further sum of sixty dollars, and costs, and judgment was rendered on this report. Hooper & Bickford filed a written motion and a request to have their judgments, one of which was rendered in the District Court for this county, set off against the judgment of Brundage against them.

Haines, for Brundage, objected to the set-off because that it was assigned by Brundage to Beatty in Feb. 1842, after the causes of action had accrued on both sides, but before judgment in the plaintiff's present suit. He referred to *Makepeace* v. *Coates,* 8 Mass. R. 481. He also objected, that this Court could not order a set-off of a judgment of the District Court against one in this Court. The defendant's counsel also insisted that if a set-off was allowed, he should be allowed to retain sufficient to pay him as the attorney of Brundage, " for his fees

and disbursements which are taxable by law in this suit, and for attorney's fees."

J. Shepley and *Leland*, for the plaintiffs, said they knew of no valid assignment to Beatty; but that this was immaterial to them, as Brundage could only assign any balance due him, which in this case did not exist. Two of the judgments were rendered before the alleged assignment, and the cause of action in the other had arisen long before that time. Rev. St. c. 117, § 35; *Hatch* v. *Greene*, 12 Mass. R. 195; *Burnham* v. *Tucker*, 18th of our Reports, 179. As to the second objection. The parties are the same in all the judgments, and it can make no difference, whether they were recovered in the same Court, or in the same county, or in different ones. The Court have unrestricted power to set off judgments, both by statute and at common law. Rev. St. c. 117, § 35; *Barrett* v. *Barrett*, 8 Pick. 342; *Moody* v. *Towle*, 5 Greenl. 415. The lien of an attorney on a judgment cannot extend beyond his taxable costs in the suit as attorney, and cannot include witnesses' fees, jury fees, referees' fees, costs of reference, or any sums properly paid by the client. Nor has the attorney any right over the judgment, to retain it for payment of his balance, even for charges in conducting this suit, and certainly not for other services. But as the attorney took the money out of Court, he has, or should have, received his pay from that source, and ought not to have any thing paid to him by the plaintiffs.

The opinion of the Court was drawn up by

WHITMAN C. J. — Brundage, it appears, recovered judgment against the petitioners, Hooper & Bickford, for $335,00 debt or damage; of which sum $275,00 had been paid by money brought into Court under the common rule, and taken out by the said Brundage; leaving $60,00 of the debt or damage unsatisfied. Brundage was, at the same time, indebted to Hooper & Bickford, on several judgments to a much larger amount. The application is to have the judgment first named, set off against the judgments last named, in satisfaction *pro*

tanto. To this the counsel for Brundage objects; alleging that the judgment recovered by him had been assigned to one James Beatty. But it appears that the debts due on the judgments in favor of the petitioners accrued before any such assignment. And it is a principle in equity, that an assignee of a chose in action takes it subject to all the equities, which exist in favor of the debtor therein. Brundage, therefore, by an assignment of his judgment, could not defeat the right of the petitioners to have the set-off, petitioned for by them, allowed. The Revised Statutes, c. 117, § 35, clearly recognize this principle. That one of the judgments recovered by the petitioners was obtained in the District Court, forms no sufficient obstacle to the set-off. *Moody* v. *Towle,* 5 Greenl. 415; 2 Stephens' Nisi Prius, 1188, and cases there cited. A discretion, however, is to be exercised by the Court as to the set-off, so far as respects the lien of the attorney of Brundage for his costs. The fact, that $275,00 had been received towards the judgment, does not conclusively show, that those costs were paid or deducted therefrom. For aught that appears, the attorney may not have been notified of the intended set-off; and may have paid the whole of the $275,00 over to his client, relying upon the balance remaining due for his reimbursement. The attorney may have made advances for his client in the progress of the cause; and, if he has, he should have his lien therefor. The Court in the exercise of its discretion, may require an exhibit on the part of the attorney, showing the extent to which his equitable lien goes, and protect him to that extent. It could not, in any event, however, extend further than to fees legally accruing, and advances made by way of disbursements for the accruing costs.

Samuel Bradeen *versus* Aaron Brooks *& al.*

Where by the contract of sale of timber trees, the property in the trees passes to the vendee subject to a lien created by the contract for the payment of the agreed price thereof, and by its terms the possession was to remain with the vendor until the money was paid or security furnished, the lien is not destroyed by any possession taken by the vendee, authorized by the contract, in the usual course of such business.

If by the contract of sale the vendor of standing trees has a lien on the trees for their price, it will not be lost, should the vendee cut them and convert them into mill logs in manner provided in the contract.

Where there is no fraud, the vendee can transfer no greater rights to a third person by a sale, than he had himself.

This was an action of trover to recover about 1300 mill logs marked W. H. It appeared that Joseph W. Haley by contract in writing, agreed to purchase of the plaintiff the standing trees on a lot of land for $350,00, and that he gave his notes to the plaintiff at that time for the purchase money.

The following is a copy of the contract, which was in the handwriting of the plaintiff.

"Know all men by these presents, that I Samuel Bradeen, have this day sold to Woodman Haley, all the pine timber that I own on the east side of Joseph Bradeen cove lot. That is, all the pine timber that is over twelve inches through, two feet from the ground, and suitable to make boards. He is to have one year to take them off, he is to make as little waste as possible in the growth, and the timber is to be holden in said Bradeen's possession until the said Haley shall pay said Bradeen three hundred and fifty dollars or give him such security as may be satisfactory to the said Samuel Bradeen, and the tops are to be left on the ground, only what he, the said Haley, may want to burn for camp wood, while he is hauling the timber.

"The condition of this agreement is, that he, the said Haley, shall pay two hundred dollars by the first of April next, and the remainder within one year from date. All the tops are said Bradeen's, after the logs are hauled. Dated, Waterborough, 7th November, 1840."

That during the following winter, Haley caused the logs to be cut and marked with such mark as he pleased, and did mark them with the mark aforesaid, and caused them to be hauled on to the bank of the Little Ossipee river, on the land of one Earle by his consent. That on the 10th of February, 1841, the said Haley by bill of sale, sold the logs to the defendants and received $20,00 cash in part payment; and the logs were, about the first of April, there surveyed and turned into the river to be floated to a place of manufacture, and that soon after, the defendants paid said Haley for said logs in full by notes and cash, and that the defendants afterwards caused them to be floated to their mills on the Saco river below, for manufacture. It appeared that the plaintiff was present and saw the defendants causing said logs to be surveyed and rolled into the river, and it did not appear that he made any remarks respecting these proceedings, other than is hereafter stated. There was testimony tending to prove, that one of the defendants, on an evening while they were thus at work during the day, stated that the plaintiff had been where they were at work that day, and stated that he had a claim or lien on the logs for $200,00, and that the two other defendants about that time, the first of April, 1841, were informed by the plaintiff of his claim or lien for the purchase money of $350,00, and that they said "they were about to pay Haley $200,00 soon, and were as willing to pay him as Haley, and to secure remainder to him as Haley." It was admitted that plaintiff demanded the logs on the 10th of May, 1841, of the defendants, before the suit was brought.

Shepley J. presiding at the trial, ruled, that the contract between the plaintiff and Haley, conveyed the property in the logs to Haley unconditionally, subject to a lien created by the contract for the payment of the agreed price, and that the plaintiff had not lost his lien by permitting, or not resisting the proceedings before stated, if the jury should be satisfied that those proceedings all took place according to the usual and accustomed course of business in relation to this species of property, which course of business was well understood by all

the parties. And upon this ruling the defendants consented to be defaulted, subject to the opinion of the Court on their rights.

If this ruling was erroneous the default was to be taken off, and a new trial granted, or such other disposition made of the action, as the Court might adjudge to be legal and just to determine the rights of the parties.

Bradley, for the defendants.

The term *lien*, when used by a Judge in a Court of law is to be understood in its legal sense. 2 English C. L. Rep. 330.

Lien is a right in one man to retain that, which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied. Such is the definition given by Grose J. in *Hammond* v. *Barclay*, 2 East, 235, and adopted by Justice Story. Story's Ag. § 352. Other definitions are given but they do not vary essentially from this. 6 East, 26; 18 Ves. 4; Story's Ag. § 361. A voluntary parting with the goods will amount to a waiver or surrender of a lien. Story on Ag. § 367; 6 East, 27; 3 Shepl. 347; 18 Ves. 188. No lien can be acquired, unless the property on which it is claimed come into the possession of the party claiming it. *Cowan* v. *Adams*, 1 Fairf. 381; 3 T. R. 119; 2 Scott, 238.

As between Bradeen and Haley, the former never had any possession of the logs. If he had any possession at any time of any thing on this land, it was of the standing trees, and not of the logs after they were cut. The cutting, marking and hauling away of the logs by Haley were done with the assent of the plaintiff, who was thereby divested of his possession, if he had any. He did these things for himself, and not as the agent of the plaintiff. Haley did every thing he could do to take the entire control and possession of the logs.

There is no usage in this business which can control the general law in relation to liens. Greenl. Ev. 336, note 4; 2 Mason, 236; 9 Cowen, 116; Story's Ag. § 378.

The plaintiff reserved the right — not of property, for he

had sold it — but the right to retain it, until he was paid or secured. Haley entered, cut and hauled away the logs without dissent or objection on the part of the plaintiff. It was a ceasing to retain or hold possession of the logs, and was equivalent to a delivery of them. If the delivery or permission was conditional, it was incumbent on the plaintiff to show, that it was so. *Leighton* v. *Stevens*, 1 App. 154; 6 Cowen, 256. And if not so proved, the delivery will be deemed absolute. By the contract the property passed unconditionally to Haley, and the defendants are *bona fide* purchasers without notice of the plaintiff's claim.

What is the law applicable to such contracts?

1. If the sale was for cash, and the property is delivered without insisting upon it, all claim of the vendor on the property is at an end. *Chapman* v. *Lathrop*, 6 Cowen, 110.

2. If the sale was on time, and for security to be furnished by the vendee, the vendor has a right to hold the property until the security is furnished; but if he parts with the possession, without the security, and the delivery is not conditional, his claim on the goods is gone, even as against his vendee. 25 Wend. 640; 4 Pick. 517; 4 Mass. R. 405. The delivery under such circumstances is a waiver of the obligation, and the vendee becomes the absolute owner. 6 Wend. 77; Long on Sales, (Rand's Ed.) 450, 275; 14 East, 308; 3 T. R. 485; 3 Shepl. 347.

3. Even if the delivery is conditional, and the vendor unreasonably neglects to claim his security, agreed to be furnished, he waives the condition, and the delivery becomes absolute. 8 Wend. 247; 6 Pick. 267; 4 Mass. R. 405; 8 T. R. 406; 1 Shepl. 428; 9 Greenl. 79; 3 Fairf. 343.

It was contended, that the ruling of the Judge at the trial was erroneous, and that a new trial should be granted.

Clifford, for the plaintiff.

Liens generally arise either from express contract, the usages or customs of trade, or from the manner of dealing between the parties. 15 Mass. R. 394; 1 B. & Ald. 582. This is a case of lien by express contract, and the rights of the parties

depend upon the terms of the contract of sale. 3 Met. 355; 24 Pick. 204; 3 Metc. 9. The signification of lien is variously stated in the books, and does not appear always to have been used in a precise or well defined sense. It is sometimes applied to mortgages, sometimes to pledges or pawns, and sometimes to conditional sales, and perhaps to other cases. A lien is simply a right to possess or retain property until some charge attaching to it is paid or discharged. In general a lien is recognized to exist only when it is connected with the possession, *or the right to possess* the thing itself. 2 Dane, c. 44, art. 1; 1 Story's Eq. § 506; 2 Story's Eq. § 12, 16; Montague on Liens, 1, note a. By the contract in this case, the plaintiff was to retain his ownership of the property until the purchase money was paid or secured. The principle involved in the present case has been settled in this State. *Emerson* v. *Fisk*, 6 Greenl. 200; *Waterston* v. *Getchell*, 5 Greenl. 435.

There was a notice of the plaintiff's claim before any delivery over by Haley to the defendants, and before they had paid him for the logs. But if there had been no notice, the purchaser could derive no higher title than the vendor possessed. 1 Johns. R. 471; 3 Fairf. 341; 1 Fairf. 310; 14 Maine R. 77; 13 Johns. R. 434; 8 Greenl. 181; 7 Greenl. 241; 17 Mass. R. 110; 2 Kent, 324; Sug. on Vend. 393; 14 Wend. 31; 1 Hill, 303; 20 Wend. 267.

It is said that the plaintiff's lien has been divested by parting with the possession. It is sufficient that the sale and delivery were both conditional. Haley entered under the contract, and in subordination to it. The possession of Haley was the possession of the plaintiff. 1 Fairf. 381; 10 Wend. 318; 3 Wend. 280; 11 Wend. 77; 9 Cowen, 680; 5 N. H. R. 286.

If the actual possession of property, on which there is a lien, be impracticable or inconvenient, the special property will vest in the person entitled to such lien without an actual delivery or possession. 12 Mass. R. 300; 3 Greenl. 427; 5 Greenl. 309; 5 Pick. 5; 24 Pick. 42. The actual delivery of goods does not of itself transfer an actual ownership in them, but to perfect the title in the vendee, there must be a

consummation of the contract of sale. 17 Mass. R. 611; 1 Salk. 113; 1 H. Black. 362; 13 Mass. R. 87; 6 East, 614; 7 T. R. 125; 4 B. & P. 237; 1 Salk. 113; 2 Campb. 240; 2 H. Black. 316; 5 Taunt. 617; 13 Johns. R. 434; 3 Cowen, 84; 2 Johns. R. 17, 418; 3 Johns. R. 399; 17 Mass. R. 197; 3 Greenl. 428; 1 Pick. 389. If the possession is consistent with the contract, it does not impair the lien. 8 Taunt. 676; 2 Cowp. 432; 1 Powell on Con. 37; 1 Br. & Bing. 506; 13 Maine R. 377. Lien by contract rights depend upon the terms of the contract. Actual possession is not necessary to render a lien valid, if there be a constructive possession. One man may have the actual possession or custody of a chattel, while another has the legal right, or constructive possession. 2 Pick. 512; 12 Pick. 81; 9 Pick. 347; 12 Mass. R. 131; 4 B. & Cr. 652; 14 Pick. 497; 19 Pick. 217; 2 Pick. 206; 6 Pick. 280. There was no delivery of the property to Haley, and there was no necessity of one back. 24 Pick. 89; 12 Pick. 316; 1 Story's R. 68; 1 Sumn. 73; 3 Fairf. 341; 9 Greenl. 47; Shep. Touch. 118; 10 Pick. 582. Where goods are sold to be paid for on delivery, the vendor has a lien. 13 Johns. R. 434; 6 Wend. 7; 15 Maine R. 349; 4 Pick. 449; 22 Pick. 535; 20 Pick. 280. Where some act remains to be done, and there is no evidence that the parties intended an absolute sale, the property does not pass. 20 Pick. 399; 7 Wend. 404; 15 Maine R. 320; 14 Maine R. 400; 11 Pick. 50; 9 Pick. 558; 2 Paige, 172; 1 Paige, 312; 8 Pick. 543; 6 Cowen, 250; 2 Kent, 497; 4 Wash. C. C. R. 588; 4 Mason, 294; 22 Wend. 659; 23 Wend. 372; 2 Pick. 607; 15 Mass. R. 244; 5 Johns. R. 261.

Where property is sold and delivered conditionally, the title does not pass until payment is made or the condition is performed; and if the vendee sells without performance, the first vendor may maintain trover against the last vendee, and this too without demand, or refusal to surrender the same. 19 Maine R. 154, 247; 2 Pick. 512; 20 Maine R. 391; 2 Fairf. 28; 8 N. H. R. 325; 11 Wend. 80; 2 Campb. 335; 13 Pick. 294; 10 Mass. R. 311; 2 Metc. 350; 9 Pick. 4. The taking

of a bond, bill, or note, does not affect the rights of the parties. 13 Maine R. 303.

The opinion of the majority of the Court was drawn up by

TENNEY J. — The mill logs in controversy were taken from trees, which were the property of the plaintiff previous to his contract with Haley. By that contract, which was in writing, the timber was sold to Haley to be taken off within one year, he promising to pay the price agreed upon at certain stipulated times. For the plaintiff's security, he was to hold possession till he should be paid or otherwise secured to his satisfaction. Haley cut and took off the timber in pursuance of the contract, marked it as he pleased; and deposited it on the banks of the stream, through which it could be driven to a market, and on land of a third person, whose consent he obtained for the purpose. After all this was done, Haley entered into a contract with the defendants to sell the logs to them, they paying at the time twenty dollars, and agreeing to pay the residue at a future day. For the present inquiry, it is settled, that about the time, that the plaintiff was entitled to his first payment, and the defendants were measuring the logs, where they had been deposited, and were rolling them into the stream, he notified them that he had a claim upon the logs; and that the defendants said, they were about making a payment to Haley, and they were as willing to pay and secure the plaintiff as him; that a demand was made on the 10th of May, 1841; also that all the proceedings took place according to the usual and accustomed course of business in relation to this species of property, which was well known by all the parties.

It is contended by the defendant's counsel, that the plaintiff having interposed no objection to the cutting and marking the timber, and taking the same from the land on which it grew, must be considered as having surrendered the possession, which he reserved the right to retain in the original agreement; and that thereby the sale to Haley became perfect and absolute,

before the latter transferred his rights in the timber to the defendant.

An unconditional contract of sale vests in the purchaser an absolute right immediately; between the parties, a formal delivery is unnecessary to constitute a sale. But if by the agreement, possession is to be retained in the vendor, till some condition shall be performed by the vendee, a delivery either actual or constructive is essential to the completion of the transfer, unless the condition shall be fulfilled. If by any subsequent understanding expressed or implied, *that* possession is relinquished by the vendor, he cannot afterwards legally regain it; and the property will pass to the vendee, although the condition be unperformed.

But it often may happen, that the property which is the subject of a conditional sale, may be found in the hands of the purchaser, and the right, which the original owner had under the contract remain unimpared. He does not relinquish his power over the property by a permission to the other party merely to have it in his custody. The latter may borrow it, or be possessed of it as the servant of the other; or for the purpose of bestowing upon it some labor, not inconsistent with the continuance of the possession which the former owner was entitled to retain. The sale of a chattel may be perfect, excepting that the delivery is withheld until the price shall be paid, and the purchaser may have the entire use by the other's consent, and the sale may not become absolute. In such a case the mere passing of the property into the hands of the vendee, divests the other party of no right, unless it be accompanied with the intention of surrendering the very possession, which it was agreed should remain in him. As in every other contract, the design of the parties is to determine the character and effect of the transaction.

In the contract now under consideration, the property by its terms did not become absolute in Haley. There was a condition to be performed by him, before his title could be perfect. There was a right remaining in the plaintiff, which nothing short of payment of the agreed price, or his own act, could

take away. The trees were not to remain standing, that Haley might derive a benefit from their growth, or a supposed increase in their value, but they were purchased by him, that they might be taken away and manufactured. The removal was made with a view to receive the avails, after payment should be made to the plaintiff. Marking the logs, according to the facts in the case, was in the usual and accustomed manner of treating this kind of property. Hauling them to the banks of the stream was of the same character. Every thing done by Haley in these operations was in pursuance of the intention, and in furtherance of the object of the parties, as clearly indicated by the written contract between them. If the plaintiff had prevented Haley from cutting, marking and removing the trees, it would have defeated the whole object of the latter in the purchase, or subjected him to an earlier payment of the purchase money than was contemplated in the contract. On the other hand, if the acts of Haley without the plaintiff's objection, made the sale absolute, it was taking from the plaintiff the security which by the contract he was entitled to, through the identical acts, which it was agreed in the same contract should be performed.

But it is insisted by the defendant's counsel, that the contract was an unconditional sale of the property, subject to a lien created thereby; and that the law touching liens is applicable to this case. The term lien is often used without the greatest precision. The legal definition as given by Judge Story in his commentaries on the law of agency, § 352, is "a right in one man to retain, that which is in his possession, belonging to another, until certain demands of him, the person in possession, are satisfied." As examples of parties having this right, are common carriers, wharfingers, shipwrights, blacksmiths and other artificers, who are entitled to retain possession of the property, which they have, until some charge thereon shall be paid. The property is that in which the one having the lien, had no interest, previous to the existence of the lien. The plaintiff in this case owned the property, and by the sale did not transfer an unconditional title. Although there is a

manifest distinction, yet it is common to use the term *lien* in a more extended sense than by the definition quoted, and it is often applied to an interest similar to that which the plaintiff retained by his contract to the property in controversy; and we propose to examine the question on the ground, that the property in the logs, did pass to Haley unconditionally, subject to a lien created by the contract for the payment of the agreed price.

At the time of his contract, the plaintiff had the possession of the property by reason of his being the entire owner thereof. This possession continued after the execution of the contract, because by its terms possession was withheld from Haley. We assume, that the general property was in Haley, subject to a lien in favor of the plaintiff, arising from the contract, for the security of the purchase money. That lien was then perfect, and it must have so continued unless something occurred afterwards to defeat it. Possession in the plaintiff or the right thereto was necessary for the preservation of this lien. But such possession could have been constructive as well as actual, and what will amount to a possession sufficient for the continuance of a lien will depend upon the nature of the articles, and the intention of the parties. Standing trees or mill logs cannot be in such obvious personal possession as chattels of a less bulky and more portable description.

One may have a valid lien upon property while it is in the hands of the person, who pledged it; as if an innholder should have a horse for the purpose of being fed only, which he had before pledged to his creditor to secure a debt; or if a watchmaker deliver a watch as a pledge and afterwards receive it for the sole purpose of showing it to a friend, or to repair, in neither case is the lien extinguished; for the right of immediate possession is in the pledgee, and the possession of the pledger is that of the pledgee; it being parted with for a specific purpose, not inconsistent with the existence of the pledge. And it is immaterial, whether such qualified possession in the pledger is in obedience to the agreement made, when the pledge was given, or by a subsequent understanding

between the parties, provided there be no relinquishment of *that possession*, which perfected the lien.

In the case at bar, there is no evidence, that the plaintiff voluntarily relinquished the possession of the property or surrendered the lien, by any act or declaration, or by an omission to do any thing to preserve it after his contract with Haley; indeed there is no evidence of any communication between them. If the lien was lost, it was by some act of Haley authorized by that contract, for every thing done by him, excepting the agreement with the defendants, which it is not contended was in any wise with the plaintiff's consent, was according to the terms of the contract, the intention of the parties thereto, and the usual course of proceeding in relation to that species of property. The plaintiff could not have prevented Haley from cutting and removing the logs, without violating the contract. And any disposition of the property attempted by Haley, inconsistent with the agreement, could be legally forbidden by the plaintiff, who had in no way parted with that right, which he retained in the agreement of sale.

If the plaintiff had a lien on the trees, while standing, did it not attach to the logs, after they were cut and removed, when by the contract, by which they were sold and cut and removed, the possession was to remain in him as security for the payment of the stipulated price? If the acts of Haley, which were all authorized by the contract, discharged the claim or lien of the plaintiff, it involves the absurdity, that the contract created a perfect lien, and at the same time destroyed it.

The right of Haley to cut and remove the trees was not intended by the parties to the contract as a surrender of that possession, which the plaintiff was to hold for his security. The possession of Haley for the purpose of cutting, marking and taking off the timber, was the possession of the plaintiff, and it was in Haley to that extent, as the plaintiff's bailee. The property, in the change from trees to logs, did not lose its identity, and if the plaintiff held them in one shape for his security, so did he in the other. So far as Haley conducted

as it was contemplated in the contract, that he should do, he is presumed to have had the property according to its terms. An attempt to have held it in any other manner, would have been a wrong in him. He must be considered as having cut and taken away the timber without interfering with the plaintiff's possession, because he was to do all this, and the delivery was not to be made to him, till his liability was discharged.

Again, it is insisted, that as the defendants are *bona fide* purchasers, without notice of the plaintiff's right, *they* are entitled to hold the property unincumbered thereby. It was a maxim of the civil law "*Nemo plus juris in alium transferre potest, quam ipse habet.*" Lord Kaimes, in his Historical law tracts, title "History of property," vindicates this principle in the transfer of chattels and says, "in the progress of society, property acquired such stability and energy as to affect the subject wherever found, and to exclude even an honest purchaser, where the title of his vendor was discovered to be defective." This doctrine is fully sustained by the Courts in England, and in this country, where there is no fraud. In the case at bar, it is not pretended, that the plaintiff's rights are defeated or diminished by any fraud between him and Haley. The logs never vested absolutely in the purchaser, so that the plaintiff could not have asserted at any time a control over them. The contract was in every respect legal, and Haley's vendees could derive no title superior to his own.

If the defendants have been losers, it is attributable to their own neglect. The money due from them to Haley, when they had notice of the plaintiff's claim, was much more than sufficient to discharge it. They could have extinguished that claim, and by the authority of *Partridge* v. *Dartmouth College*, 5 N. H. R. 286, and other cases cited for the plaintiff, the same amount must have been allowed to them by Haley.

Default must stand.

WHITMAN C. J. remarked: that the bill of sale of the timber seemed to him, when taken together, to import a conditional sale. The condition not having been complied with, the plain-

tiff had a right to reclaim, and to maintain trover for it. The doctrine of liens is not applicable to such a case. Story on Agency, c. on liens. But the default may well stand, as the parties have agreed that such disposition shall be made of the cause as the Court may adjudge to be legal and just. But he could not assent to the reasoning in the opinion as applicable to the state of the case.

BENJAMIN FARNHAM *versus* WILLIAM L. O'BRIEN.

While the common law doctrine is admitted, that there must be proof of a consideration to support an unsealed written contract, the position cannot be maintained without limitation, that a moral obligation is a sufficient consideration. There are many moral duties, which cannot be enforced at law, although a verbal or written promise may have been made to perform them.

Where one person has voluntarily received a benefit from another, not gratuitously conferred, or has been the occasion, without sufficient excuse, of loss or injury to another, there arises a moral obligation to compensate him for the benefit received or the loss occasioned; and the law will enforce the performance of this duty, if some statute, or rule of public policy, providing for the general good even at the expense of individual loss, does not interpose.

A contract, void by the statute of frauds, from which a party might otherwise have derived a future benefit, is not a legal consideration for an express promise; but if one party, by such contract, has induced the other to perform in part, or to incur expense in preparations to perform, while he refuses him the future benefit of the contract, the loss and injury thereby occasioned is a valid consideration for a promise to make compensation therefor.

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

This was an action of assumpsit on an account annexed to the writ, and a special count. To sustain the action the plaintiff introduced a letter written to him by C. R. A. of which this is a copy.—

"Cornish, Oct. 15, 1840.—Mr. Farnham,—I am under the necessity, in consequence of unexpected circumstances, to say to you, that my house will not be in readiness for you so soon as you may have expected, and under the present circumstances

it will not be best for you to bring any more of your goods. I shall feel bound to return your goods to Alfred or settle with you for the disappointment.

"Yours—W. L. O'Brien."

Mr. A. testified that he wrote said letter for O'Brien, but had no previous authority to write it; that he was coming to Alfred, where Farnham lived at the time, and was instructed to deliver a message to said Farnham; that he did not see Farnham, and wrote the letter aforesaid, and on his return to Cornish, he informed O'Brien what he had written, who approved of the same and said it was right.

Testimony was then introduced by the plaintiff, showing that the defendant in the month of August, 1840, had agreed by parol to let his tavern stand, at Cornishville, to the plaintiff for one year at a rent of $125. To the admission of this and all other parol evidence the defendant objected on the ground that the contract was within the statute of frauds. The District Judge ruled, that the objection was good as to the contract for letting the tavern, but that the parol agreement imposed upon the defendant a moral obligation, which was a good consideration for the express promise contained in the letter written by A. and that under that promise, the plaintiff might show any expense he had been to in moving goods to Cornish, and the injury in not having the stand to occupy as a tavern, or the extent of the damages he sustained by reason of the disappointment. The plaintiff then introduced evidence showing, that sometime in September, 1840, he had moved one two-horse load of furniture from Alfred to Cornish, and tending to prove that it was put into the tavern house for which he had agreed; that he bought a tavern sign and had it varnished and lettered for said tavern house; that he had made three journeys from Alfred to Cornish for the purpose of fitting up and occupying the tavern, and that in December, 1840, the plaintiff removed the goods from said tavern house, where he had carried them. And also evidence showing the profits he would have made by occupying said tavern for the year as agreed.

The defendant contended that he was only bound to return

said furniture to Alfred, or settle for the disappointment to the plaintiff for not reconveying the same. Also, that damages could not accrue to the plaintiff for his particular items of expense, and also for injury in not having the tavern, denying that any damages for injury in not having the tavern could be allowed him in any event.

The District Judge charged the jury, that the action was for breach of contract, and to recover damages for not performing the same; that the contract, being by parol, no damages could be recovered, but for the subsequent letter ratified by the defendant; that the defendant was under a moral obligation to the plaintiff, which if they believed the contract was made as alleged, and broken by the defendant, was a sufficient consideration for his promise in the letter, that the letter might be regarded as a civil intimation, that the defendant would not let his tavern stand to the plaintiff, but of this they would judge; that by the letter the defendant promised to return the goods to Alfred or settle for the disappointment; that it was not contended that the defendant had returned the goods or offered to do so; that he should leave it to the jury to determine what was intended by the defendant by the term "disappointment" in the letter aforesaid, whether he intended only to engage to settle for the disappointment in not returning the goods to Alfred, as contended for by the defendant's counsel, or whether he intended the disappointment to the plaintiff in not having the tavern stand according to the alleged parol agreement. His impression was, that the latter was what was intended, and if such should be their opinion, they should give such damages as they believed the plaintiff had sustained in consequence of the loss of said stand, if they were satisfied that it was without the fault of the plaintiff, or without any neglect of his to comply with the terms of the agreement; that the stand was withheld from him, and that he was ready to perform on his part; that they could determine from the whole evidence, whether it was not an undertaking to indemnify him for the loss he had sustained in time and money in making preparation to remove to Cornish, and in removing his goods

there, purchasing a sign, having it prepared, &c.; that if the plaintiff had been led to make these arrangements by the act of the defendant, they would judge whether it was not reasonable to suppose that he intended to indemnify him for them.

The jury returned a verdict for the plaintiff, assessing damages in the sum of seventy-five dollars.

To the rulings and instructions of the Court the defendant excepted.

Clifford, for the defendant, contended that the rulings and instructions of the District Judge were erroneous.

A moral obligation is not a sufficient consideration to support an express promise in the broad and unqualified sense laid down in the instruction to the jury, or in any sense within the range of the facts in this case. A moral obligation is a sufficient consideration for an express promise only in cases, where there has been some pre-existing legal obligation, which has become inoperative by positive law. An express promise can only revive a precedent good consideration, which might have been enforced at law, had it not been suspended by some positive rule of law. 3 Bos. & Pul. 249, note (a); 3 Pick. 207; 15 Pick. 159; 1 Metc. 520; 2 Barn. & Adol. 811; 8 Ad. & Ellis, 467; 7 Conn. R. 57; 16 Johns. R. 281, and note; 2 Kent, (2d Ed.) 465; 13 Johns. R. 257. In the present case, the parol agreement was within the statute of frauds at the moment it was made, and never was binding or operative. The confusion on this subject has grown out of two cases in the first of Cowper, 284, and 290. An examination of the cases cited will show, that those in Cowper have been much restricted.

The instruction is erroneous, because it alleges, that the parol agreement "to let," was a good consideration for an express promise in the letter "to return the goods to Alfred or settle for the disappointment." The moral obligation resting on the defendant, if any, was to let his tavern to the plaintiff. This could not form a valid consideration to do an entirely different thing, but merely to do that. 7 Conn. R. 57; 3 B. & P. 249, at the close of the note. A repetition of a promise

within the statute of frauds does not revive it, or give it validity. 5 Greenl. 352.

The Judge's construction of the term "disappointment" was erroneous, and calculated to effect the rights of the defendant injuriously. It opens the door to proof wider and broader than the expression will warrant. His informing the jury, that they might put their construction upon it, is inconsistent with his own construction, and calculated to mislead the jury.

The promise in the letter was a mere *nudum pactum*, neither a benefit to the defendant, nor an injury to the plaintiff, and not binding. 4 East, 455; 18 Johns. R. 149; 7 Mass. R. 22.

But there was no promise made. The letter merely contained a proposition, which was not accepted. Both parties must be bound, or neither is. 1 Com. Dig. 411; 5 East, 16; 3 Greenl. 340.

It was also contended that the instruction with respect to the defendant's "undertaking to indemnify him (the plaintiff) for the loss he had sustained in time and money," was so clearly erroneous as to preclude argument.

N. D. Appleton, for the plaintiff, contended that the rulings and instructions of the District Judge were correct, and supported by numerous authorities, ancient and modern.

Where a man is under a moral obligation which no Court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a good consideration. 2 Black. Com. 445, and Christian's note, 3; Chitty on Con. (5 Am. Ed.) 46; 1 Dane, c. 1, art. 8, § 1; 2 Stark. Ev. 54; 1 Com. on Con. 24; Buller's N. P. 129; 1 Selw. N. P. 1; 1 Esp. Dig. 95; Cowper, 284, and 289; 2 East, 505; 4 East, 76; 7 East, 231; 3 Taunt. 311; 5 Taunt. 36; 2 B. & Adol. 811; 3 Mass. R. 438; 6 Mass. R. 43; 15 Mass. R. 93; 2 Caines, 150; 14 Johns. R. 378; 2 Binney, 501; 5 Ver. R. 175; 14 Johns. R. 468; 2 Stark. R. 153.

Attempts have been made to limit and qualify the generality of the principle broadly laid down, that a moral obligation is a sufficient consideration for an express promise. Most of the

cases cited for the defendant are of this class. But they all go to bring the present case within the rule as limited and qualified.

The contract between these parties was made on a good and sufficient consideration, and would have been valid in a court of law, but for the statute of frauds. This was a good and sufficient consideration for the express promise to pay, contained in the letter.

The proposition advanced in the argument for the defendant, that this is a sufficient consideration "only in cases where there has been some pre-existing legal obligation," is not sustained by the authorities cited to support it. The cases were commented upon, and the conclusion drawn, that not only they did not sustain the position taken by the counsel for the defendant, but that they did justify the ruling of the Judge.

The contract was valid, were it not for the statute of frauds; and where that statute is not interposed, such promise would enable the plaintiff to recover. 17 Wend. 71. The original agreement was not void, but voidable only. 6 East, 602; 15 Mass. R. 92; 2 T. R. 763; 2 Dev. & Bat. 300.

The contract was valid because it was partly executed. Cowper, 294; 15 Mass. R. 92.

The express promise in the letter was to do precisely what honesty and rectitude required of the defendant, after refusing to complete the contract.

The proposition in the letter required no formal acceptance; and if it did, the commencement of the suit upon it, was sufficient to prove its acceptance.

No one contends, that the mere repetition of the original promise would make it any more valid. But here it was in substance repeated in writing, and the letter may be considered a recognition of the parol agreement, sufficient to take it out of the statute of frauds. 15 Pick. 159.

The construction of the letter, intimated by the Court and adopted by the jury, was the natural, fair, and proper construction, and was properly submitted to the jury. 16 Maine R.

79; 17 Maine R. 402; 1 Stark. Ev. 462; 1 T. R. 180. The rule of damages was correctly stated. 17 Wend. 71.

The opinion of the Court was drawn up by

Shepley J. — While the common law doctrine is admitted, that there must be proof of a consideration to support an unsealed written contract, the position cannot be maintained without limitation, that a moral obligation is a sufficient consideration. There are many moral duties, which can never be properly enforced at law, although a verbal or written promise may have been made to perform them. Under certain circumstances there may be a very strong moral obligation to feed one who is hungry, or clothe one who is naked, or relieve one from suffering, or from peril; but no one would think, that the moral obligation acquired any additional strength from a promise to perform it. Nor would any one conversant with the doctrines of the common law consider, that these would compel the performance of such a promise. Other instances of moral duties of a like character have been presented in some of the decided cases. Judicial and other minds, perceiving that the position could not be received without limitation, have attempted to state some general rule or principle of limitation. The limitations presented have not always appeared to be satisfactory. The one contended for by the counsel for the defendant, "that a moral obligation is a sufficient consideration for an express promise only in cases, where there has been some pre-existing legal obligation, which has become inoperative by positive law," finds some support in the decided cases. But the case of a minor, who has bargained for property and receives the benefit of it, and has when of age promised to pay for it, is not one presenting a pre-existing legal obligation. And yet such a promise is generally admitted to be binding; and is often put as an example to illustrate the alleged rule, that a moral obligation is a sufficient consideration for a promise. And no case has been found, which denies, that a promise made by one of age to pay a debt contracted in infancy is valid.

When one person has voluntarily received a benefit from another, not gratuitously conferred, or has been the occasion, without sufficient excuse, of loss or injury to another, there arises a moral obligation to compensate him for the benefit received or the loss occasioned. And the law would enforce the performance of this duty, if some statute or rule of public policy providing for the general good, even at the expense of individual loss, did not interpose. In such cases the statute or rule of law would not be violated, if the person, who had received the benefit, or occasioned the loss, should voluntarily make compensation. And when he has promised to make compensation the moral obligation arising out of such benefit received, or loss occasioned, will be a sufficient consideration for it. Mutual promises, each for the other, are considered a sufficient consideration. But when such promises are so made, that the law will not enforce the performance of them, the parties cannot be supposed ordinarily to be either injured or benefitted. Neither receives a present benefit or suffers a present injury. And if the law will not require the performance, and there is no attempt to perform made by either party, there is no moral obligation arising out of a refusal to perform, binding either to make compensation for any expected gains or losses. But so far as one may by such promises, before they are retracted, have induced the other to perform in part, or to incur expense in a preparation to perform, while he refuses him the benefit of the contract, he would cause him to suffer loss. There is much difference between anticipated gains and a benefit already received or a loss experienced. By the application of these principles the case may be decided. It appears, that in the month of August, 1840, the defendant agreed, that the plaintiff might occupy his tavern house for one year, and the plaintiff agreed to pay him therefor the sum of one hundred and twenty-five dollars. This agreement was not made in writing and signed by the parties. The statute then in force, c. 53, § 2, provided that all leases not in writing and signed by the parties should have the force and effect of leases or estates at will only. The argument for the plaintiff there-

fore, that the contract remained unimpaired, although the law would not enforce a performance of it, fails, for the statute reduced the contract to a lease at will. And it will be perceived, that to consider the contract as continuing to exist for a year, and to allow the plaintiff to recover damages for the expected gains during that time, would be alike a violation of the statute provisions and the principles before stated. For it being but an estate at will, either party might determine it even before a change of possession. And this appears to have been done. And it does not appear, that the plaintiff has suffered other actual loss or injury, than was occasioned by the removal of some of his goods to and from the house, by the journeys made to prepare for his removal, and by the expense incurred in the preparation of a tavern sign. And according to the principles before stated and without a violation of the provisions of the statute, the plaintiff may perhaps recover on the second count in his writ. For if the language used in the letter approved by the plaintiff, could be construed into an engagement to regard the agreement originally made, still binding so far as to make it the basis of a compensation for expected gains for one year, the provisions of the statute would prevent the plaintiff from setting up such a contract.

Exceptions sustained and a new trial granted.

ABNER BURBANK *versus* WILLIAM BERRY *& al.*

After the Revised Statutes were in force, the oath to be taken by a debtor, arrested on mesne process before those statutes took effect and released on giving a debtor's bond, is that prescribed in Rev. Stat. c. 148.

A bond taken to liberate a defendant from arrest on mesne process, is subject to chancery; and the damage actually sustained is the measure of the plaintiff's claim.

Since the act of 1842, c. 31, amendatory of the Revised Statutes, was in force, the damages in such cases are again to be assessed by the Court, and not by the jury.

THIS suit was commenced Oct. 3, 1842, on a bond dated

June 9, 1841, given to procure the release of Berry from *arrest upon a writ* in favor of the plaintiff against him.

The case came before the Court upon a statement of facts, from which it appeared that the poor debtor's oath provided in the statute of 1836, had been duly administered to the debtor, Sept. 17, 1842, before two justices of the peace and of the quorum, both selected by the debtor, on Sept. 17, 1842. Final judgment in the action was recovered at the adjournment of the May Term to Aug. 17, 1842, more than fifteen days prior to taking the oath, the notice to the creditor having been given within the fifteen days. The justices certified, that the attorney of the plaintiff was present at the time of the taking of the oath, and objected to their jurisdiction, because more than fifteen days had elapsed after final judgment, and because they had not been legally selected, and that they overruled the objections.

It was agreed, that if the question as to amount of damages was properly for the decision of a jury, that Berry, the debtor, was without visible property and reputed to be poor; and that the Court should render such judgment in this case as they should deem authorized by law, and in case they should hold the question of damages to be triable by a jury, they were authorized to determine what, if any, damages the plaintiff has sustained, in the same manner as a jury should.

M'Donald argued for the plaintiff, and cited and commented upon Rev. Stat. c. 115, § 78, and the act of amendment of the Rev. Stat. in 1842, c. 31, § 9; *Hathaway* v. *Crosby*, 5 Shepl. 448; Stat. 1830, c. 463; Rev. Stat. c. 148, § 35, 36, 37, and 39.

Caverly argued for the defendants, and cited and remarked upon Stat. 1835, c. 195, § 7, 8; Stat. 1836, c. 245, § 3, 8; Rev. Stat. c. 115, § 78; *Goodwin* v. *Huntington*, 5 Shepl. 75; *Oriental Bank* v. *Freese*, 6 Shepl. 113; 6 Dane, 600; 3 Greenl. 156; 3 Shepl. 55; 6 Shepl. 152; 3 Shepl. 338; 4 Shepl. 386; Rev. Stat. c. 148, § 17, 5; Rev. Stat. repealing act, § 2, 4; 4 Shepl. 370.

The opinion of the Court was drawn up by

SHEPLEY J. — This suit is on a bond given by a debtor to liberate himself from arrest on mesne process. In a suit on a bond given to liberate himself from arrest on execution, it was decided, that the proceedings for a performance of the condition should be in conformity to the provisions of the Revised Statutes, after they took effect. *Morse* v. *Rice*, 8 Shepl. 53.

The reasons and principles, upon which that decision was founded, are applicable to the present case; and this bond must be considered as forfeited by a neglect to comply with those provisions. It has also been decided, that bonds taken to liberate one from arrest on mesne process were subject to chancery, and that the amount, for which execution should issue, was not regulated by the former statutes, and that the damage actually sustained was the equitable and proper measure of the plaintiff's claim. *Wilson* v. *Gillis*, 3 Shepl. 55; *French* v. *M'Allister*, 7 Shepl. 465.

It is contended, that the measure of damages in such cases is regulated by the Rev. St. c. 148, § 35. The language of the clause is, "and the like proceedings shall be had, and the like consequences shall result therefrom as herein before provided for the case of a debtor after arrest on execution, except as is mentioned in the following section."

The consequences resulting from the examination and disclosure of a debtor after arrest on an execution will be found to relate to the rights of the creditor to take the property, that may be disclosed; to the preservation of his lien upon it; and to the effect, which the certificate of the justices is to have to discharge him from imprisonment, and to exempt his body from future arrest. They are found in sections twenty-nine to thirty-four inclusive. These matters are not elsewhere provided for. There are provisions on these subjects in the sections preceding the seventeenth, but they relate to disclosures made before final judgment in the suit. The consequences are also in that clause stated to be those "before provided for;" but the damages to be recovered by a creditor for a

breach of the bond taken to liberate a debtor from arrest on execution had not already been provided for, and were afterward provided for in section thirty-nine.

Another question presented is, whether the damages should be assessed by the Court or by a jury. The clauses in the first part of the statute, c. 115, § 78, relate to bonds given by a debtor arrested on execution, and not to those given by a debtor arrested on mesne process. The last clause of that section, as originally enacted, would have required the interposition of a jury to assess the damages. It has, however, been amended by the act of 1842, c. 31, § 9; and the language of the act, c. 463, upon which the decision in the case of *Hathaway* v. *Crosby*, 5 Shepl. 448, was made, has been restored, so that the provisions of the statute are in substance the same in this respect, as they were at that time.

It appears from the facts agreed, that "the principal defendant is without visible property and reputed poor;" and that he took the oath prescribed by the former statute, the plaintiff's counsel being present, and having an opportunity to examine. Under such circumstances the Court does not feel authorized to issue execution for more than nominal damages.

AARON C. WALDRON *versus* WILLIAM BERRY *& al.*

In an action upon a bond given to procure the release of a debtor from arrest on mesne process, the condition of which has not been performed, where there was no evidence in relation to the amount of damages, excepting that the poor debtor's oath had been irregularly taken by the debtor before two magistrates who had certified that he was clearly entitled to have the oath administered after a disclosure of his affairs, it was held, that execution should issue for nominal damages only.

DEBT on a bond dated June 9, 1841, given to procure the release of Berry from arrest on mesne process at the suit of the plaintiff. Within fifteen days after final judgment in the suit, the plaintiff was cited by Berry to attend to his examination and oath before two justices, on Nov. 18, 1841, more than fif-

teen days after the judgment. On the day last mentioned, two justices of the peace, each of the quorum, selected by the debtor, administered to Berry the oath prescribed in the poor debtor act of 1836. It was agreed, that the Court should render such judgment, as the law authorizes, and assess such damages as a jury would be warranted in assessing. There was no evidence whatever respecting the ability or inability of Berry to pay the debt, unless what was shown by the proceedings before the justices.

M'Arthur argued for the plaintiff, and cited the poor debtor acts of 1835, and of 1836, and of the Revised Statutes; *Oriental Bank* v. *Freese*, 18 Maine R. 109, and *Morse* v. *Rice*, in Cumberland, (21 Maine R. 53.)

Caverly argued for the defendants, and cited *Hastings* v. *Lane*, 3 Shepl. 134; 12 Mass. R. 385; *Morse* v. *Rice*, in Cumberland (21 Maine R. 53.); *Oriental Bank* v. *Freese*, 18 Maine R. 112; 12 Wheat. 262; 18 Maine R. 152; 3 Metc. 568; 18 Maine R. 23; 3 Greenl. 156.

The opinion of the Court was by

SHEPLEY J. — The proceedings exhibited in the agreed statement of facts, do not prove a performance of the condition of the bond, as was decided in the case of *Burbank* v. *Berry*, *ante* p. 483.

In that case it was also decided, that the amount of damages to which the plaintiff might be entitled was not regulated by statute.

In this case there is no other testimony to prove the losses, which the plaintiff may have sustained, than the oath of the debtor irregularly taken before the magistrates, and their certificate, that he was clearly entitled to have that oath administered after a disclosure of his affairs. If there could have been any testimony produced to counteract the effect of these proceedings, it is to be presumed, that it would have been introduced.

In the absence of any such testimony the Court is not

authorized to conclude, that the plaintiff has suffered any material injury; and execution must issue for nominal damages only.

JAMES M. DEERING *versus* ROBERT CHAPMAN.

When part of the consideration of a promissory note is illegal, the whole note is void.

If a part of the consideration of a note be spirituous liquors, sold by the payee in less quantities than twenty-eight gallons, without license therefor, in violation of the statute, such note is wholly void.

And where partial payments have been made, less than the amount charged for ardent spirits, thus sold without license, and a note has been given for the balance of the account, it will nevertheless be entirely void.

THIS action was assumpsit on a note given by Isaac Chapman and the defendant to the plaintiff, January 5, 1839, for $39,44. The facts were agreed, from which it appears, that the plaintiff had an account against Isaac Chapman, amounting to $51,44, the first item being under date of Nov. 28, 1838, and the last Jan. 2, 1839. There were credits of cash, Nov. 30, 1838, $5,00; Dec. 3, $5,00; and Dec. 19, $2,00. The note was given on the day of its date for the balance. A part of the charges in this account, amounting to $27,66, was for spirituous liquors sold in the town of Saco by the plaintiff to Isaac Chapman, in less quantities than twenty-eight gallons, for the purpose of being sold out in small quantities in that town. At the times when the articles were sold and delivered, the plaintiff had no license authorizing him to sell spirituous liquors.

If in the opinion of the Court, the action could not be sustained for the whole or some part of the note in suit, judgment was to be entered for the defendant; and if it could, judgment was to be rendered for the plaintiff, for such sum as the Court should adjudge he was entitled to recover.

W. P. Haines, for the plaintiff, contended that the Stat. 1834, c. 141, ought not to be extended by construction; and that it would seem reasonable to suppose, that inasmuch as the

legislature has provided remedies in the act itself for any violation of the provisions of the act, that no further consequences should follow. This view is confirmed by the fact, that in other statutes, where it was intended to avoid securities, &c. they are made void by the acts themselves. In the English statute relative to the sale of spirituous liquors, 24 Geo. 2, c. 40, notes, &c. are expressly made void. By our statute it is not so, and it forms a good reason for believing, that the legislature did not intend to attach such consequences to securities given for liquors.

But however it may be in reference to that part of the note given for liquors, it would seem that the decisions are clear, that if the legal can be separated from the illegal part of the consideration of a note, that judgment will be given for amount of the legal part. Even in England, where such notes are expressly made void by statute, the legal part of the consideration may be recovered, if it can be distinguished. *Crookshank* v. *Rose*, 5 Car. & P. 21; *Gilpin* v. *Rendle*, Selw. N. P. 61; *Dawson* v. *Remnant*, 6 Esp. R. 24; *Spencer* v. *Smith*, 3 Campb. 9. This question has been decided, directly, in Pennsylvania. *Yundt* v. *Roberts*, 5 S. & Rawle, 139. The credits should be deducted from the amount of spirits, and that balance from the whole sum. This would leave $23,95, for merchandize; and for this sum and interest we ought to have judgment.

The case shows, that the liquors were bought to be sold again; and courts have held, that in such cases, even the act of 24 Geo. 2, c. 40, did not apply. Peake's N. P. R. 181.

There is no privity between the plaintiff and defendant in relation to the consideration. The goods were sold to Isaac Chapman, and the defendant cannot come into Court and insist on the defence set up here.

Hayes & Nye argued for the defendant in support of these positions.

1. The St. 1831, c. 141, forbids the sale of spirituous liquors without license, in such quantities as were here sold, under a

severe penalty. The note is void so far as it had for its consideration the spirituous liquors sold in such illegal manner. It is well settled that a contract made in violation of any statute provision is illegal and void; and that a security given in pursuance of it, or to carry it into effect, is illegal and void also. Nor can the price of goods sold in violation of a statute be recovered. Chitty on Con. (5 Am. Ed.) 417, 427; Metcalf on Con. in Am. Jurist, No. 43, 44, 45; *Hunt* v. *Knickerbocker*, 5 Johns. R. 327; *Greenough* v. *Balch*, 7 Greenl. 462; *Wheeler* v. *Russel*, 17 Mass. R. 258. It can make no difference, whether a statute prohibits a contract expressly, or only impliedly by the infliction of a penalty. 5 B. & Cr. 406; *Kepner* v. *Kelfer*, 6 Watts, 231; *Wright* v. *Geer*, 1 Root, 474; 1 Taunt. 136; Chitty on Con. (5 Am. Ed.) 419, 422, 694, 696; Carth. 252; *Mitchell* v. *Smith*, 4 Dall. 269; *Roby* v. *West*, 4 N. H. R. 287; 2 Kent, (4th Ed.) 466.

2. The partial illegality of the consideration of the note in suit, vitiates the whole note, and renders it entirely void. There is a distinction to be observed between a want, or failure, and illegality of consideration. Want or failure of consideration in part can effect a promise only *pro tanto*. *Parish* v. *Stone*, 14 Pick. 198. Partial illegality destoys it entirely. Metcalf on Con. before cited; Chitty on Con. (5 Am. Ed.) 692, 693, 694; Com. Dig. Assumpsit, B. 13; *Bliss* v. *Negus*, 8 Mass. R. 51; *Greenough* v. *Balch*, 7 Greenl. 461; 1 Chipman, 137; 6 N. H. R. 225; 2 B. & P. 377; 1 Kent, (4 Ed.) 467; 2 Stark. Ev. (6th Ed.) 50, and note. The consideration of the note was entire, and cannot be separated. It was not given for the legal charges, but for the balance of all the charges. Cro. Eliz. 199; 3 Taunt. 226; 1 T. R. 359; *Greenough* v. *Balch*, 7 Greenl. 462; 2 Kent, 467.

3. Whether the consideration of the promise be entire or not, the promise itself indisputably is; and if any part of an entire promise be illegal, the whole promise is void. Chitty on Con. 692, 693; 11 East, 502; 7 T. R. 200; 2 Vent. 223; 8 Johns. R. 253; *Loomis* v. *Newhall*, 15 Pick. 167.

Decisions upon the Stat. of Geo. 2, c. 40, are not applicable

to the present case, since that statute did not make the sale of spirituous liquors illegal, either by an express prohibition or a penalty, but only prevented the seller from maintaining an action for the price thereof. Chitty on Con. 755.

If any portion of the note can be recovered, it should be merely for the small balance remaining after deducting the credits from the amount of the legal charges. No appropriation has been made by the parties, and the law will appropriate the credits first in payment of the legal charges. *Hilton* v. *Burley*, 2 N. H. R. 196; *Greenough* v. *Balch*, 7 Greenl. 463. If this rule is not adopted, the credits should go in payment of the first items of charge.

The opinion of the Court was drawn up by

WHITMAN C. J. — The note declared on was signed by the defendant as surety, it would seem, with Isaac Chapman, who must have been the principal debtor. Payment is resisted upon the ground, that a part of the consideration for the note was ardent spirits, sold by the plaintiff, a retailer, without license therefor, to said Isaac in violation of the statute, which prohibits such selling in less quantities than twenty-eight gallons at one time. The authorities cited by the defendant's counsel are numerous, and fully establish the general principle, that all contracts, made in violation of law, are nugatory; and that if a note of hand be founded, even in part, upon such consideration, it is void *in toto*. The counsel for the plaintiff, nevertheless, contests the principle, and cites the case of *Yundt* v. *Roberts*, 5 Serg. & Raw. 139, as laying down the law differently. Mr. Justice Duncan, in that case, is reported to have said, "that a note may consist of many items; be composed of many contracts; and, though they are blended in the note, they are divisible in their nature; if part of the contract arises on a good, and part on a bad consideration, they are divisible; the legal contract remains, and the party has a right to maintain his action for so much of his demand as is legal." This language of the learned Judge, it would seem, must have been used with reference to a contract or note of hand, the consid-

eration for a part of which had failed, as being merely void, and not in violation of law; for he afterwards says, "if the contract is entire, and founded on two considerations, one of which is unlawful, that vitiates the whole." And surely a note of hand is an entire contract. This case, then, cannot be considered to be clearly opposed to the general principle before named.

The counsel for the plaintiff, also cites the case of *Dawson* v. *Remnant*, 6 Esp. cases, 24, which, he contends, shows an exception to the general principle. It is, that, where mutual accounts have existed between parties, and a settlement has taken place, and a balance has been struck, it will be obligatory, though some of the items might have arisen from sales made in violation of law. And Mr. Justice Duncan, in his opinion, may be believed to have had such a principle in his mind, as he has, in the course of it remarked, that, "it would be unreasonable to say, that where a note is given on a final settlement of accounts, for a balance, if one item of the account, consisting of a tavern debt, exceeded twenty shillings, the whole should be void." The case of *Dawson* v. *Remnant*, was one in which the parties had cross demands, which they settled, and a balance was agreed upon. Though part of the items in the settlement was for liquors sold contrary to law, so that an action could not have been sustained for the value thereof; yet it was held, that the defendant was concluded by the settlement, and bound to pay the balance. And Stephens, in his law of Nisi Prius, a late work, citing the above case, recognizes the supposed exception, as being the settled law, in these words; "Where parties, having cross demands, settle and balance their accounts, it is no defence to an action brought for the balance, that a great part of the amount was for spirituous liquors delivered in quantities under twenty shillings in value;" yet a debt so arising in England, aside from such settlement, so far as it respected the charges for such liquors, would not be recoverable, except under certain circumstances, not necessary to be named in reference to this case. It must be admitted that if a balance, so ascertained and struck,

could be recovered, that a note of hand would be good for it; and the note of hand in this case grew out of such a settlement. The plaintiff had, from time to time, for a considerable period, supplied Isaac Chapman with liquors, and other goods, from his store. The latter had made payments, occasionally, of sundry sums of money on account generally. A settlement finally took place between them; and, the balance being ascertained, and agreed upon, the note in suit was given for it.

The plaintiff would here contend, that this case is precisely parallel with that of *Dawson* v. *Remnant*. If it be so at all points, that case must be admitted to be an authority of no inconsiderable weight in his favor. If the statutes of England and of this State, were precisely similar, it might be difficult to distinguish the one case from the other. The English statute is, however, that if spirits be sold, at one and the same time, in quantities of a value less than twenty shillings, the seller shall not recover for the value of them. But no penalty is annexed to the act of selling; nor is there any direct prohibition against it. If liquors were sold there in small quantities, and paid for at the time, it would be no breach of law. Under such circumstances the Court might hold, that a settlement of mutual accounts, although in part for spirituous liquors, should be conclusive; when if the selling were prohibited, and a penalty inflicted for a breach of the law, they would hold that public policy required of the Court the disregard of a settlement, which would otherwise contravene the intention of the law makers.

Our statute makes selling without license highly penal. In such case a door would be open to an evasion of it, if we were to admit the settlement to be a shield against one of the consequences ordinarily attaching to an act done in violation of a penal statute. It would be difficult to distinguish such a case from any other violation of a statute law, whether against acts *malum prohibitum* or *malum in se*. We are, therefore, brought to the conclusion, on the whole, that the plaintiff must become nonsuit.

THOMAS B. PARKS *& al. versus* CYRUS KNOX *& Trus.*

The provision in the Rev. St. c. 119, § 63, that "no person shall be adjudged a trustee by reason of any amount due from him to the principal defendant, as wages for his personal labor, for a time not exceeding one month," is not restricted to the month immediately preceding the service of the process on the supposed trustee.

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

The Mousam Manufacturing Company were summoned as trustees of Knox on Sept. 1, 1842, and disclosed, that at the time of the service upon them there was in their hands a sum of money, due from them to Knox for his personal services from Jan. 3, 1842, to Feb. 3, next following, amounting to $28,50, which remained in their hands; and that Knox left their employment on Feb. 3, 1842. The District Judge decided that the company were not chargeable as trustees, and the plaintiffs filed exceptions.

N. Wells, for the plaintiffs, contended that the trustees were not exempted from being chargeable by the 63d section of c. 119 of the Revised Statutes, containing the provision, that "no person shall be adjudged a trustee" "by reason of any amount due from him to the principal defendant, as wages for his personal labor, for a time not exceeding one month."

The statute was intended to secure only the avails of the debtor's labor for the month next preceding the service of the process. If it be not so, the debtor may have hundreds of dollars locked up from his creditors, and put beyond their reach by working at several places a month at a time. He cited, to show how statutes should be construed, 3 Mass. R. 540; 5 Mass. R. 380; 7 Mass. R. 458; 15 Mass R. 205; 14 Mass. R. 88; 1 Pick. 248.

Bourne, for the company, remarked that they merely wished to be legally discharged from the claim, either by the plaintiffs or defendant.

PER CURIAM — The language of the statute, Revised Stat-

utes, c. 119, § 63, is not obscure or ambiguous; nor is it inconsistent with any other provision therein.

The legislature may have overlooked the effect of their language in this instance; but if they have, it is for that body to cure the defect. We are not at liberty to do it.

The exceptions are overruled, and the judgment of the District Court is affirmed.

DANIEL BURNHAM *versus* JOHN SPRING.

Where the drawer of a bill has no funds in the hands of the drawee, a demand and notice need not be proved, to charge the drawer; unless he had reasonable ground to expect that his draft would, nevertheless, be honored; and this, if relied upon by the drawer in his defence, should be shown by him.

ASSUMPSIT upon a writing of this tenor. "March 26, 1836. James Irish. Pay Daniel Burnham or order, fifteen hundred forty-seven dollars and sixty-eight cents, for value received.

"J. Spring."

Irish was called by the plaintiff, and testified that the paper was presented to him for payment in the month of March, 1836, and that he refused to pay it, having no funds of the defendant in his hands at that or any other time, and so informed the plaintiff at the time. The defendant introduced an agreement between Irish and himself, dated Sept. 10, 1835, and a letter from Irish to him, dated Sept. 10, 1835, which are referred to, but are not found in the copies.

The defendant contended, that the plaintiff was bound to prove notice to the defendant of the refusal of Irish to accept and pay the order; that the proof did not show that the order was seasonably demanded of Irish; and that if the jury were satisfied, that the order was drawn upon the fund, and on the conditions specified in the agreement, that the defendant was not liable, although nothing was realized from that fund.

SHEPLEY J. who presided at the trial, instructed the jury, that if Irish had no funds of the defendant in his hands when

the order was presented to him, that the plaintiff was not bound to give notice to the defendant of its non-payment; that the order, not being payable on demand, or in a given time, was payable when presented; that the law requires that it should be presented within a reasonable time; and that what was a reasonable time was for them to decide; that if Irish was not to pay the order except out of funds alluded to in the agreement there must be proof of this; and that the burthen of proof, to show this, was on the defendant. The verdict was for the plaintiff, and the defendant filed exceptions.

Leland argued for the defendant, citing Story on Bills, 354; 7 Greenl. 126; 14 Mass. R. 116; Metc. & Per. Dig. Bills of Exchange, c. 4, § 124, and cases there cited; Story on Bills, 43.

Howard and *Osgood*, for the plaintiff.

The opinion of the Court was by

Whitman C. J. — The case shows that the defendant, at the time he drew the draft declared upon, had no funds in the hands of the drawee, so that the plaintiff has realized no part of his demand from that source. In such case a demand on the drawee, and notice of non-payment by him, need not be proved; unless the drawer had reasonable ground to expect that his draft would, nevertheless, be duly honored; and this, if relied upon by the drawer in his defence, should be shown by him. For this purpose, at the trial, he introduced an agreement in writing, signed by the drawee and himself, dated Sept. 10, 1835, in which the drawee stipulated, upon certain terms and conditions, to transfer the one half of certain "notes and cash, received by him of Asa Hanson and others." He did not show that, at the time of drawing the draft, or within a reasonable time thereafter, he had complied with any of those terms and conditions; and therefore did not show that he could reasonably have expected the draft would be paid.

The letters which were introduced, probably, as tending to show something of the kind, bear date, July 14 and 23, 1836,

nearly six months after the time, when the draft might have been expected to be presented for payment; and therefore show nothing of the kind; but rather the contrary; for no allusion is made, either in the letter of Irish, the drawee, or in the reply of the defendant, to any receipt of money by the former. They both refer solely to certain notes of which a division was proposed. There does not, therefore, seem to be any ground upon which the defendant can honestly or legally resist the payment of the amount due on the draft.

Exceptions overruled — Judgment on the verdict.

JOHN SHEPLEY & *al. versus* JOSEPH WATERHOUSE & *al.*

A new promise, made by one of two joint and several promisors, before the Rev. Stat. went into effect, will take the case out of the operation of the statute of limitations as to both, although the new promise was made by a principal, when the other promisor was a surety.

THE parties agreed on a statement of facts.

The suit was commenced May 3, 1842, on a note for $28,84, dated Feb. 8, 1830, payable to the plaintiffs in sixty days with interest, given jointly and severally by Waterhouse as principal, and by Hersey as surety. On August 8, 1836, an agreement was signed by Waterhouse, on the back of the note as follows: "August 8, 1836. I agree to pay the within. Joseph Waterhouse." Waterhouse is defaulted. Hersey pleads the general issue, and by brief statement the statute of limitations. If the action can be maintained against Hersey, he is to be defaulted; and if not, his name is to be stricken from the writ, and he is to recover costs.

J. Shepley, for the plaintiffs, said that the Rev. Stat. had no application to this case. c. 146, § 27.

He considered the law to be well settled, that the new promise of one of two joint and several promisors will take the case out of the operation of the statute of limitations as to both. *Getchell* v. *Heald*, 7 Greenl. 26; *Greenleaf* v. *Quincy*,

3 Fairf. 14; *Pike* v. *Warren*, 3 Shepl. 390; *Dinsmore* v. *Dinsmore*, 8 Shepl. 433; *Hunt* v. *Bridgham*, 2 Pick. 581; *White* v. *Hale*, 3 Pick. 291; *Frye* v. *Barker*, 4 Pick. 382; *Sigourney* v. *Drury*, 14 Pick. 387; *Johnson* v. *Beardslee*, 15 Johns. R. 3. The English cases on the subject have been called to the attention of the respective Courts in the cases above cited. The law is now altered by statute in England, New York, Massachusetts and Maine.

The fact that Hersey appears on the note to be a surety, makes no difference. As it respects the creditor, there is no difference between principal and surety. He may collect the whole debt of the surety, if both are able to pay. The creditor may discharge a surety, or one of several joint promisors, by certain acts, but mere delay will not have that effect. The new promise of the principal was held to take the case out of the operation of the statute as to the surety in *Hunt* v. *Bridgham*, in *Frye* v. *Barker*, and in *Sigourney* v. *Drury*, already cited.

M. Emery, for the defendants, contended that all the cases cited for the plaintiffs grew out of the old rules of construction adopted by the Courts, which made the statute of limitations equivalent only to a presumption of payment, which might be rebutted, like any other presumption of law. The Courts have now given up this old rule of construction, and hold that there must be a new promise, express or implied; and that such new promise is a new cause of action. *Little* v. *Blunt*, 9 Pick. 488; *Cambridge* v. *Hobart*, 10 Pick. 232; *Pray* v. *Garcelon*, 5 Shepl. 145; *M'Lellan* v. *Allbee*, ib. 184; *Bell* v. *Morrison*, 1 Peters, 351; Story on Partnership, 462, and note; *Manson* v. *Felton*, 13 Pick. 206; 2 M'Cord, 5.

The cases cited for the plaintiffs were occasioned by the decision in *Whitcomb* v. *Whiting*, 2 Dougl. 650. But this case has been overruled. 6 N. H. R. 124; 1 Peters, 351, before cited. Story on Partnership, 461. The contract of a surety is to be construed strictly. *Miller* v. *Stewart*, 9 Wheat. 680.

The promise in this case does not purport to be the promise of both, but that of Waterhouse alone, and cannot bind Hersey.

The opinion of the Court, SHEPLEY J. taking no part in the decision, was drawn up by

TENNEY J. — The note declared on was barred by the statute of limitations, when one of the makers by a writing by him signed in 1836, promised to pay the same. The other maker denies, that the promise revived the note as to him, who had no knowledge thereof. The question involved in this case has been much discussed, and different Courts and Judges have entertained different opinions thereon. In *Whitcomb* v. *Whiting*, 2 Dougl. 652, Lord Mansfield is reported to have said, "payment by one is payment for all, the one acting virtually as the agent of the rest. And in the same manner an admission by one is an admission by all." This decision has been treated in England as a binding authority to the time, when the statute of 9 Geo. 4, c. 14, was enacted, though it appears that it has not in every respect commended itself to all the Judges who have had questions somewhat analogous under consideration. In *Bell* v. *Morrison*, 1 Peters, 351, the Supreme Court of the United States say, "the reasoning of Lord Mansfield," in *Whitcomb* v. *Whiting*, "is certainly not very satisfactory," and overrule the decision.

The Courts in Massachusetts have, however, in numerous cases, adopted the English doctrine. Similar decisions have been pronounced in New York. In this State, the Courts have uniformly held, that a note by several makers, barred by the statute of limitations, is revived against all, by a new promise of one. The subject was fully examined in *Dinsmore* v. *Dinsmore*, 21 Maine R. 433, and former decisions of this State confirmed. Future cases of the kind will rest upon different principles, by reason of the provision in c. 146, § 27, of the Revised Statutes, which is similar to the English statute referred to, but it can have no application to the case before us.

Defendant Hersey must be defaulted.

Ira Clark *versus* James L. Peabody.

It was held, that if the patent right, which was the consideration of a note, was not wholly worthless, the consideration was sufficient to entitle the payee to recover the full amount of the note.

If it appears on the face of a promissory note, that it was given "for value received," this is *prima facie* evidence of a sufficient consideration.

No action can be maintained by an indorsee of a note, unless it was indorsed by the payee before the commencement of the suit.

The ratification by the payee of a note of an indorsement thereof, made by one assuming to act as his agent without authority from him, can operate only as an indorsement made at the time of the ratification.

In an action by an indorsee against the maker of a note, the written admission by the payee, that one acting as his agent in indorsing it had authority from him for that purpose, is not competent evidence to prove the agency.

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

The plaintiff claimed to support his action as indorsee of a note made by the defendant to Baker Webster or order, for $250, dated Sept. 9, 1839, and payable one half in one year and one half in two years. The writ was dated Oct. 2, 1840. The indorsement was thus: — "Baker Webster by D. Webster, Agent." The defendant denied, that D. Webster had any authority to make the indorsement. It was proved to be in the handwriting of D. Webster, but there was no evidence of any previous authority of Davidson Webster to sign the name of Baker Webster, and to show the authority, the plaintiff offered in evidence the following memorandum on the back of the note in the handwriting of Baker Webster, made in Court immediately before the trial. "This note was indorsed by Davidson Webster by my consent, who at the time was my agent. Baker Webster." The indorsement by D. Webster was not made until after the first payment was overdue. The defendant then contended, that the present plaintiff could not maintain the action. The presiding Judge ruled, that the action could be maintained, upon this evidence, if believed by the jury, subject to the same equitable defence, as if it had been brought by the payee.

The note was given for "one half of the right to use, construct and vend Farnham's patent pump in certain towns in the county of Cumberland." Evidence was introduced by the defendant tending to show that the right was worthless. And he contended that if it was not wholly worthless, yet that as it had been proved, that a joint purchaser of the other half of the right for the same towns had paid therefor $250 before this suit was commenced, that more than the right could be worth had already been received therefor, and the jury were at liberty to find, as due on the note, only the actual value of the right. The Judge instructed the jury, that if it had been proved to their satisfaction that the right was worthless, they should find for the defendant, otherwise they should find for the plaintiff the amount of the first instalement due on the note, with interest.

The defendant also contended, that if Farnham had no valid patent right, or had never conveyed it to Baker Webster, then nothing passed by the deed to the defendant; and that under the circumstances of this case, the plaintiff should be holden to prove that Baker Webster had a title to the patent right. The Judge instructed the jury, that the burden was on the defendant to prove these facts, if he deemed them material to his defence, and that the plaintiff was not required to offer proof of title in Baker Webster in order to maintain the suit.

The verdict was for the full amount of the first payment, and interest; and the defendant filed exceptions.

Howard & Osgood, for the defendant, contended that the District Judge erred in admitting the memorandum on the back of the note as evidence of the authority of D. Webster to make the indorsement. It is the mere admission, or declaration, of the payee of the note, and not competent evidence between third persons, as this suit is. Nor was there any necessity for it, for D. Webster was a competent witness.

If this is evidence of a ratification of the authority of the pretended agent, it can have no effect as it respects third per-

sons, excepting from the time when the ratification was made. This would not be sufficient, as the memorandum was not put upon the note until after the suit was commenced. Story on Ag. 236 to 248; 11 Mass. R. 98; 12 Mass. R. 185; 3 Greenl. 73; 7 Greenl. 28; 17 Maine R. 266.

Bradley & Caverly, for the plaintiff, contended that the memorandum on the back of the note, signed by Baker Webster, amounted to a complete ratification of the agency of D. Webster. 17 Maine R. 270; 3 Greenl. 73; 7 Greenl. 28; 13 Pick. 377; 3 Pick. 246; 8 Pick. 9; 12 Wend. 525. Any one who has the possession of a note without fraud may receive payment and discharge it. 9 Mass. R. 423; 3 Cranch, 208.

The instruction of the District Judge, that if the patent right was of some value, its mere inadequacy as a consideration was no defence, was correct. 6 Pick. 427; Chitty on Con. 7; 2 B. & Cr. 474; 1 Dane, 109, 110; 14 Pick. 219; 22 Pick. 514; 12 Conn. R. 234; 3 Shepl. 296; 5 Shepl. 329.

The note acknowledges that value was received, and this is *prima facie* evidence of the fact. 2 Shepl. 18; 4 Shepl. 397; 14 Pick. 201.

The opinion of the Court was drawn up by

TENNEY J. — This case comes before us on exceptions taken to the ruling of the Judge of the District Court in admitting evidence, which was objected to, and also to certain instructions to the jury.

The instruction, that if the patent right, which was the consideration of the note, was not worthless, they would return a verdict for the sum which was payable when the action was commenced, and interest thereon, we think correct. It is not for the Court or jury to amend or alter an improvident bargain, fairly made by the parties, unless there has been a failure of the entire, or a certain and distinct part of the consideration. Such is not the case here. The jury were required to find for the defendant, if the patent right was utterly worthless. It is not pretended, that the defendant did not obtain all that he

contracted for, and a reduction in damages would be substituting the opinion of the jury for the price agreed upon by the parties.

The view taken by the Judge, that in order to avoid the note for want of consideration, the burden would be on the defendant, is not subject to objection. The promise is made upon consideration expressed, which must be taken as true till the contrary is shown.

Was the plaintiff entitled to a verdict upon the evidence adduced, which was competent? The defendant denied the authority of Davidson Webster to indorse the note for Baker Webster, and objected to the admission of the memorandum made and signed by the latter on the day of trial in Court, as evidence of such authority. No action can be maintained by an indorsee on a note payable to a person therein named, or order, unless the same shall have been indorsed, before the commencement of the action. A party may in numerous and perhaps in most instances, adopt and ratify the act of one professing to be his agent, when no power at the time to perform the act existed, so far as to bind the principal; and such ratification will relate back to the time of the act. But this is by no means true, in reference to the liability of third persons. As when a certain thing must be done by one having power to do it as a prerequisite to constitute a liability of a party, who had no agency in the act, the ratification of the performance thereof, by one unauthorized, cannot create a liability, when none existed before. A notice of the dishonor of a promissory note by a mere stranger, not a party to the same, or authorized by one interested, would not be a notice, which would bind an indorser. Story's Agency, § 247.

There can be no ratification of the indorsement of a note, which can relate back, so as to make that a transfer, at a time earlier, than the ratification; and the ratification can have no greater effect, than would the indorsement itself, made at the same time by the payee. The cases referred to by the plaintiff's counsel from our own Reports, are those where the notes were indorsed by the payee before suits were brought, and

therefore are not applicable to the present inquiry. Then so far as Baker Webster adopted the indorsement of Davidson Webster, it was too late to affect the present action.

Again, it is insisted that the memorandum, "this note was indorsed by Davidson Webster by my consent, who at the time was my agent," was legal evidence of full authority to make the transfer at the time, when it purported to be made. The correctness of this proposition, which was adopted by the Court, is denied by the defendant's counsel. The memorandum is simply a written declaration of one not a party to the suit, and may be regarded as his admission, that he had no interest in the note. If however he was interested in the event of the suit, in favor of the plaintiff, this declaration even if offered by the plaintiff, to be made under oath in testimony, could not be received to affect the case. If on the other hand, the payee was disinterested, he was a competent witness, and his declarations made in Court could not be received unless in testimony. He should in such case be placed in a situation to be examined by the other party.

Can the declaration of the payee be allowed because it is in derogation of his title to the note. In the case of *Maddocks* v. *Hankey*, 2 Esp. R. 647, the doctrine contended for by the plaintiff's counsel was allowed to prevail. But in the case of *Hemmings* v. *Robinson*, Barnes' 3d Ed. 436, it was overruled. And in *Western* v. *Wilmot*, tried July 5, 1820, in Westminster Hall, the doctrine of the case of *Maddocks* v. *Hankey* was held by Abbot C. J. to be erroneous; and Mr. Chitty in his treatise on Bills, p. 634, considers the same case as overruled.

This writing cannot be treated with more favor as evidence, between these parties, than the verbal admission of the payee made at the trial; for if the same thing could be evidence, when in writing, and not otherwise, the admissibility would depend upon form rather than substance; and it would be in the power of the party, to avail himself of evidence not given under oath. We think the memorandum was improperly admitted, and the

Exceptions are sustained, and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD,

ARGUED AT MAY TERM, 1843.

Seth Spring *versus* Stephen Chase.

If land be conveyed by deed of warranty with the usual covenants, and the grantee enter into possession under his deed, and continue such possession for nearly twenty years, and then purchase in an outstanding paramount title, he cannot recover, for breach of the covenant of seizin, the consideration originally paid with interest; but is entitled to recover the amount last paid and interest thereon.

Where the grantee enters into the possession and actual occupation under his deed of warranty, and afterwards purchases in an incumbrance or outstanding paramount title, the amount he may recover is not affected by proof, that the rents and profits are more or less than the interest on the consideration originally paid.

On August 27, 1814, Seth Spring conveyed to Stephen Chase, by deed of warranty with the usual covenants, a tract of land in Lovell, for the consideration of one hundred and twenty dollars. Chase entered into possession under his deed, and continued in the uninterrupted possession until August 17, 1831. Seth Spring conveyed this land, with much other real estate, to Samuel Parkman by absolute deed, dated Jan. 8, 1814, but not delivered until March 18, 1814, when Parkman gave back to Spring a writing, not under seal, promising to re-convey the premises on the payment of certain notes

against Seth Spring and sons; and if the notes should not be paid, to sell sufficient to pay the notes and convey back the residue, if any. On July 4, 1827, this writing was assigned by Seth Spring to John Spring, and given up to the heirs of Parkman, who conveyed the whole real estate included in the deed of Spring to Samuel Parkman to John Spring, and he paid a portion of the amount due, and mortgaged back the same property to secure the payment of the balance. On August 17, 1831, the heirs of Parkman made a formal entry on the land conveyed to Chase, under the mortgage of John Spring, for condition broken, but did not otherwise interrupt Chase in the possession. On Nov. 15, 1832, Chase paid the heirs of Parkman seventy-five dollars, and received from them a release of their right in the land conveyed to him by Spring, commenced a suit against Seth Spring, declaring on all the covenants in his deed, and in Jan. 1833, took judgment by default for the sum of $252,60, and costs of Court, $9,63. He took out execution on this judgment, and collected thereon $153,00. Seth Spring petitioned for a review of Chase's action against him, which was granted; and on the hearing, the facts above stated appeared.

J. Shepley, for Spring, said the action of Chase could not be maintained on the covenant of seizin. Spring was in possession as the owner of the equity, and conveyed to Chase who entered into the possession under his deed and has remained in the actual possession ever since. He had been in possession more than seventeen years when the entry was made under the mortgage. If things had remained, as before the entry of Parkman's heirs, no suit could have been maintained. This covenant was not broken.

The action may be maintained on the covenant against incumbrances. The measure of damages, in such case, is the amount paid to extinguish the only incumbrance upon it and interest.

If there can be a recovery on the covenant of warranty, the measure of damages is the value of the land at the time of the eviction. In this case, it is the sum he paid to Parkman to

acquire a perfect title, and interest to the time of judgment. He cannot say, that he purchased the land for less than its value; especially, when there is no evidence, that it was not the true value. And we may reasonably suppose it was timber-land, and that the defendant has taken off the timber. Whether Chase can recover on the covenant of warranty, or on that against incumbrances, it is immaterial to inquire, as in this case the damage would be the same. The principles of law governing this case are clearly settled, and familiar. *Boothby* v. *Hathaway*, 20 Maine R. 251; *Cushman* v. *Blanchard*, 2 Greenl. 266; *Bearce* v. *Jackson*, 4 Mass. R. 408; *Twambly* v. *Henley*, ib. 441; *Marston* v. *Hobbs*, 2 Mass. R. 433.

Chase then was entitled only to the seventy-five dollars paid, and interest until he received the money of Spring, and costs of suit, and the judgment should be reversed for the residue. We are entitled to an execution for the overpayment and interest, and our costs of the petition for review and of the present trial. *Kavanagh* v. *Atkins*, 2 Greenl. 397; Rev. St. c. 124, § 12.

S. H. Chase, for the defendant in review, contended that nothing passed by the deed of Spring to Chase, as the conveyance to Parkman had already been made.

The paper given back did not make the transaction a mortgage, because it was not under seal, and was not at the same time, and part of the same transaction, and was not recorded. *Fuller* v. *Pratt*, 1 Fairf. 197; 5 Dane, c. 104, art. 10; *Kelleran* v. *Brown*, 4 Mass. R. 443; *Flint* v. *Sheldon*, 13 Mass. R. 443; *French* v. *Sturdivant*, 8 Greenl. 246; 5 Pick. 450; 7 Pick. 157. The Stat. 1821, c. 50, gives no definition of the term defeasance, but leaves it to be determined by the common law. Parkman then was seized of the premises, and the covenant of seizin was broken as soon as the conveyance was made, and the measure of damage was the consideration paid and interest.

The possession of the mortgagor is the possession of the mortgagee. Spring did not hold adversely to Parkman, but under him, by virtue of his right to have the land on the payment

of a certain sum. Spring therefore was not in possession as a disseisor of Parkman, and no seizin was imparted to Chase by the deed. *Noyes* v. *Sturdivant*, 18 Maine R. 104. Although in possession Spring claimed no title, and the action could be maintained against him forthwith. *Wheeler* v. *Hatch*, 3 Fairf. 389; *Kinsell* v. *Daggett*, 2 Fairf. 309. It is only where the deed conveys a seizin to the grantee, that the grantor is liable on the covenants of warranty. The grantee is liable to Parkman for profits derived from the land, if there had been any. As there is no evidence on the subject, it is to be presumed there were none.

The deed from Parkman's heirs to Chase was a mere release of their right. If John Spring had redeemed his mortgage, Chase would have had no title to this land. The sum paid to Parkman for this release has nothing to do with the subject of damages. There is, therefore, no good reason why the original judgment should be in any part reversed.

The opinion of the Court, SHEPLEY J. not being present at the argument, and taking no part in the decision, was drawn up by

WHITMAN C. J. — The subject matter of the action of which this review was granted, is now before us upon an agreed statement of the facts. Neither the original writ, nor a copy of it has been furnished us; but from the arguments of the counsel we understand, that the suit was founded upon the breach of the covenant of seizin in a deed of warranty of land. The only question presented was as to the amount of damages to be recovered; the plaintiff contending that he had a right to recover the amount of the original consideration paid for the land, with interest thereon from the time of payment; while the defendant insisted that he should have recovered no more than he has been compelled to pay to extinguish the adverse title, and interest thereon from the time of payment. The general rule is as contended for by the plaintiff; and is predicated upon what is ordinarily true, viz. that the covenantee has never been able to derive any advantage from his purchase;

or, if he has, that he is answerable therefor to the owner in fee. In this case the grantor, at the time of his sale to the grantee, was tenant at will or sufferance under the owner in fee; and without the reservation of rent therefor; and under a contract, upon the performance of certain conditions, that the premises should be released or conveyed to him. This tenancy at will or sufferance, without liability to pay rent, the owner of the fee would seem to have been content, that the grantor should transfer to the defendant in review, who was allowed to continue the tenancy for seventeen years, without any claim of rent on the part of the owner in fee. In *Caulkins* v. *Harris*, 9 Johns. 324, it was held, that a grantee, on being evicted, was entitled only to six years interest on the consideration, although he had been a longer time in possession; because the party evicting him could only recover mesne profits for that length of time; and in *Tanner* v. *Livingston*, 12 Wend. 83, it was held, that a purchaser, who has entered into possession of the premises purchased, and enjoyed the rents and profits from the time of the conveyance, is not entitled, upon a breach of the covenant of seizin, to recover the whole consideration and interest, he having enjoyed the premises under a right existing for the time under the grantor. It must be immaterial how such right arises, so that it be a tenancy, without liability to pay rent. In the case at bar the vendor had such a tenancy, and his grantee, the original plaintiff, enjoyed it under his conveyance till the eviction took place in 1831, without any claim for rent or for mesne profits. If then the original plaintiff had recovered judgment only for his purchase money, with interest from the time of his eviction to the time when judgment was rendered in his favor, he would have recovered a full indemnity; and we think he should have been content with such a judgment. The former judgment must therefore be reversed in part, viz, for the sum of one hundred and seventy-three dollars and ten cents; and be affirmed for the residue; and the plaintiff in review having paid more than such residue, towards satisfying said former judg-

ment, is entitled to recover the balance remaining after deducting said residue therefrom.

It has been urged, that the original plaintiff derived no rents and profits from the premises; but we think that cannot be taken into consideration to affect the rights of the parties. If a person purchases real estate, it is to be presumed, that he does so because the rents and profits of it will be equivalent to the interest of the money he may be content to pay for it. This may be in the continual rise in value of the land, or from the growth of timber on it, or from its accommodating him in some way or another; and it is to be presumed also, that the vendor would not have parted with it but upon the consideration that the interest of the money received for it would be a fair equivalent for the income he could have derived from the land. Whether the vendee turns his purchase to a profit or not is no concern of the vendors.

JOHN BRADLEY *versus* STEPHEN CHASE.

Where a person was entitled to shares in an incorporated company on his performing certain acts for them, and where the company did not set up any want of complete performance of the condition as a ground of forfeiture, but conducted in the matter as if full performance had been made, and such person conveyed certain of his shares to a third person; *it was held* in a court of equity, that it was not competent for the latter to set up such condition to avoid his own contract in the purchase.

Where the property conveyed was materially different from what the seller represented it to be, and from that which the purchaser expected to obtain, this is sufficient, in a court of equity, on the ground of misrepresentation and of misapprehension of what the property conveyed really was, to entitle the purchaser to be relieved from his contract.

But if a settlement of the losses sustained thereby has been made by the parties, after a full knowledge of all the facts, the contract cannot be disregarded or set aside, although the amount received may have been less than the party might justly have insisted upon.

If a party would avoid his contract on the ground of fraudulent misrepresentations respecting the property conveyed, he has his election to proceed by bill in equity, or by a defence before a jury, when the contract is attempted to be enforced by a suit at law; but if he proceeds by bill in equity, he must be governed by the rules of courts of equity.

Testimony which speaks of representations made by the defendant after the sale, is inadmissible to prove the fraud.

Testimony which states the representations made to other persons, and not to the plaintiff, can be used only to prove that the defendant had formed the design to commit frauds in that manner, as opportunities should be offered; and when such design has been established, that fact may be used, in connection with other testimony, to satisfy the mind, that it was acted upon in making the contract under consideration.

Where material misrepresentations, on the part of the defendant, were established, in a suit in equity, but the bill was dismissed for other causes, no costs were allowed.

THIS was a bill in equity, and was heard on bill, answer and proof, and was very fully argued in writing. Including the arguments, the case extended to two hundred and thirty-five printed, and seventy-four manuscript pages. A statement of the prominent facts, sufficient to understand the questions of law arising out of them, will be found in the opinion of the Court. The legal positions, only, taken by the counsel for the parties, respectively, with the authorities cited in support of

them, can be given without filling a greater portion of the volume, than can be spared for any one case.

Fessenden, Deblois & Fessenden and *C. S. & E. H. Daveis*, counsel for the complainants, cited the following authorities in support of their argument.

Firstly, that the original contract was void:

I. Because Chase had no title to the property he undertook to convey, and nothing was conveyed to Bradley. 2 Bl. Com. 451; 3 Bl. Com. 166; Chit. on Cont. 133; Story's Eq. Jur. § 134, 141, 142, 143, 208, 219, and authorities cited; *Pasley* v. *Freeman*, 3 T. R. 57, 58; *Bingham* v. *Bingham*, 1 Ves. 126; *Johnson* v. *Johnson*, 3 Bos. & P. 162; *Caswell* v. *Black River M. Co.* 14 Johns. R. 453, 457; *Johnson* v. *Tool*, 1 Dana's R. 469; *Waggener* v. *Waggener*, 3 Munro. 556; *Cox* v. *Strode*, 2 Bibb, 275; *Gill* v. *Corbin*, 4 J. J. Marsh, 596.

And even where the title to a material part fails, the contract will be set aside. 2 Kent's Com. 470 to 476, (3d Ed.) and cases cited; *Roffey* v. *Shallcross*, 4 Madd. 227; *Dalby* v. *Pullen*, 3 Sim. 29; *Edwards* v. *M'Leary*, Coop. R. 308; *Cassamajor* v. *Strode*, 2 Myl. & Kee. 726; *Hammond* v. *Allen*, 2 Sumn. 387, 395; *Allen* v. *Hammond*, 11 Peters, 63.

II. Because Chase had no such interest as he represented, and undertook to convey. *Farrer* v. *Nightingal*, 2 Esp. Ca. 639, (cited 2 Kent, 469;) *Hearn* v. *Tomlin*, Peake's Ca. 192; *Thompson* v. *Miles*, 1 Esp. Ca. 184; *Hibbert* v. *Shee*, 1 Camp. Ca. 113; *Duffel* v. *Wilson*, 1 Camp. Ca. 401; *Belworth* v. *Hassel*, 4 Camp. Ca. 140; *Long* v. *Fletcher*, 2 Eq. Ca. Abr. 5, pl. 4; *Pasley* v. *Freeman*, 3 T. R. 51, 57; *Dutricht* v. *Melchor*, 1 Dall, 428; *Raymond* v. *Bearnard*, 12 Johns. R. 274; *Putnam* v. *Wescott*, 19 Johns. R. 73.

III. Because, if Chase had any assignable interest, there was an incumbrance upon it, which was not known to the complainants. Story's Eq. Jur. § 208; 2 Kent's Com. 570; Sugden on Vend. 5, (2d Ed.) and p. xii. *addendum; Tucker* v. *Woods*, 12 Johns. R. 190; *Junkins* v. *Simpson*, 14 Maine R. 364, 367, 368.

IV. Because the contract was entered into by the complainants under material mistake. 1 Fonbl. Eq. 120, note *x*; 2 Pow. on Cont. 196; 2 Kent's Com. 471; 1 Pothier on Obl. (by Evans,) 17, 18; 1 Story's Eq. Jur. § 140, 142, and authorities cited; *Hepburn* v. *Dunlop*, 1 Wheat. 197; *Allen* v. *Hammond*, 11 Peters, 63, 71; *Hammond* v. *Allen*, 2 Sumn. 387; *Daniel* v. *Mitchell*, 1 Story R. 172; *Roosevelt* v. *Fulton*, 2 Cow. 129; *Champlin* v. *Leighton*, 18 Wend. 407.

V. Because the contract was made under misrepresentation and concealment by the defendant, as to material and intrinsic circumstances, which the complainants had not equal means of knowing, and under a delusion created by the conduct and representations of the defendant. 3 Bl. Com. 165; 1 Madd. Ch. 262; 2 Kent Com. 482; 1 Story's Eq. Jurisp. § 191 to 218, and authorities cited; Jeremy's Eq. Jurisd. b. 3, p. 2, c. 3, § 1, and authorities cited; *Small* v. *Atwood*, 1 Younge, 407; *Edwards* v. *M'Leary*, 2 Swanst. 287; *M'Ferran* v. *Taylor*, 3 Cranch, 270; *Laidlaw* v. *Organ*, 2 Wheat. 178; *Smith* v. *Richards*, 3 Peters, 26; *Cochran* v. *Cummings*, 4 Dall. 250; *Daniel* v. *Mitchell*, 1 Story R. 172; *Harding* v. *Randall*, 15 Maine R. 332; *Irving* v. *Thomas*, 18 Maine R. 418.

As to the evidence upon this point, see *Beal* v. *Thatcher*, 3 Esp. 194; *Hunter* v. *Gibson*, 2 H. Bl. 187; *Pilmore* v. *Hood*, 5 Bing. N. C. 97; *Dobell* v. *Stevens*, 5 B. & Cres. 623; *Crocker* v. *Lewis*, 3 Sumn. 1; *Bottomley* v. *U. S.* 1 Story R. 135; *Bridge* v. *Eggleston*, 14 Mass. R. 245; *Somes* v. *Skinner*, 16 Mass. R. 348; *Foster* v. *Hall*, 12 Pick. 89; *Howe* v. *Reed*, 3 Fairf. 515; *Hawes* v. *Dingley*, 17 Maine R. 341.

VI. The fact that the price paid by the complainants was grossly beyond the value of the property, and that the bargain was unconscionable, supports these reasons. Jeremy's Eq. Jur. 396, 483; 1 Fonbl. Eq. 122, note; 1 Madd. Ch. 268; Chit. on Contr. 224; 1 Story's Eq. Jur. § 246, 249, 331, and authorities cited; *George* v. *Richardson*, Gilmer's (Va.) R. 231; *Hough* v. *Hunt*, 2 Ham. (Ohio) R. 502.

Secondly. Considering the contract of May 6th, 1835, as an *executory agreement*, that the complainants are entitled to recover the consideration paid by them; see Long on Sales, 138, citing *Giles* v. *Edwards*, 7 T. R. 181; *Skillern's Ex'rs* v. *May*, 4 Cranch, 137; *Bullock* v. *Beemis*, 1 A. K. Marsh. 434.

Thirdly. That the general language in the writing of January 16th, 1837, does not extend the meaning of that instrument, nor give it any effect beyond what is specified in it, and what the parties had in view at the time; see 1 Story's Eq. Jur. § 145; 1 Evan's Pothier, 59; Jeremy's Eq. Jur. 546; *Stokes* v. *Stokes*, 1 Vent. 35; *Lyman* v. *Clarke*, 9 Mass. R. 225.

And that this instrument was void for the reasons given in the argument; see Chit. on Cont. 222; Story's Eq. Jur. § 217, and authorities cited; *Wood* v. *Downes*, 18 Ves. 120; *Baugh* v. *Price*, 1 Wils, 320, and note; *Cann* v. *Cann*, 1 P. Wms. 723; *Roche* v. *O'Brien*, 1 Ball & Beat. 330; *Dunbar* v. *Tredennick*, 2 Ball & B. 317; *Murray* v. *Palmer*, 2 Scho. & Lef. 486; *Cockerell* v. *Cholmerly*, 1 Russ & Myl. 425; *Crowe* v. *Ballard*, 3 Bro. C. C. 117; *Gordon* v. *Gordon*, 3 Swanst. 400; *Hammond* v. *Allen*, 2 Sumn. 387; *M'Donald* v. *Neilson*, 2 Cow. 141; *Anderson* v. *Bacon*, 1 A. K. Marsh. 51; *Carr* v. *Callaghan*, 3 Litt. 366; see also authorities cited ante, VI.

Lastly. That the defendant has not answered directly, under oath; see Story's Eq. Pl. § 664, 854; 1 Grant's Ch. P. 122; *Taylor* v. *Luther*, 2 Sumn. 228; *Jackson* v. *Webster*, 6 Munf. 462.

Howard & Osgood, and *S. H. Chase*, counsel for the defendant, in support of their argument, cited the following authorities; — premising, however, that, in their view, this case involved, mainly, questions of fact rather than law.

I. The answer, being responsive to the bill, must prevail. *Walton* v. *Hobbs*, 2 Atk. 19; *Janson* v. *Ray*, 2 Atk. 140; *Cooth* v. *Jackson*, 6 Ves. 40; *Cook* v. *Clayworth*, 18 Ves. 12; *Clark's Ex'rs* v. *Vanreimsdyk*, 9 Cranch. 153; *Smith*

v. *Brush*, 1 Johns. Ch. R. 460; *Daniel* v. *Mitchell & als.* 1 Story's R. 188; 2 Story's Eq. Jur. § 1528.

II. Representations made to strangers to the sale, in respect to the property sold, are not material unless they were communicated to the purchaser, so as to become the basis of the purchase. *Crocker* v. *Lewis*, 3 Sumn. 8; 1 Story's Eq. Jur. § 191, 192; 1 Fonbl. Eq. B. 1, Ch. 2, § 8.

We contend, that the facts involved in this case do not call for, or admit of the application of the principles involved in the numerous authorities cited by the plaintiffs. We have not supposed that there could be any doubts as to the law governing the case, when once the facts were ascertained. In this case, we contest the application of the principles contended for by the plaintiffs, — more than the principles themselves.

An examination of the authorities cited by the plaintiffs, will show that their *theory*, as such, is well constructed; — but the facts to support it are wanting.

The opinion of the Court was afterwards drawn up by

Shepley J. — The bill seeks relief from one of those unfortunate contracts of the year 1835, by which usually one and not unfrequently both the parties were seriously embarrassed or ruined. The judicial history of those contracts too frequently discloses an infatuation, which substituted fanciful and imaginary schemes of profit for the practical results of business and the past experience of life. Sound judgment and a correct moral sense often yielded to the strong desire for sudden or rapid accumulation. The vendors have been found in many cases to have made inflated and deceptive statements; and the vendees to have exhibited in others an eagerness to embark in delusive enterprises requiring no such statements to effect their ruin. While judicial tribunals may lament the destruction of hopes, and the personal sufferings occasioned by them; they can only proceed, guided by its principles, to administer the law, which cannot be varied by any of these considerations, and to apply it to the proof introduced in the case before them.

The defendant, acting under the influence of the prevailing excitement, appears to have originated the disastrous enterprise, from which this contract arose. The first important step taken in its execution was the contract made on October 18, 1833, by which the defendant and others subscribed for shares, and authorized the purchase of lands in the State of Georgia for a sum not exceeding forty thousand dollars. This clause is found in the third article of that contract. "And whereas Stephen Chase, Esquire, of Fryeburg, has procured information relative to said lands, and been at pains and expense in examining the subject, it is hereby agreed by the undersigned, that we will severally advance for the said Stephen Chase, provided he will go to Georgia and complete the purchase aforesaid, our proportion of a sum sufficient to pay one quarter part of the lands purchased as aforesaid; and shall hold the said quarter part as security for the payment of said advance." At a meeting of the subscribers to that contract on October 24, 1833, it was "voted, that Stephen Chase, Abraham Colby, and Samuel E. Crocker, be the agents of the company for the purpose of exploring the lands in Georgia and making the purchases pursuant to the plan adopted." These agents proceeded to Georgia, and before December 26, 1833, appear to have come to the conclusion to contract with Peter J. Williams to purchase seven hundred thousand acres of land at the price of seven cents an acre. Information thereof having been communicated to them by the letter of Mr. Crocker of that date, they, having assumed the name of the Georgia land company, on January 8, 1834, "voted to instruct Stephen Chase, now at Milledgeville, to complete the purchase of seven hundred thousand acres as mentioned in said letter at the price therein mentioned, and to procure good title deeds to the same to the individuals of the company according to the amount of their several shares or interests in the concern." Another vote was passed, at the same time, stating the names of the individuals to whom the deeds were to be taken, omitting the name of the defendant, and containing this clause, "that the land thus conveyed be held for

the benefit of the respective members of the company, who pay their several proportions of the purchase money according to their interest in the land thus purchased." The defendant's answer states, that the obligation of Williams was to convey to the agents, and that he remained in Milledgeville till sometime in the month of March, 1834, "during which time said Williams, in part fulfilment of his said obligation, procured and conveyed to said obligees for said company about three hundred thousand acres of land, described in about fifteen hundred deeds of conveyance. All which proceedings were forthwith communicated to said company, and all the writings and papers relating to the same, including said deeds, were after the return of this defendant placed in the hands of William Willis of Portland, then the secretary and agent of said company." The answer also states, that the agents before leaving Georgia made a contract with Robert Flournoy to secure the right of preemption for their own benefit of about eighteen thousand acres of land near the mouth of the little Ocmulgee river, including certain mills upon it. This contract was afterward by them transferred to the company. Mr. Willis, in his answer to the defendant's seventeenth interrogatory, says, "my impression is that the title was conveyed both by Williams and Flournoy to Henry Goddard, Enoch Paine, and myself, as trustees of the company. At any rate I am sure, that the title was conveyed to the company; and that the deeds were in my office." At a meeting of the company on April 18, 1834, it was determined, that "the property of said company shall be divided into forty shares. Ten of said shares, for which the company have agreed to make the payments for Stephen Chase, shall be held by them, until said advances, interest and expenses shall have been paid by said Chase or his assigns; and the holders of the remaining thirty shares shall pay or cause to be paid all assessments, which may be laid upon said forty shares, and shall be reimbursed for their said advances and interest from the first sales or profits of the land." At another meeting the company, on October 21, 1834, voted, that on or before the completing the purchase of the land and prop-

erty contracted for by said company, so much at least of said property shall be disposed of by sale or by increasing the number of shares, as shall be sufficient to pay the amount of cash advanced with interest and expenses on Stephen Chase's shares; and on the reimbursement of said advances, &c. said Chase shall be entitled to receive his certificate of his shares free from any claim of said company, except such further assessments, as may be thereafter declared on said shares. And if additional shares should be created more than sufficient to pay said advances, the net proceeds of the sales thereof after paying the amount due on the said Chase's shares, shall be divided among the holders of the original stock in proportion to their respective interests." The defendant again proceeded to Georgia with written instructions from the agent of the company, bearing date on Oct. 20, 1834, to procure an act of incorporation for the company; to complete the purchase of the Flournoy mills and property; and to procure further conveyances of land from Williams. An act was passed by the legislature of that State on December 17, 1834, incorporating certain persons and their associates by the name of the Georgia Lumber Company. A contract was made with the executor of Flournoy, who had deceased, for the purchase of that estate. But no further conveyances of lands from Williams were obtained. The defendant's answer states, that he "returned and made a full report of all his doings to said company, which said doings were, at a meeting of said company, acting under and by virtue of said act of incorporation, on the second day of February, 1835, fully ratified and confirmed, together with all the previous acts of the company, before they were incorporated." And it appears, that at a meeting on that day, the Georgia lumber company voted, "that all the acts and doings of the persons associated under the late name of the Georgia land company, relating to the purchase of lands, mills, &c. in Georgia, and all contracts made by persons employed by said company in relation thereto, be and the same hereby are accepted, ratified and confirmed by the company." William Cutter testifies, that the company was organized under its charter, and

that three quarters of its stock were issued before May 6, 1835. William Willis testifies, that in consequence of the proceedings at the meeting on October 21, 1834, the stock was divided into two hundred shares. And this appears to have been done before May 6, 1835. The owners of three fourths of the shares appear to have paid for the property purchased without receiving any aid from the defendant. It was necessary to recite these facts in their order to exhibit the title of the company to the property and the interest and rights of the defendant on May 6, 1835, when he conveyed that interest to John Bradley.

The counsel for the plaintiffs contend, that the contract of sale was void, "first because Chase had no title or interest in the shares or stock of the Georgia lumber company, and none was conveyed to Bradley." It is said, that his title depended upon a condition recited in the first contract of the associates in these words, "provided he will go to Georgia and complete the purchase aforesaid." And that he never did perform that condition by completing the purchase. This could not be a condition to complete the purchase of any particular lands, for there were none then selected or agreed upon to be purchased. Nothing more could have been contemplated, than that he should go to Georgia and complete the purchase of such lands, as the associates should conclude to purchase. It could not have been the intention, that while there and acting as their agent and attending to their business, he should be responsible for the performance of contracts by those, with whom he contracted. This is shown by the subsequent proceedings of the company. The object of the vote passed by the company on January 8, 1834, instructing him to complete the purchase of seven hundred thousand acres, was not to impose a condition, that he should be responsible for the performance of that contract by Williams; it was to authorize and instruct him as their agent to proceed and do all, which they could themselves do, to complete that purchase. The company accordingly, after about three hundred thousand acres only had been purchased, recognize his rights without any such condition, and by their

vote, on April 18, 1834, say, "ten of said shares, for which the company have agreed to make the payment for Stephen Chase, shall be held by them until said advances, interest and expenses shall have been paid by said Chase or his assigns." Another answer to this objection to the title is, that the company do not appear at any time to have set up any such condition or ground of forfeiture against him or his assigns; and it is not competent for any one but the company, or those representing its rights, to interpose to enforce any such condition. This observation is equally applicable also to another objection to the title, that the defendant was instructed to "procure a good title to individuals of the company," and did not do it. And it appears also from the testimony of Mr. Willis, that the company received the title, and did so apparently without any objection to the channel, through which it was conveyed. That the defendant could not establish a legal title to a fourth part of the shares of the incorporated company or to the property conveyed to it, is undoubtedly true. And there appears to be as little reason to doubt, that he had an equitable interest in a fourth part subject to the payment of certain liabilities, for which the shares remained pledged to the company. But it is said, he could have no such equitable interest, because the trustees held the legal title in trust for those, who advanced the purchase money, and that the defendant had not advanced any of it. It has already been stated, that the testimony shows, that this argument is founded upon an erroneous statement of the fact, that the trustees held the legal title, whereas it had been conveyed to the company. But admitting that the company held it upon the terms stated in the vote passed on Jan. 8, 1834, that would not deprive any member of his proportion or interest, who should thereafter pay for it, within such reasonable time, as should be prescribed. The other members of the company having, both before and after that vote, agreed to advance the purchase money for the defendant's proportion, and to hold it for his benefit subject to a re-payment of those advances with interest and expenses, could not pretend, that his rights were destroyed by that vote. And the incorporated

company, having received the title and ratified the former proceedings, would find itself in a like position. It is further contended, that he had no equitable title, because the agreement between him and others, by which his rights were secured, was void on account of his fraudulent representations to them, by which they were induced to enter into the speculation. It is a sufficient answer to this objection, that it does not appear, that those persons or the company ever alleged against him any such fraud, or claimed to avoid their contract on that account. And it is not competent for another person, without authority from them or the company, to assume the right to interfere by making such charges. While the sale of his shares by the company for neglect to pay the amount due upon them would show, that no such objection to his equitable interest was ever made by those, who alone had the right to make it, it could not affect otherwise the question now under consideration, which is, whether the defendant had any interest in them, when he sold to Bradley. The plaintiffs cannot therefore prevail upon this point of their case.

The second point made is, that "Chase had no such title or interest, as he undertook to convey; and if he had any interest, it was materially different from what he represented." To decide upon this point it is necessary to ascertain, what he did undertake to convey; and the best evidence of this is his deed of conveyance. In that he says, I do sell and convey "all the shares together with all the right, title and interest, I have to any and every portion of the stock in the Georgia lumber company, and all the rights, privileges and immunities, to which I am entitled as a stockholder in said company," excepting twenty-two shares. Then follows a power authorizing Bradley to demand and receive of the company certificates for the shares. This power and the language of the deed would indicate, that it could not have been the intention or expectation of the parties, that the shares themselves should be transferred free from incumbrance, but only the right to demand and receive them. This is corroborated, if not fully established, by that part of the answer responsive to the bill, and

uncontradicted, which states, that "in the spring of 1835, herein before stated, this defendant did show said Bradley the votes and doings of said company annexed hereto, as evidence of this defendant's title to a certain amount of said company stock." It was apparent from all these votes, that the defendant's shares were not free from embarrassment, but were pledged for a part of the purchase money and expense. This is further shown in the letter of the defendant on March 4, 1836, to Samuel Fessenden, introduced by the plaintiffs, wherein he says, "all the persons above named read and examined all the votes and doings of the association of gentlemen styled the Georgia land company, touching my rights and interests therein; their construction, as well as mine, of my contract with said company was, that I was entitled to one quarter part of the stock of the company, being fifty shares; that my shares were not liable or subject to any assessment; that they were bound to pay all advances for my part of said stock, and the other stockholders to be repaid or reimbursed for their advances for my shares from the corporate property, the common stock, or from the sales or profits of the land company. The effect of such construction would be, to make my interest of one quarter part of the stock eventually pay one sixteenth part of the whole costs and expenses of said stock." The plaintiffs contend, and the defendant admits, that these representations were made before the sale. And if so, the parties must have been fully informed that the shares were not to be conveyed free from incumbrance. On the contrary it appears to be quite certain, that all parties well knew, that they were liable to pay one sixteenth part of the purchase money and expense. The basis, upon which the contract of purchase and sale was actually made, appears to have been, that the shares were free from all liability or embarrassment except to reimburse the company that sixteenth part, and that they were pledged to the company for that amount. That he did not undertake to convey, and did not convey, the shares free from that liability is established by the testimony. That the purchaser should have taken a conveyance, and have agreed to pay such a large

sum of money for it without any definite description of the interest conveyed, and without any covenants from the vendor to secure any certain interest, leaving the conveyance to pass and secure only such interests, as the vendor might happen to have, can only be accounted for by the strange want of consideration and reflection exhibited in many of the most important transactions at that period.

It is not necessary to prolong this examination of the rights of the parties by an argument to prove, that the defendant's construction of his first contract, and of the subsequent votes of the company, cannot be supported; and that the interest, which was conveyed by his deed to Bradley, was materially different from what he represented it to be, and from that, which the purchaser expected to obtain. And this would be sufficient on the ground of misrepresentation and of misapprehension, of what the property conveyed really was, to entitle Bradley to be relieved from his contract, if he had not made a settlement of this part of his case. For the defendant must be considered as having a more intimate knowledge of the facts and of his own rights, than a stranger to them could have, who would be entitled to rely upon his representations respecting them. But the Court is constrained to come to the conclusion, that a settlement of these misrepresentations and misapprehensions has been made under such circumstances and with such a full knowledge of the facts, that it cannot be disregarded or set aside. The difference in the value of one fourth part of the stock on the estimated expenditure of eighty thousand dollars for the purchase and improvement of the property, if liable to pay a full, and if only liable to pay a sixteenth part of it, would be fifteen thousand dollars. This the defendant admitted in his letter of March 4, 1836, which was communicated to Mr. Bradley. And on the eighth day of the following April, he agreed with Paine and others upon a reference to obtain a decision, whether the shares purchased of the defendant were liable to pay their full proportion. The referees made their award on the seventh day of May following, that those shares were liable to pay their full proportion of

the money expended for the purchase and for the improvement of the property. Mr. Bradley was then in possession of a full knowledge of the misrepresentations, and of their effect upon the value of the shares. He then knew precisely, what his position was in this respect, and no new light appears to have been thrown upon it since that time. At the term of this Court held in November following, he entered into a reference of an action instituted by the defendant upon some of the notes taken in payment for the shares. This reference was discharged on January 21, 1837. In the meantime in the presence of two of the referees, who aided them as friendly advisers and not as referees, he came to an agreement with the defendant for a settlement, and signed the agreement made on January 16, 1837, which states, that they "have agreed on a settlement and adjustment of the controversy and difficulty between them, in relation to the sale of the said Chase to said Bradley of his interest in the Georgia land or lumber company, as by said Bradley's deed from said Chase will appear." After reciting certain terms of settlement, that agreement is concluded in these words. "Said notes given by said Bradley and Warren not to be affected in any way, but hereby acknowledged to stand good and valid to all intents and purposes; all controversies and misunderstandings being amicably settled and adjusted." The testimony of Samuel Fessenden shows, that this matter was fully agitated and considered, and that the parties finally agreed upon an adjustment of it, and that the sum of seven thousand and three hundred dollars was then indorsed upon the notes on account of it. This sum was not so much by eleven hundred dollars, as Bradley might justly have insisted upon. But where a party with a full knowledge of his rights settles and takes a less sum, than the law would give him; if he were to be relieved from the settlement on that account, all confidence in the settlement of difficulties would be broken up, and parties would be compelled to litigate until a final judgment was obtained.

It is alleged, that this settlement was not conclusive, because Warren was not a party to it, and that Bradley had no authori-

ty to bind him. The answer is, he was not a party to the purchase, and cannot prevent the parties to that purchase from settling all difficulties arising out of it, as they please. It is also said, that it was not binding because there was no consideration for it. But this is quite erroneous. Bradley obtained by it an indorsement of seven thousand three hundred dollars upon his notes, and Chase submitted to a diminution of them to that amount; and Bradley also gave, and Chase received, additional security for the payment of them. There is no testimony in the case tending to prove, that the settlement was procured by any fraud or misrepresentation. The Court cannot therefore either disregard it, or set it aside.

The third point made is, that "the contract was made under material misrepresentation and mistake in regard to the stock of the Georgia lumber company, and the property constituting that stock." So much of this position, as respects the stock of the company and the misrepresentations in relation to it, has been already under consideration, and the discussion will not be resumed. If the plaintiffs would avoid their contracts on the ground of fraudulent misrepresentations respecting the property conveyed to the company, they had their election to proceed by a bill in equity, or by a defence before a jury, when those contracts were attempted to be enforced by a suit at law. The prosecution of the suit in equity was attended by material advantages by enabling them to call upon the defendant to state upon oath the precise representations, which were made, although no other person might be present, by whose testimony they could be proved. It was also attended by corresponding disadvantages by making such statements extracted under oath from the defendant, who must know what was said and done, equivalent to the testimony of one credible witness. This Court sitting in equity is bound therefore, in the examination of the testimony, to act upon a different rule from that, which would be applied to it on a trial at law. The plaintiffs' counsel would impair the force of the answer by insisting, that the denial of the representations alleged in the bill is not direct and positive, but only according to the defendant's recollection

and belief. It will be necessary to examine and ascertain, whether this be a correct statement of the form of the answer. It states an interview with Mr. Bradley in the month of February or March, 1834, and then recites, what was said and done at that time. It then denies, that at any other time, to the best of his recollection and belief, he made any representations or expressed any opinions respecting the Flournoy purchase, or the value of the property embraced in the contract with Williams. It proceeds and states that the next conversation between them on this subject was in the office of the defendant in the spring of 1835; recites it, and says, that he "declined giving any opinion or description of said land and property in Georgia," but referred him to "the evidence touching said property, its location, character, and value," to be found in the office of Mr. Willis in Portland. It states a third interview between them in Boston, in the month of April, 1835, and their conversation; and a fourth in Portland, on the sixth day of May following, when the bargain was made, and the conversation in relation to it. The defendant next proceeds in his answer, to speak of the representations charged in the bill, and says, "this defendant distinctly denies, that he ever made any representations to said Bradley or Warren, as stated in the bill, other than are herein before set forth, concerning the quantity or quality of the lands so as aforesaid purchased and contracted for on behalf of said company; and that he ever made any statements of the quantity or quality of the timber thereon, its situation, or the facilities for manufacturing and getting the same to market, as stated in said bill; and that he ever made any statements to said Bradley or Warren touching any mill sites, waterfalls, streams, or other privileges connected with said property, as stated in the bill." This is a clear, unqualified, and positive denial of the representations alleged in the bill, and relied upon to avoid the contract. The effect of the whole answer is to make this denial, and to state, according to the defendant's recollection and belief, what was said and done at each interview between those parties. It must, therefore, according to the rule in equity, be considered

as disproving this point in the plaintiff's case, unless its effect has been destroyed by testimony equivalent to more than the testimony of one credible witness. Has such an amount of testimony been presented? That part of the testimony, which speaks of representations made by the defendant after the sale, is clearly inadmissible, and it must be disregarded. The testimony, which states the representations made to other persons and not to the plaintiffs, can be used only to prove, that the defendant had formed the design to commit frauds in that manner, as opportunities should be offered; and when such a design has been established, that fact may be used in connexion with other testimony, to satisfy the mind, that it was acted upon in making the contract under consideration. Testimony to prove such a design should have little weight, when used to destroy the effect of the testimony of a witness, who knows and states what was actually said and done; while it may have a more important and legitimate influence, when the intentions of a party, and not his acts and declarations, are to be ascertained, and when the case depends wholly or principally upon circumstantial evidence. Evidence, that representations were made to other persons, is no proof, that the same were made to the plaintiffs. A person may make statements and bargains with one man, greatly differing from those, which he makes with another. He may have made statements respecting property, and have become satisfied, that they were of a doubtful or erroneous character, and have concluded to make them no more; and to infer, that he always continued to make the same representations to all persons, would often be contrary to the fact, and manifestly unjust. Unless, therefore, positive testimony is to be found in the case proving, that the defendant made to the plaintiffs representations contrary to the averments of the answer, that must prevail. The testimony relied upon to do this, comes from Ruel Barrows, Samuel Ilsley, and Alexander R. Bradley. The only testimony found in the deposition of Barrows respecting the representations made by the defendant to John Bradley, is in answer to the fifth interrogatory of the plaintiffs, and it is as follows. "Prior to May 6, 1835, I was

in the office of Stephen Chase, and John Bradley, one of the plaintiffs, was there; said Chase was there exhibiting to said Bradley his plans and maps of his property in Georgia, and explaining to him the mill privilege and situation of the lumber. I do not remember the particular representations, which said Chase then made to said Bradley. I stopped but a short time." How long before the sixth day of May, 1835, this took place, the witness does not state. And there is nothing in this testimony contradicting that part of the answer, which states what took place between those parties in the month of February or March, 1834. The only testimony of Ilsley in relation to this matter, is found in his answer to the same interrogatory. He says, "while I was a clerk in the store of Bradley and Warren, the plaintiffs, and prior to the 6th of May, 1835, said Chase was often in the plaintiffs' store and conversing about the Georgia property. His conversation was usually with Warren, and although I cannot remember the particulars of the conversations, I do remember, that he made favorable representations as to the value of said property. I was about my own business, and did not pay particular attention to what said Chase said." It will readily be perceived, that the defendant might have made representations, which the witness would consider as favorable to the value of the property, without contradicting in the least the statements of the answer. And there is nothing in the testimony of these two witnesses tending to impair its force.

The testimony of Alexander R. Bradley, in answer to the same interrogatory, is more material. In answer to a preceding question he had stated the representations, which the defendant had made to him, and they were in substance, those alleged in the bill to have been made to the plaintiffs. And he says, that the defendant "made to said Warren substantially the same representations, as I have stated above." He then says, "I may possibly be mistaken as to said Warren's being the person conversed with at that time." This last remark so materially impairs the force of the one preceding it, and leaves it so doubtful, whether those representations were

made to Warren, that it would be wholly unsafe and dangerous for a Court to consider the fact as proved by it, if considered independently of the answer, which denies it. The witness also says, "and I think, that on a different occasion at said office, previous to May 6, 1835, I heard said Chase make similar statements about said property to John Bradley." There are two objections to the reception of this testimony as satisfactory proof in contradiction of the answer. One is, that the witness cannot and does not state positively, that such representations were made. He only says, that he thinks, they were. The other is, that it is uncertain, what the representations were, if they were made. The witness does not attempt to state the language used by the defendant; nor does he state the ideas, which he communicated with such reasonable certainty, that the Court can come to a satisfactory conclusion, as to what they really were. The witness does not say, they were the same representations, which had been made to himself, but only that they were similar. And the Court is only authorized to consider, that there was a resemblance or likeness between them. How close that was, is left doubtful. The Court could not feel the least assurance, that a conclusion on a point so material and vital would rest on any solid foundation, without having the ideas, which were communicated in that conversation, stated in the testimony, that it might judge how far they were contradictory to the answer. The witness further says, "I have a perfect recollection of hearing said Chase, prior to May 6, 1835, in the plaintiffs' store, speak in high terms of said property; his conversation was directed to one or both of the plaintiffs; I cannot say to which. The conversation on this occasion seemed to refer to some prior conversation between the parties." The remarks, which were made, when he spoke in high terms of the property, are not related in the testimony; and he might have spoken in high terms of it without making any of the representations alleged in the bill and denied in the answer. The very minute examination of this witness, in a deposition taken by the defendant, does not appear to vary materially the effect of his testimony. If the tes-

timony of the witness were in direct and certain conflict with the answer, the Court would not be authorized to consider the answer as disproved without corroborating circumstances. But it is so far from being in direct conflict with it, that the allegations of the bill could not be considered as satisfactorily proved, considering the witness entitled to full credit and confidence. And regarding the answer as testimony, as it is bound to do, it is not possible for the Court to come legally to the conclusion, that fraudulent representations respecting the property conveyed to the company, were made to induce Mr. Bradley to make the purchase.

Nor does the testimony disclose any such mutual mistake respecting that property and its condition at that time, as would authorize the Court to rescind the contract. Especially, when it considers, that the plaintiffs had an opportunity for more than twenty months to obtain information respecting that property, before Mr. Bradley signed the settlement on Jan. 16, 1837, stating that all controversies and misunderstandings were amicably settled and adjusted. And this he did after having information for about ten months, that he had been deceived with respect to the amount, for which the shares were held by the company, and thereby cautioned to examine the whole transaction anew, and to ascertain, whether there were other just grounds of complaint, before he settled with the defendant. Although it is apparent, that the plaintiff may sustain very heavy and even ruinous losses; yet the Court, taking into consideration that settlement, is not authorized on this testimony to give relief.

The bill is dismissed. But as a misrepresentation on the part of the defendant has been established, he is not entitled to costs.

JOHN KNIGHT *versus* DANIEL BEAN *& al. Adm'rs.*

Where the plaintiff held a bond from a third person for the conveyance of a tract of land on the payment of six hundred dollars in six months, and sold and assigned to the defendant *one half of the bond*, and received the written promise of the latter to pay the plaintiff $625,00; and the defendant, before the expiration of the six months, gave the plaintiff one half of the six hundred dollars, to be by him paid to the obligor, and the plaintiff promised to pay the same, as well as his own half, but neglected so to do, and kept the money, and the time expired, without payment; *it was held*, that the plaintiff could not maintain an action to recover the $625,00.

If a stipulation be for the performance of an act, which the party alone is competent to perform, and he is prevented by the act of God from performing it, the obligation is discharged.

THE plaintiff presented his account against the estate of James Steele, the intestate, to the commissioners, the estate having been represented to be insolvent, who allowed but a part of it. The following is a copy:

"The estate of Gen. James Steele to John Knight		Dr.
"Feb. 1833. To passage and conveyance of said Steele one journey to the east of Baskehegan river,	$	35,00
"To damages on non-fulfilment of contract of Dec. 21, 1835, by said Steele, to give warranty deed of land in Cold river, and to give up note, confession, &c.		350,00
"To damages on non-fulfilment of said Steele's contract of Dec. 21, 1835, to pay $625, in 3, 6 and 9 months, in consideration of my assignment of Ingham's bond to him,		750,00
"1836, March. To expenses and services in attending to said bond, and endeavoring to get a deed from said Steele,		30,00
		$1165,00"

The plaintiff then, in the mode provided by law, brought an action on his demand. The writ contained ten long counts. The following is a copy of the writing, signed by Steele, of

Dec. 21, 1835. "Brownfield, Dec. 21, 1835. This may certify, that I have this day purchased of John Knight, one half of a bond of ten thousand acres of land, lying in Indian stream in the State of New Hampshire. Bond dated 23d September last past, signed by Oliver Ingham to Aaron Pottle, which I am to pay him six hundred and twenty-five dollars, to be paid in six, nine and twelve *months*, in equal *annual* payments. Provided there is such land as mentioned in the bond as described." On Sept. 25, 1835, Oliver Ingham gave a bond to Aaron M. Pottle, wherein he covenanted to convey to Pottle, "ten thousand acres of land, situate and lying in the territory of Indian stream, being undivided land of Wales purchase, after the said Pottle shall first well and truly pay the said Ingham the sum of six cents per acre within six months from this date." This bond was assigned to the plaintiff by Pottle on Oct. 27, 1835. On Dec. 21, 1835, the plaintiff made a writing on the same bond in form as follows: "Brownfield, Dec. 21, 1835. I have this day sold one half of my right to the within bond to James Steele, and received payment in a valuable consideration."

"John Knight."

Steele gave to the plaintiff a writing of the following tenor. "Brownfield, Dec. 21, 1835. This may certify, that I agree to give John Knight a good warranty deed of a tract of land that I gave Benjamin Day a bond of, that belongs to William Steele's estate in Cold river by his producing the bond.

"James Steele."

"I am to give up a note I hold against Benjamin Day for seventy-five dollars, and to discharge a confession I hold against Day and John Knight, before Stephen Chase.

"James Steele."

The report of the trial is quite voluminous; and as it is believed, that enough appears in the opinion of the Court, in addition to what has already been given, to understand the questions of law, no abstract will be attempted.

Able and extended arguments in writing were furnished to the Court. They are too long for insertion, and cannot well be abridged.

Deblois and *A. R. Bradley*, for the plaintiff.

Howard & Osgood, for the defendants.

The opinion of the Court was drawn up by

WHITMAN C. J. — The demand of the plaintiff, having been submitted to the commissioners on the claims against the estate of the defendant's intestate, Steele, and but a small portion of it having been allowed by them, he has, according to the provisions of law, brought his action to recover the whole of it. The parties, after the evidence, at the trial, had been developed, agreed that the same should be submitted to the whole Court, upon a report thereof to be made by the Judge presiding at the trial; and "that such judgment should be entered upon nonsuit or default, as the facts and evidence would warrant on the application of legal principles."

The plaintiff's claim consists of four items. The first in importance of which, is a claim for $750,00, for the non-fulfilment of the intestate's contract of December 21, 1835, to pay $625,00, in three, six and nine months," in consideration of the assignment of the bond of one Ingham to him. This item arises upon a writing of the date named, in which the intestate acknowledged the assignment of "one half of a bond for ten thousand acres of land, lying on Indian stream, in New Hampshire," and promising to pay therefor as above, "provided there is such land as mentioned in the bond described." The bond is conditioned for the conveyance of "ten thousand acres of land, situated and lying in the territory of Indian stream, being undivided land of Wales purchase so called."

The first objection to this item of the claim, is, that there is no such land as described. If there be not, of course the intestate's promise is void. Much of the evidence tends to show, however, that there was a region of territory called the Indian stream tract. And it may be that what, in said bond, is called the Wales purchase, was a part of it; and was probably supposed so to be. But it seems unnecessary for us to investigate these particulars.

The assignment was but of one half of the interest under the bond ; so that the intestate, and the plaintiff became jointly interested therein. The sum to be paid the obligor, and without the payment of which the assignees of the obligee could not become entitled to a conveyance, was six hundred dollars. The intestate furnished the plaintiff with one half of that sum to enable him to comply with the conditions of the bond, by paying it, together with the other half, which it belonged to him to pay, in order to become entitled to the conveyance ; and it is manifest that it was the understanding and agreement between them that the plaintiff should do whatever was needful for that purpose ; instead of which he kept the $300,00, and never complied with the terms requisite to secure a conveyance of the land ; so that by the misfeazance of the plaintiff the consideration for the $625,00, utterly failed, and the obligation on the intestate to pay it was annulled.

There is another ground on which reliance might well be placed, in defence, against this item of claim. Looking at the whole complexion of the transaction, at the strange and crazy state of the title as exhibited in the deeds; and at the time of the plaintiff's becoming connected with it when, as litigation for some years past has abundantly evinced, a very unnatural state of excitement in speculation was prevalent, indicative of an utter disregard of all regularity in negotiation, if not of moral honesty ; and connecting this with the evidence of the want of good faith on the part of the plaintiff, but too plainly indicated, by his letters to the intestate, when compared with the testimony of the witnesses, Davis and Pottle, the presumption of a premeditated fraud upon the intestate, becomes very powerful, if not absolutely conclusive. We cannot doubt, therefore, that the commissioners did right in rejecting this item of claim.

The next item in amount is, "for damage in non-fulfilment of contract of Dec. 21, 1835, by said Steele, to give warranty deed of land in Cold river, and give up note, confession, &c." To support this item, a writing is produced, signed by the intestate, in which he promises to convey, by deed of warranty,

to the plaintiff, a certain lot of land in Fryeburg, upon his producing a bond, which he had before given to one Day, to convey the same to him, on certain conditions, which seem not to have been complied with; and the intestate further stipulated in said writing, to give up a note he held against the plaintiff and said Day. This writing bears date the same day, with the promise before considered, to pay to the plaintiff $625,00; and the evidence affords much reason to believe, that they formed one transaction.

One of the plaintiff's counts states the assignment of the bond to have furnished the consideration for the promise to convey this lot of land; and this averment of the plaintiff we may well believe to have been true; for without it no adequate consideration for such a conveyance would seem to have been in contemplation of the intestate, and if the consideration stated be not the true one the plaintiff could not recover. The producing of the bond to Day, which had ceased to be obligatory, was an incident, collateral in its nature, and cannot be regarded as the motive to the contract. The fact being so, the consideration for the promise to make such conveyance must stand upon the same basis with the promise to pay the $625,00, and must fail with it.

But in reference to this claim for a conveyance, it was to be made by the intestate upon the performance of a condition by the plaintiff. There was no stipulation that any one else should make it in any event. His administrators as such, would have no power to make it, even if there had been a stipulation that they should.

Again, the condition upon which it was to be made, viz. upon the production of the bond before given to Day, was that, and of course during his life, it should be produced *to him.* The production of it to any one else, after his decease, would not be a compliance with the terms of the condition. No one else was authorized to receive it, or to do any act upon its being produced. It does not appear ever to have been produced to the intestate in his lifetime. He therefore, if the contract was obligatory upon him, would not appear to have

committed a breach of it. There is then no foundation for a personal claim, under and by virtue of it, against his estate. There are breaches of contract which may take place after the decease of the individual making it; as where a man promises to pay money at a stated time, and dies before the time. The non-payment at the time agreed upon will be a breach of contract, although after his decease, which will authorize an action against his executors or administrators; they being the representatives of the deceased, and intrusted with the fund out of which payment is to be made; and cases of a similar kind are numerous.

But if the stipulation be for the performance of an act, which the party alone is competent to perform, if prevented by the act of God from performing it, the obligation is discharged; as if one man should agree to work for another for a specified time, and should die before the expiration of the period agreed upon, the obligation would be discharged. So if one person should agree to wait and tend upon another personally for a year, and the person to be waited and tended upon should die before the expiration of the time, the other party would be absolved from his undertaking. Real estate can be conveyed by no one but the owner, unless it be by special authority from him or by regulations of law. Hence the provision by statute, formerly, that in case of an agreement to convey real estate upon condition, if the person contracting to convey, died before making the conveyance, a process might have been had to authorize the conveyance to be made. Now by the Revised Statutes, this Court, as a Court of equity, is authorized to administer relief in such cases.

The two other items of the plaintiff's demand are for services performed, and for money expended for the use of the intestate; first in endeavoring to obtain a deed under the bond from Ingham, and secondly, on a journey upon which he started with the intestate, for some purpose which does not distinctly appear. As to the latter of these items, there is no evidence showing satisfactorily, any service or expenditure of money for the use of the intestate. The witness, Downing,

testifies, that he saw the plaintiff and the intestate start from the plaintiff's in his sleigh, drawn by his horse; and knows the plaintiff was gone about three weeks. Of the intestate he knows nothing more. Upon such loose evidence showing nothing definitively of the object of their journey, whether for the use of one or the other or both; how far they went, or how long they were together, nor which paid the expenses of the journey, it is impossible to come to a satisfactory conclusion, that the plaintiff is entitled to recover any thing. As to the endeavors to obtain a deed, under the bond from Ingham, what is before said will suffice to show that we cannot become satisfied that he has any just claim for compensation for services in reference to that business.

Judgment must therefore be entered upon nonsuit.

JACOB D. BROWN *versus* SEWALL CROCKETT.

If horses, neat cattle, &c. are attached, and "are suffered by the officer making such attachment to remain in the possession of the debtor on security given for the safe keeping or delivery thereof, to such officer," under the provision of St. 1821, c. 60, § 34. (Rev. St. c. 114, § 37,) and are afterwards attached by another officer on another writ, and removed, the first attaching officer, if prejudiced thereby, may maintain a suit for the removal of the property; but the owner cannot, either as bailee of the first officer or as receiptor to him for the property, support an action of replevin in consequence thereof against the second attaching officer or his bailee.

REPLEVIN for a horse. From a statement of facts by the parties, it appeared that on Jan. 16, 1839, the horse was the property of the plaintiff, and was on that day attached as his property by Cousens, a deputy sheriff, on a writ in favor of Pierce against Brown. Cousens immediately "delivered the horse back again to the plaintiff, and took a receipt therefor." Pierce recovered judgment, took out his execution and delivered it to an officer, who within thirty days demanded the horse of the receiptors, and they neglected to deliver him to the officer. Cousens brought an action on the receipt and obtained judgment against the receiptors for the value of the

horse. It did not appear at what time this judgment was recovered, nor whether it was or was not satisfied; nor whether Brown did or did not sign the receipt.

On April 17, 1839, Carey, a deputy sheriff, attached the same horse, then in possession of the plaintiff, as his property, on a writ in favor of Welch against him, and this suit was pending at the time the statement of facts was made. When Carey made his attachment he took the horse from the possession of the plaintiff, and put the same into the possession of the defendant as the servant of Carey. In May, 1839, the plaintiff demanded the horse of Crockett, who then had him in his keeping, and he refused to deliver him. The plaintiff brought this action of replevin on June 3, 1839. A nonsuit or default was to be entered, as the opinion of the Court should be.

Dunn, for the plaintiff.

The attachment made by Cousens was in full force, and was duly preserved. St. 1821, c. 60, § 34; *Woodman* v. *Trafton*, 7 Greenl. 178. The statute permits the property, when receipted for, to be left in possession of the defendant.

This horse, being under an attachment by one deputy sheriff, was not liable to be attached and taken away by another, and Carey was a trespasser in so doing.

The plaintiff is the owner of the horse, and having actual possession he may retain it against all persons but the first attaching officer, and may maintain this action. *Denny* v. *Willard*, 11 Pick. 519.

Even if the second attachment was properly made, it had ceased to have any force when this suit was brought. The case shows that the property was wholly consumed by the first attachment, as the officer recovered judgment against the receiptors for the full value of the horse. The second attachment is necessarily to the prejudice of the first, which the statute does not permit. St. 1821, c. 60, § 34.

Codman & Fox argued for the defendant, contending, that the plaintiff could not recover, because no person can replevin his own property from an officer who has attached it as his. The

form of the writ of replevin, (St. 1821, c. 63, § 9,) provides expressly, that the property to be replevied shall not have been attached as the property of the plaintiff in replevin. The St. 1820, c. 60, § 34, does not militate with this position. That only provides, that as it respects the first attaching officer, the attachment shall not be lost by suffering that description of property to remain in the possession of the debtor. It gives no new rights to the debtor, and it takes none from him. *Woodman* v. *Trafton*, 7 Greenl. 178. Nor could the plaintiff, as one of the receiptors for the horse, maintain replevin. 9 Mass. R. 266 and 104.

The opinion of the Court was drawn up by

TENNEY J. — This is an action of replevin brought for property, the general ownership of which was in the plaintiff. It had been attached on a writ and bailed by the officer to the defendant. One ground on which the suit is attempted to be supported is, that the same property having been before attached on another writ and by another officer, and having been permitted to go back into the hands of the plaintiff, on his giving a receipt therefor, it was not subject to the last attachment; and in support of this position, c. 60, § 34 of the statutes of 1821 is relied upon.

As the law was before that statute, personal property attached on mesne process and permitted to remain in, or be returned to the possession of the debtor, could again be attached and held against the first attachment, especially if the creditor or the officer had no knowledge of the previous attachment. To prevent the expense which would materially diminish in many cases the net avails of a sale on the execution, and at the same time to secure the lien created for the creditor's benefit, the statute was probably enacted. But it alters the former law, no farther, than to preclude a creditor from attaching the same property subsequently, to the prejudice of the first attachment. It was never intended, we think, to prevent creditors from the exercise of any other before existing right. The possession being in the debtor, he can lawfully sell the

property, when under attachment, subject only to the lien thereby effected. *Denny* v. *Willard*, 11 Pick. 519. An attachment made subsequently by another officer may be a trespass upon the rights of the one who made the first, but is not an act of which the owner can complain, and will be a valid attachment, if yielded to by him who made the first. As bailee of the first officer, the plaintiff has no special property in the goods, and as owner he cannot replevy from the one, who holds them by authority of an attachment on a writ against him.

Again, it is insisted that as the officer, who made the first attachment, resorted to the security taken for a re-delivery of the property, it has thereby been consumed in discharging that debt, which it was taken to secure. The property has not been so consumed, even if the judgment recovered on the receipt had been discharged. If it had been taken and sold on the execution, it would have been so; but the officer was content to resort to the security of the receipt without availing himself of his privilege in seizing the property. If the execution was satisfied without a resort to the property attached, the attachment no longer existed, and the goods were those of the debtor freed from all claim, excepting that by authority of which the defendant held the possession before the present suit. The liability of the receiptor, or payment by him of the debt, does not by operation of law transfer the lien of the officer upon the property to the receiptor. The general ownership remains unchanged, unless a sale has taken place.

The plaintiff must become nonsuited, and judgment for nominal damages and for a return.

STEPHEN ABBOTT & *al. versus* PHINEAS WOOD.

If a statute be both penal and remedial, it should be construed strictly.

In an action brought to recover double the value of fence built by one occupant for the other on account of his neglect, under the provisions of St. 1821, c. 44, § 2, the plaintiff cannot, on the trial, give parol evidence of the contents of the writing given by the fence viewers to the defendant, directing him to repair or rebuild his part of the fence, without having given the regular previous notice to produce it.

An action founded on St. 1821, c. 44, § 2, to recover double the value of fence built by order of the fence viewers cannot be sustained, unless the fence viewers adjudge that the fence, built by the plaintiff, is sufficient, and give notice thereof, and of the value of the fence, as ascertained by them, to the occupant so neglecting to repair or rebuild.

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

This was an action under the statute for regulating fences, in which the plaintiffs claim to recover double the expense of "amending, surveying and viewing the partition fence between the adjoining lands of the parties." It was admitted, that the parties were owners and occupiers of adjoining lands, and improved the same; and to prove that there had been a division of the partition fence between them, the plaintiffs offered in evidence, the records of the town of Rumford, upon which was found the following. "Whereas a dispute has arisen between John Manson and Stephen Abbott of Rumford and Phineas Wood of said Rumford, about their respective rights in and obligation to maintain a partition fence in the line between their several lands at Rumford, and whereas we the subscribers, fence viewers of the town of Rumford, upon application to us by said Manson and Abbott, gave due notice to each of said parties to attend, if they saw cause, at the time and place when and where assignment should be made; therefore by virtue of the statute in such cases provided, and after having viewed the premises and duly considered the matter in dispute, we have assigned and do hereby assign to each of said parties his share of said fence as follows, to wit, the said Phineas Wood shall build and keep in repair a legal and sufficient fence, from the northeast corner of a lot of land owned

by said Manson and Abbott, No. 14; thence southwardly sixty-three rods and eleven links to the southeast corner of said lot, thence in the northerly line of said lot seven rods to a stake and stones; and the said Manson and Abbott build and keep in good repair a like fence on the other part of said line, to wit, from the aforesaid stake and stones on said southwardly line eighty-one rods and eight links to the corner of a lot of land owned by David Abbott, 2d; and the space of thirty days is hereby assigned to each party for the erection of their several parts of said fence. Given under our hands at Rumford this eighth day of April, 1839.

"Colman Godwin, } Fence Viewers
"Henry Martin, } of Rumford."

"A true copy. Attest, Charles A. Kimball, Town Clerk."

The counsel for the defendant objected to the admission of the record, and contended, that it was so defective upon the face of it, that said assignment did not make a legal partition of said fence, and that said Wood was not bound by said assignment to build and maintain the fence, on the part so set out to him. But it being proved that said Wood was present, when said assignment was made, and did choose to take that part so set out to him, the Judge ruled, that if the jury believed such was the fact, the assignment was legal and sufficient.

Colman Godwin testified, that said Wood was present when said assignment was made, and that he gave a copy of it to each of the parties, and one to the town clerk; that Wood chose the part assigned to him. This was in April, A. D. 1839. He further testified, that about August 13, 1840, complaint was made to him and Joshua T. Hall, they being the fence viewers for said town of Rumford for that year, that said Wood's part of said fence was not in good repair, and they were requested to go and survey the same, which they did; that they adjudged said fence to be insufficient, on said Wood's part, and the fence of the plaintiffs to be good and sufficient; and that said Wood was notified and present at this time. They made and signed a writing and gave it to said Wood, certifying that his part of said fence was insufficient, and that

the plaintiffs' part was good and sufficient; that they had been called upon to view said fence, and that they gave him ten days to build and repair the same, and if he did not do it, they should direct the plaintiffs to do it. The defendant objected to testimony of said Godwin relating to the contents of said writing, as they had given the defendant no notice to produce the same. The Judge admitted it. Godwin further testified that they did not describe in said writing, where said fence was, or in what part it was out of repair; that after said ten days had expired, he and said Hall went and examined said fence again of their own accord, and found it had not been repaired; that after the plaintiffs had completed said fence, he and said Hall went and viewed the same, and adjudged it to be sufficient, but not in writing. The defendant objected to the admission of this testimony but the Judge admitted it. He testified that Wood was present, and tried said fence by jumping on to the rails, he being a heavy man; that they did not state to him, that they had so adjudged, but did tell him they had appraised the value of it at nineteen dollars, and their own expenses at seven dollars; that they made a writing at that time and gave the same to the plaintiffs, but did not show it to the defendant. The writing was produced by the plaintiffs, and put into the case, and was as follows. — "Rumford, Aug. 26, 1840. We Colman Godwin and Joshua T. Hall, fence viewers for the town of Rumford, called upon by Stephen Abbott and John Manson, to appraise a piece of fence between their land and Phineas Wood's, built by John Manson and Stephen Abbott, we appraise what has been built and repaired worth nineteen dollars; likewise our expense seven dollars.

"Colman Godwin, } Fence Viewers
"Joshua T. Hall, } of Rumford."

"You have a right to call on Mr. Wood for thirty-eight dollars and seven dollars."

Said Goodwin testified, that they made said appraisal the next day after said fence was completed; that the seven dollars for their expenses was made up as follows, one dollar for dividing the fence in 1839, and two dollars, being one dollar

for each of their views of said fence in 1840, being three in number, including the one when they went of their own accord; and also that they communicated nothing more to the defendant than what appeared in said writing.

A witness testified that said Godwin, Hall and Henry Martin beforementioned were freeholders, to which testimony the defendant objected, contending that such fact, if true, should appear by the records of the town, or be recited in the adjudication and doings of said fence viewers; but the Judge admitted it to be proved by parol. It appeared by town records that they were chosen fence viewers and duly sworn. The plaintiffs made demand for this claim of Wood, in August, 1840, and shewed him the writing, dated Aug. 26, 1840.

The counsel for the defendant requested the Court to instruct the jury, that upon the foregoing evidence, this action could not be maintained. But the presiding Judge declined so to instruct them. The verdict was for the plaintiffs for the sum of $56,78, and the defendant filed exceptions.

May, for the defendant, said that the plaintiffs must bring themselves within the provisions of the statute, or the action could not be maintained. *Rust* v. *Low*, 6 Mass. R. 90; *Little* v. *Lothrop*, 5 Greenl. 356. It is also an action for a penalty, and the statute which gives it must be construed strictly. It must be shown that every step was taken, which the statute requires, or there can be no recovery, as no agreement of parties, or prescription, has been shown.

There was no legal division of the fence. It does not appear, that there was any dispute between adverse owners, or that legal notice was given, or that there was an equal division of the fence. It does not appear by record, as it should, that the fence viewers were freeholders. Stat. 1821, c. 44; 13 Maine R. 423; 8 Greenl. 271; 11 Pick. 441; 6 Mass. R. 641.

But if the original assignment had been legal, the after proceedings were insufficient and void. There was no adjudication that the fence was insufficient; the time, too, was longer than the statute allows; it does not appear when the fence was built, or that the fence viewers adjudged it to be sufficient; or

that the amount was ascertained in writing; or that the defendant had notice. 8 Greenl. 81; 15 Pick. 123; 14 Pick. 276. Nor does it appear, but that the valuation of the fence viewers included the whole fence, the plaintiffs' share, as well as the defendant's.

Parol evidence of the contents of the paper was improperly admitted. 2 Stark. Ev. 975; 1 Metc. 440; Colm. 33.

Howard, for the plaintiffs, contended, that it did appear, that there was a dispute between the parties about the fence.

Equal halves, in the statute, means a just and equal division of the fence, having reference to the expense of building and keeping in repair. The statute cannot be construed to mean a division of equal length of line. This would often cause great inequality and injustice.

The defendant had notice of the adjudication, and that is all the statute requires. The case shows, that he was actually there, and tried the fence himself. *Prescott* v. *Mudgett*, 13 Maine R. 423.

The case shows, too, that these men were actually chosen and sworn as fence viewers. But if it did not, such proof is not required. They acted as such, and they are public officers. The question whether they were legally chosen and sworn, cannot be tried out collaterally in this manner. They will be presumed to be so. *Fowler* v. *Bebee*, 9 Mass. R. 231; *Nason* v. *Dillingham*, 15 Mass. R. 170; *Bucknam* v. *Ruggles*, ib. 180; 7 Johns. R. 549; 2 Ld. Raym. 668.

They have described themselves as fence viewers, and the law requires that fence viewers should be freeholders. This is enough. But it was proved, that they were freeholders.

If the fence viewers allowed the defendant a longer time than they were required to do, he cannot complain of what was for his benefit; and the plaintiffs do not.

Whether the demand was sufficient, or not, it is unnecessary to inquire, for the defendant waived all objections of that kind by refusing to pay on other grounds.

The paper in question was not one of the papers, where

the opposite party is to be previously served with a notice to produce it, as a prerequisite to giving notice of its contents, when in possession of the other party and withheld by him, under rule 20, of the District Court. This is not a private paper of his own, but a public one.

The opinion of the Court, SHEPLEY J. taking no part in the decision, not having been present at the argument, was drawn up by

TENNEY J. — To the maintenance of this action several objections have been urged, upon the evidence introduced and relied upon in its support. It is founded upon chapter 44 of the statutes of 1821; and being for a penalty as well as remedial, the statute must be strictly construed. Without considering all the points presented, we are satisfied, that the proof in two respects has failed of being such as the law requires.

Assuming the fact to be true, that a proper division of the line between the parties existed, and that each was bound to keep up a good and sufficient fence on their respective portions, we are to inquire, whether the proceedings on which the plaintiffs' claim is founded were correct. It is provided in the second section of the chapter referred to, that "in case either party shall neglect and refuse to repair or rebuild the fence, which of right he ought to maintain, the aggrieved party may forthwith apply to two or more fence viewers of such town, duly chosen and sworn, to survey the same; and upon their determination, that the fence is insufficient, they shall signify the same in writing to the occupant of the land, and direct him to repair or rebuild the same within six days." The fence viewers of the town of Rumford, where the parties lived, and where the land was situated, were applied to by the plaintiffs, to view and judge of the sufficiency of the defendant's fence, which it is contended he was bound to maintain between the parties; they proceeded to examine the same, and the result of their examination was committed to writing and delivered to the defendant. No loss or destruction of this paper was attempted to be shown, and no notice was given to the de-

fendant to produce it at the trial, but parol evidence of the proceedings and the contents of this paper, was allowed against the objection of the defendant's counsel. The duties of the fence viewers in this particular were important, and in order that their action should be effectual, evidence thereof is required to be in writing. The omission to make and deliver such a writing to the delinquent party, would prevent the other from recovering in an action; any essential defect in a writing, made and delivered would be equally so; upon a correct fulfilment of the duty devolving upon these officers, thus indicated, the defendant was holden to make payment for that, for which he did not contract, together with a like sum as a penalty for neglect, and double the usual rate of interest for delay. It would be a violation of a reasonable rule of law to trust to the recollection of witnesses, where evidence of a character, which time could not render uncertain is accessible. This was not a paper, which the plaintiffs could suppose would be immaterial, for the facts which it should contain were indispensable.

Where the party complained of shall neglect to repair or rebuild the fence, according to the direction, within the prescribed time, the same section provides, that it shall be lawful for the complainant to make up, amend or repair the deficiency; and when the same shall be completed and adjudged sufficient by two or more fence viewers, and the value thereof, together with the fence viewers' fees ascertained in writing, the complainant shall have a right to demand, &c. and in case of neglect or refusal to make payment thereof for the space of one calendar month after demand, &c. he may sue, &c. The case finds that the fence viewers examined the fence after the plaintiffs had professed to repair it, and that the defendant was present and made trial of its sufficiency. But they did not state to him, and there is no proof that they did state to any one, that they had adjudged it to be sufficient, or had made their judgment known in any manner whatever. They did inform the defendant of the amount of the value of the fence, as they had appraised it and their own fees for their services,

but this might have been consistent with an opinion, that the fence was still insufficient. They gave a writing to the plaintiffs expressing the same, and also that he had a right to the sum which was double the amount of the appraisal; but this writing was not exhibited to the defendant, and there is no evidence that he knew of its existence till it was presented by the plaintiffs. It was the right of the defendant to be notified of this examination. *Scott* v. *Dickinson*, 15 Pick. 276. And as he was present, it may be presumed that he could make no complaint in this particular. It was equally his privilege to be heard, and afterwards to know distinctly the result of their deliberations, in express terms. The statute cannot be construed to mean, that when they were to judge of the sufficiency of the fence, he was to derive his knowledge of that judgment by inferences from facts accompanying the examination. Nothing short of the opinion of the fence viewers of the entire sufficiency of the fence could in any degree bind him. Upon this solemn adjudication, and the value of the fence and the fence viewers' fees ascertained in writing, alone can this action be maintained. The paper put into the hands of the plaintiffs, if it had been shown to the defendant, is wanting in this particular. The opinion of the fence viewers, we are to suppose, was formed at the time of the examination, but till expressed, could have no binding effect. It would be unreasonable to hold the defendant to pay a heavy penalty without a clear knowledge that it had been incurred.

Exceptions sustained and new trial granted.

Ira Bean, Adm'r. *versus* Calvin Bumpus.

No notice is required by the Rev. St. c. 106, prior to the granting of administration on an intestate's estate if it be granted, "to the widow, husband, next of kin, or husband of the daughter of the deceased, or to two or more of them.

By the Rev. Stat. c. 105, the Judge of Probate has no jurisdiction, and cannot grant administration, if it does not appear to his satisfaction, "that there is personal estate of the deceased, amounting to at least twenty dollars, or that the debts due from him amount to that sum; and in the latter case, that he left that amount, in value, of real estate."

If a female, while under guardianship as a minor, marries, and afterwards dies, and the husband is appointed administrator of her estate, the guardian must pay over to the administrator the money of the minor which had remained in his hands until after her decease, even although he might be entitled to receive it, on a distribution, as her heir at law.

If a widow, entitled to dower in the real estate of her late husband, as guardian to her daughter, a minor, under license from Court, sells the right, title and interest of the minor in the same real estate, and the full value of the land is bid therefor, and received by the guardian, under the supposition that the right of dower passed by the deed, the Court of Probate cannot, on the settlement of the guardianship account, order the value of the dower to be deducted from the amount the guardian is to pay over to the minor or her representatives.

Appeal from a decree of the Judge of Probate.

Ebenezer Smith died April 1, 1828. On Sept. 22, 1831, Deborah Smith, his widow, was appointed guardian to Polly Smith, a minor daughter of said Ebenezer and Deborah, and at the Oct. Term of the S. J. Court, 1832, petitioned for license to sell the real estate of the minor to be put at interest for her benefit, stating in her petition, that she was the widow of Ebenezer Smith, and "guardian to Polly Smith, a minor aged ten years, and the only child and heir at law to the said Ebenezer Smith who died intestate," and that at the time of his death he "owned a small farm on which he resided." License was granted, and on Jan. 26, 1833, the guardian sold all the right, title and interest, of the minor in the real estate, and for the consideration of $850, made a deed thereof to the purchaser wherein she recited her appointment as guardian, license and proceedings, and covenanted in this manner. "And I do

further in the capacity aforesaid, covenant with the said S. B. his heirs and assigns, that the premises are free of all incumbrances; and that I will warrant, secure and defend the same to him, the said S. B. his heirs and assigns forever against the lawful claims and demands of all persons." On March 19, 1833, Deborah Smith, the guardian, was married to Calvin Bumpus, the appellant; and on Sept. 17, 1833, Bumpus was appointed guardian to Polly Smith, the minor. On December 20, 1840, Ira Bean was married to the said Polly Smith. Afterwards Polly, the wife of Ira Bean died, and he took administration on her estate, the precise time not appearing, nor whether there was any order of notice before granting administration, and on Aug. 1842, made a petition to the Judge of Probate, requesting that the guardian should be cited into Court to settle his account, and that the balance thereof might be paid over to him, as administrator, or in his own right as the owner of the property by virtue of the marriage. Bumpus settled his account as guardian in November, 1842, the balance of which found due was $963,83. In this account Bumpus credited the whole amount of interest on the proceeds of the sale of the real estate, and charged, and was allowed one third part of the interest thus credited, as "being the income of my wife's part of proceeds of sale of the farm." The decree of the Judge of Probate was, "that the said Calvin Bumpus pay over the amount of said estate now remaining in his hands to said petitioner, administrator on said estate, to be administered upon pursuant to law." Bumpus appealed to the Supreme Court of Probate, and filed the following reasons of appeal.

1. Because the property and money in the hands and possession of said Calvin, being the balance of his guardianship account aforesaid, were never in the hands and possession of the said Polly in her lifetime, nor in the hands and possession of her said husband, nor any part thereof; nor were the same or any part thereof ever demanded of said Calvin by said Polly, or her said husband, or by any other person or persons for them or either of them, in the lifetime of said Polly; and that said Polly did not die possessed of the same or of any right or in-

terest therein, so as to vest the same or any right thereto in him, the said Bean; and that the same in fact consisted of mere choses in action, never reduced into possession by said Bean.

2. Because the said Polly died on the day of July, A. D. 1841, under the age of twenty-one years, leaving no children or issue, nor father, nor brother, nor sister living at the time of her death, but that said Polly did leave a mother living at the time of her death, viz. Deborah Bumpus, the wife of said Calvin Bumpus, to whom, it is insisted, the property aforesaid did descend upon the death of said Polly, as her sole heir.

3. Because said Polly died free from all debt; that said property is not wanted to pay any debt or charge whatsoever; and that if said Calvin were to pay the same over to said Bean, he insists, that said Bean would be bound by law to pay the same back to him, the said Calvin, as husband of the only heir to said Polly; and that to prevent circuity of action, said decree ought not to have passed; but that the decree in the premises should have been, that said Bean take nothing by his said petition.

4. Because the decree aforesaid does not decide all the matters and things embraced in said petition, and especially does not decide to whom the absolute property in the balance of said guardianship account does lawfully belong.

5. Because the administration aforesaid is void, it having been granted without notice to any person or persons; and without property, goods or estate, whereon the same could legally operate.

6. Because said decree is erroneous and altogether against the law of the case.

The arguments were in writing.

S. Emery, for the appellant, contended that the decree of the Judge of Probate ought to be reversed; and argued in support of the positions taken in the reasons of appeal.

And he insisted that in no view of the case, should the whole balance be decreed to be paid over to the administrator, because a portion of it belonged to Mrs. Bumpus, being the

proceeds of the sale of her right of dower in the premises; and because Mrs. Bumpus was entitled to another portion of it as an heir to a posthumous child, which he said was born a few days after the death of Ebenezer Smith, and lived a day, and then died. He cited Rev. Stat. c. 105, § 39 and 33.

R. Washburn, for Bean, contended that the property in the hands of the guardian arose from the sale of the estate of the wife of the appellee, and came into the hands of the guardian. On her decease the guardian is bound to pay it over to her administrator, to be then distributed according to law. Had she never been married, the decree would still have been right.

No notice is required to be given prior to the appointment of an administrator, when the person appointed is entitled to it by law; and the practice is universal, not to give notice in such cases.

But on the marriage the whole personal property of the wife became vested in the husband. And if any part had not been reduced to possession if he survived her, he could as administrator of his wife collect it, and retain it for his own use. 2 Kent, 109, 113, 114, 115; Rev. Stat. c. 93, § 15 and 16.

He denied, that there was any posthumous child, and referred to the petition of the widow herself for the license to sell this estate, wherein she alleged that Polly was the only child and heir, and entitled to the estate.

The right of Polly Smith, only, was sold in the real estate, and if the widow has not cut herself off from dower by the covenants in her deed, she may still have it assigned to her. The appellee is, however, willing that she should have secured to her one third part of the income of the property during her life.

The opinion of the Court was drawn up by

Tenney J. — The appellant married the widow of Ebenezer Smith, deceased, and was the guardian of Polly Smith, his daughter, at the time of her intermarriage with the appellee, who on her death took administration of her estate. He now claims to receive from the appellant the goods and effects of

his late wife, after deducting the guardian's account, which has been allowed. This claim is resisted upon the grounds set forth particularly in the reasons assigned for the appeal from the decree of the Judge of Probate, which was, that he pay over the amount of the estate remaining in his hands to the appellee, the administrator of said estate, to be administered upon according to law.

It is insisted that the Judge of Probate had no authority to grant administration at the time it was done, and that the same is void. 1st. Because notice that the appointment was to be made, was not previously given; and 2d. Because there was no property, goods or estate whereon the same could legally operate. The Judge of Probate is required to grant administration of intestate estates to the widow, husband, next of kin, or husband of the daughter of the deceased, or two or more of them as he shall think fit, if he be of the age of twenty-one years and in other respects, in his opinion, is suitably qualified for the trust. Rev. Stat. c. 106, § 1. No notice is required to be given previous to the appointment of either of the persons named in the section referred to; and we believe it has not been the practice with Judges of Probate to give such notice. If other persons, however, are appointed to the trust, those who are first entitled to letters of administration, if suitably qualified, are required to be cited by the Judge of Probate previous to such appointment. § 2.

The Judge has no jurisdiction, so that he can grant administration, if it does not appear, to his satisfaction, "that there is personal estate of the deceased, amounting to at least twenty dollars; or that the debts due from him amount to that sum." Rev. Stat. c. 105, § 39; *Chapin & ux.* v. *Hastings & al.* 2 Pick. 361. Here, however, we have evidence furnished by the appellant, now matter of record, that there was personal estate of the deceased of much greater amount. His accounts as guardian settled from time to time during the life of the ward, and the one presented and allowed after her death, distinctly show this.

Administrators are required to be under bonds, among other things, to make out within three months an inventory of all the goods, chattels, rights and credits of the deceased, which have come to his possession or knowledge; and to administer the same according to law. Rev. St. c. 106, § 3. The duties imposed upon administrators clothe them with power to perform them. They are authorized to take into possession every species of property which the law requires them to administer; and if any is withheld, to compel by legal process the surrender thereof. All the personal property of intestates go to administrators, while real estate passes to the heirs. Whatever personal property there was in the hands of the appellant, as guardian, belonging to his ward, he was bound to deliver, on legal demand, to the administrator of her estate, that the same might be administered upon. After a full administration shall be made, the residue, if any, will pass to the heir or heirs. If the wife of the appellant be the sole heir, he has no right to withhold the goods from the administrator, on the assumption, that there are no liabilities against the estate, and so that it will eventually come entire to his wife.

It is unnecessary here to consider the question whether the appellee can take and hold the property to his own use by virtue of his marriage with the deceased. The decree of the Judge of Probate was not founded upon such supposed right, and is not therefore subject to objection. Neither is it material to determine who is the heir at law of the deceased, for upon the present controversy that determination could have no operation. The Rev. Stat. c. 93, § 15 and 16, however, would seem to leave little or no occasion to present that question.

The property in dispute arises from the income of the real estate, of which Ebenezer Smith died seized, and the avails of the sale of the same, and interest on the whole. His widow, while sole, under a license from this Court, sold the real estate of her late husband, she being at the time the guardian of Polly, his daughter. It is insisted by the appellant that a portion of the proceeds of the sale belong to him, inasmuch as his wife was entitled to dower in the real estate sold. She

was licensed to sell only the real estate of said Polly Smith, and she sold only the right, title, and interest of her ward, as appears by her deed as guardian. She did not convey by said deed her life estate, the right to which can still be asserted, unless the covenants in her deed shall operate as an estoppel. If the value of the whole real estate was actually received, under the belief that it all passed, and was not subject to the widow's dower, the offer, which is made by the appellee to secure to the appellant one third part of the income of the proceeds of the sale, would be no more than justice requires; if this offer is not accepted, we feel certain that no power is lodged with this Court, on this appeal, to decree any portion thereof to him or to his wife as the widow of said Smith.

If there was a posthumous child of said Smith who lived but a few hours, that child was entitled to a share of his estate, and it vested in that child at the birth; and on its death that share would belong to whoever was the heir of that child. But this is a fact, which is not admitted or proved, and if it were competent for us to give any opinion as to rights, which would exist in consequence of such a fact, if established, we should be unwilling to do so, where the whole previous proceedings of the appellant who now alleges it, were inconsistent therewith.

Decree of the Judge of Probate affirmed with costs.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN,

ARGUED AT MAY TERM, 1843.

JAMES BARKER *versus* MOSES WHITTEMORE *& al.*

Under the provisions of the Revised Statutes, where an action of trespass, *quare clausum*, is originally commenced before a justice of the peace, and on soil and freehold being there pleaded, is removed, without trial, into the District Court, an appeal lies to the Supreme Judicial Court from the judgment of the District Court.

THIS was an action of trespass, *quare clausum*, and was originally commenced before a justice of the peace, where title to real estate in the defendant was pleaded in defence, and the case was removed, without trial, to the District Court pursuant to the provisions of Revised Statutes, c. 116, § 3, 4, 5. A trial was had in the District Court, and a verdict was there given for the defendant, and the plaintiff appealed from the judgment rendered thereon, with the assent of the District Judge. The plaintiff entered his appeal in this Court and the defendants filed a motion to dismiss the action, on the ground that the appeal was not permitted by law. In the agreed statement of facts, reference was made by the counsel to Revised Statutes, Act of Amendment of April 16, 1841, § 12, page 764; St. 1821, c. 76, § 11; St. 1839, c. 373, § 4; Rev. St. c. 97, § 13; Rev. St. c. 96, § 16.

Everett, for the defendants.

Moody, for the plaintiff.

The opinion of the Court was by

WHITMAN C. J. — It is questioned, by the counsel for the defendant, whether an appeal from the District Court, in this case, can be sustained. The action is trespass *quare clausum;* and was brought into that court, from before a justice of the peace, in the manner prescribed when soil and freehold are there set up in defence. By the statute of 1821, c. 76, § 11, an appeal, in such case was expressly provided for from the decision of the Court of Common Pleas to this Court, and under the same provision an appeal might be taken from the District Court, subsequently established, to this Court. When the Revised Statutes were enacted no such special provision was re-enacted. But a general provision (c. 97, § 13,) was made for an appeal from the judgment of the District Court in any action of *trespass on lands.* This language is sufficiently comprehensive to embrace this case; for it is an action of *trespass on lands.* And it may well be believed, that the special provision was deemed to be superseded by this general provision. Actions *quare clausum*, when the title to real estate is pleaded by the defendant, are not triable before a justice of the peace. The process, in such case, becomes a mode merely of originating the action in the District Court; and is as to every intent and purpose the same as if originated therein. We think therefore that the appeal in this case must be sustained.

JOHN SEIDERS, 2d, *versus* CORNELIUS CREAMER.

Where an action of replevin is commenced originally before a justice of the peace, and is carried by appeal to the District Court, and a verdict is given and judgment rendered thereon in that Court, *no appeal* lies therefrom to the Supreme Judicial Court.

THIS action was replevin, and was originally commenced before a justice of the peace, was there tried, and appealed to the District Court. There was a trial in the Court last mentioned at the April Term, 1843, when a verdict was given for the plaintiff, and judgment was rendered thereon. The defendant claimed an appeal and entered into recognizance to prosecute, &c. He entered his appeal at the May Term of the S. J. Court, and the plaintiff there moved to dismiss the action, because no appeal was open to the defendant.

Bulfinch and *Kennedy*, for the plaintiff, cited and commented upon the act of amendment to Rev. Stat. p. 764, § 13; Rev. St. c. 116, § 1; Rev. St. c. 130, § 9.

E. A. Reed, for the defendant, relied on Rev. St. c. 97, § 13, as conclusive in his favor.

The opinion of the Court was by

WHITMAN C. J. — In all cases of actions tried before justices of the peace the statute provides, in general terms, that an appeal may be taken, by the party aggrieved, to the District Court. And in actions of replevin, tried before a justice of the peace, it is specially provided that such appeal may be had. It is not said, in such case, that an appeal may again be had from the District Court to the Supreme Judicial Court. If it had been intended that an appeal should be permitted, in such actions, to this Court, such a provision might well have been looked for in the same statute granting an appeal to the District Court. It does not seem reasonable to suppose that it could well have been in contemplation, by the Legislature, that causes of minor importance, such as were triable before a justice of the peace, should be carried further than to the District Court, and be allowed three trials in succession, at an enhanced expense.

The provision that where a part only of the goods replevied, and of a value less than twenty dollars, shall be found to belong to the plaintiff in replevin, when the action is originated in the District Court, the plaintiff shall recover not over one quarter part of their value for costs, affords a strong indication that the legislature must have contemplated, that actions of such small importance should not be sent to a third trial, when actions of greater magnitude are to be finally disposed of upon a second trial. If it had been intended that actions of such minor importance should be carried by appeal to the Supreme Judicial Court, it would seem that such actions never would have been allowed to be tried, in the first instance, before justices of the peace. It is true that the language of the Revised Statutes, c. 97, § 13, is broad enough to embrace this case; but the literal import of language used in statutes is, often, seemingly at variance with what was obviously intended. In such case the intention, and not the literal import is to govern. In the above section it may well be imagined, that actions, originally triable in the District Court, were alone in the contemplation of the Legislature. It speaks of statements of facts in cases; of actions in which debt or damage exceeded two hundred dollars; and where a verdict had been given; and of other matters not applicable to trials before justices of the peace. The provisions of the act of 1839, c. 373, § 4, establishing the District Court, were equally comprehensive, and of the same import, in relation to actions of replevin, with those in the above section of the Revised Statute. Yet an appeal of an action, originally tried before a justice of the peace, otherwise than by a bill of exceptions, from that Court to this, it is believed, was never heard of. The absurdity of such a proceedure may well be believed to have prevented the attempt.

At the common law, and under the judicial systems of the United States, and of many of the individual states, but one trial, as of course, of matters of fact is ever allowed in cases of the greatest importance. Strange indeed would it be, if our legislature should in actions of the most trifling nature, have authorized first a trial before a justice of the peace, and

then subsequently two trials before a jury in succession, first in the District Court and then in this Court. From our earliest judicial history such a practice has been unknown. And hence it may be that it did not occur to the minds of the legislators in the revision of the laws in express terms, to exclude appeals, in such cases, to this Court. This case is very distinguishable from those in which the title to real estate may be brought in question before a justice of the peace, when no trial can be had before him; and when cognizance of the action is immediately transferred to the District Court. Such a proceeding is tantamount to the commencement of the action originally, although circuitously, in that Court.

Appeal dismissed.

SIMON HANDLEY *versus* JOEL HOWE, JR.

The time when a mortgage of personal estate was received by the town clerk, must be noted both "in the book" of records "and on the mortgage," in order that it should "be considered as recorded, when left, as aforesaid, with the clerk," under the provisions of Rev. St. c. 125, § 32 and 33.

REPLEVIN for ten tons of hay, valued at one hundred dollars. The defendant, in a brief statement, justified the taking as an officer, alleging that the hay was the property of W. P. Harrington, and that he attached it as such, on a writ in favor of Moses Call. The plaintiff claimed the hay by virtue of a mortgage bill of sale from Harrington to him, dated July 23, 1841, prior to the attachment, to secure the payment of the sum of one hundred dollars.

At the trial before TENNEY J. the plaintiff called Isaac Chapman, who testified that he witnessed the execution of the bill of sale; that he was town clerk of the town where the hay was; that the plaintiff was not present, nor any other person than himself and Harrington; that after signing it, Harrington handed the mortgage bill of sale to him, that he might record it as town clerk; that he made an indorsement on the back of the mortgage at that time as follows. "July 23, 1841. En-

tered for town records;" that he put the bill of sale into a book containing town records, a few of the last pages being appropriated for the recording of mortgages; that he did not record it until Nov. 3, following, which was after the attachment; that he made no entry of it in any book, and did not note the time of receiving the bill of sale until after the attachment, excepting on the back of it as before stated; and that the plaintiff did not request him to take charge of or record the mortgage, and did not pay him his recording fee. The hay remained in the possession of Harrington until it was attached.

On this point, for there were several other questions raised at the trial, the Judge instructed the jury, that for the purposes of that trial, they must regard the record of the mortgage as having been legally and properly made on July 23, 1841, the record showing that it was left with the town clerk on that day, and an entry having been made to that effect; that if the bill of sale was fairly made and executed between the parties, and the same was left with the clerk as a perfect contract by the direction of the plaintiff, and was free from fraud, all the rights claimed by the plaintiff were protected by it, as much as if it had been extended upon the record.

This case was argued on *Monday*, when the law required the Court in the county of Lincoln to be holden on that day, before the Reporter arrived. The briefs of the counsel were intended to have been handed to the Reporter, but he has not received them.

E. Smith, for the plaintiff.

Ruggles, for the defendant.

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

WHITMAN C. J. — The Revised Statute, c. 125, § 32 and 33, requires that all mortgages of personal estate, made as collateral security for any debt, exceeding thirty dollars in amount, shall be recorded in the clerk's office of the town where the

mortgagor resides, unless accompanied with actual possession by the mortgagee; and, unless so recorded, that the same shall be void, except as between the parties thereto. The defendant is an attaching officer, and as such represents the interest of a creditor of the mortgagor in this case; and, unless the mortgage was duly recorded at the time he made his attachment, he has a right to retain the property against the plaintiff, the mortgagee. The mortgage was not in fact extended upon the record at that time. The statute, however, provides, that "it shall be considered as recorded when left as aforesaid with the clerk." The question in this case is, what do the words "left as aforesaid" refer to? The words immediately preceding are, that "the clerk, on payment of his fees, shall record all such mortgages," "in a book kept for that purpose, noting in the book, and on the mortgage, the time when the same was received." No doubt is entertained, that in order to be considered as recorded, the time when received must be noted on the mortgage. That was done in this case; but it was not noted "in the book" at the time of the attachment. Was this necessary also to authorize the mortgage to be considered as recorded? It is contended that it was not. In cases of mortgages of real estate, no provision is made, other than what is contained in reference to all deeds left to be recorded. Rev. Stat. c. 11, § 17, requires, that the register, at the time of receiving any deed to be recorded, "shall make a memorandum thereon of the day, and the time of the day, when it was received and filed;" after which it is to be considered as recorded. When the legislature, in reference to personal estate, superadded to the noting on the mortgage, the noting of the same in the book, did they not mean that these should be simultaneous acts? What was the object of this noting in either case? It must have been to enable persons, not parties to the deed, to ascertain when the property, purporting to have been conveyed, actually passed to the vendee. At least this must have been one object in view; and the noting in the book was much better calculated to subserve this purpose, than the mere noting, upon the mortgage, of the same circumstance.

Individuals applying to ascertain if their debtors had conveyed away their property would naturally look to the record; and as the law provides for noting "in the book," viz. the book of records, if no record was made, recourse would be had to the noting "in the book;" and, if no such noting or record of a conveyance were found, the conclusion might well be, that none existed. The legislature has prescribed both of the notings, as it were, in the same breath; and this would seem to indicate, that they were to be simultaneous. Again, if it had been otherwise intended, it is somewhat remarkable, if they intended that one of them should be made at the time of leaving the instrument with the clerk, as it is conceded was the case, and that the other need not be done till some future period, that it should not have been so expressed. It is true that the phraseology used would, if no recourse were had to other parts of the act, seem to imply, that the recording and notings were all to be done at the same time; but the words "when left as aforesaid," would seem clearly to show, that it was not so intended, as what was referred to was to be in place of the recording, and a substitute for it; and besides, we can have no authority for saying, that either of the notings prescribed was to be a substitute for the actual recording, more than the other. A majority of the Court, therefore, are of opinion, that both must be regarded as requisite for the purpose.

Exceptions sustained and a new trial granted.

JAMES C. WHITMORE *versus* NICHOLAS HOGAN.

The Statute 1821, c. 117, being the "act to provide for the education of youth," made each school district a "body corporate"; as well those existing *de facto*, as those created by a legal vote of the town; the limits of such as were not already certain, to be defined by the town.

If the town attempts to form two new school districts out of an existing one, and one of them be legally established by the proceedings of the town, its rights will not be affected by a failure to establish the other district in a legal manner at the same time.

Should the town, under an article in the warrant, for calling the meeting, "to see if the town will divide school district No. 2, in some convenient manner," include a portion of some other district in one of the new ones, if the proceedings would not be strictly legal on the objection of a person aggrieved, yet mere strangers cannot take the objection, to render the whole proceedings void.

When two new school districts are formed from one old one, the title to the existing schoolhouse is in that district within whose territory it falls on the division.

And if the schoolhouse was originally built by money furnished by voluntary subscription, it is the property of the district, where it has been appropriated to and used by the district as a schoolhouse for forty years.

Before school districts were specially authorized so to do by statute, they might make sale of their old schoolhouses, which had become unfit for the use of the district.

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

Assumpsit upon a promissory note, dated December 21, 1836, for $105,20, made by the defendant to the plaintiff, and payable on demand with interest. The defence set up was, a want or failure of consideration. It was proved, that the plaintiff was a licensed auctioneer, and as such sold at public auction an old schoolhouse for $100,00, and an old stove and some old furniture for $5,20, on a credit of six months. The defendant was the highest bidder, and the same were struck off to him. At the expiration of the six months the note in suit was given for the articles bid off.

At the trial the plaintiff offered to prove by the testimony of witnesses, that for more than forty years prior to 1836, there had existed distinct shcool districts with well marked limits,

and particularly that there was a district called the Parker district, whose limits were well understood throughout the town. This was objected to by the defendant, but admitted by the Court.

It was proved that more than forty years before the sale the town assigned one hundred dollars to each of the school districts, of which the Parker district was one, and that the school house was built with this money and money subscribed by individuals, and had been used as a school house for that district until recently before the sale.

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

The counsel for the defendant requested the Court to instruct the jury: 1. That a school district cannot prove its existence by reputation. 2. That the committee had no authority by the vote of the district to sell the house. 3. That a school district has no authority to sell its schoolhouse. 4. That inasmuch as the vote of the town, when purporting to divide the original No. 2, did in fact divide two other districts, when the article in the warrant only authorized the division of No. 2, and therefore the south district was not legally constituted.

The presiding Judge declined to give these instructions, but did instruct them, that if they believed the districts had been established, and their limits fixed and known from the early period named by the witnesses, and that the defendant, at the time of giving the note, understood the whole character of the sale, and possessed such mental powers as to render him capable of understanding his contracts, he must be chargeable in this action. The verdict was for the amount of the note and interest, and the defendant filed exceptions.

This was continued *nisi* to be argued in writing, at the May Term, 1843; but no arguments have been received by the Reporter.

Mitchell and *Randall & Whitman*, for the plaintiff.

Groton and *Tallman* and *Sewall*, for the defendant.

The opinion of the Court was drawn up by

SHEPLEY J. — This suit is upon a promissory note made by the defendant and payable to the plaintiff. It was received in payment for an old schoolhouse and some small articles of furniture, sold at auction to the defendant. In defence it is contended, that he did not acquire any title to the property sold, and that he cannot therefore be required to pay the note. The property was sold as that of a school district in the town of Phippsburg. It appears from the exceptions, that a school district *de facto* had existed for more than forty years, called the Parker district; and that a school had been taught from year to year in a schoolhouse situate within it during all that time. Yet it may well be doubted, whether the existence of a school district as a body corporate, capable of taking and holding property, can be proved by parol evidence. There doubtless were school districts having no strictly legal origin, as well as those created by votes of the towns, at the time of the passage of the act of 1821, c. 117. Before that time, there was no legislative declaration, that they should be considered as bodies corporate. It was provided by the seventh section of that act, that "each and every school district in this State is hereby made a body corporate." This language is sufficiently comprehensive to embrace all districts, as well those existing only *de facto*, as those created by a legal vote of the town. And it is not probable, that it was the intention of the legislature to make those only bodies corporate, which could be proved to have had before that time a strictly legal existence. The action of the law was upon all actually existing districts, without regard to the manner in which they were brought into existence; and power was given to the towns to determine their number and define their limits. Bodies corporate may be known by different names, and the case finds, that the Parker district before the year 1836 had been designated in the town books as district No. 2.

In the warrant for calling the annual town meeting of that year there was an article inserted, "to see if the town will divide school district No. 2 in some convenient manner, so as

better to accommodate the scholars, and produce a more general attendance." At that meeting the town voted to divide it, and to establish that part of it north of mill creek, including two other persons named, as one district, "and those inhabitants, who live south and east of said mill creek as far as James Daley's and David Wyman's south line, to constitute another school district." The case finds, that these districts were afterward called north district No. 2, and south district No. 2 until the name of the latter was by a vote of the town, at the annual meeting in 1838, denominated the Parker district. It is objected, that the division was ineffectual, because the districts were not defined by territorial limits. That they included persons by name and not the lands occupied by them. If this be the necessary construction, so far as it respects the two persons included in the north district, there can be no reasonable doubt, that the intention was to form the south district by territorial limits; and if this was legally established the failure to establish another district in a legal manner at the same time could not affect its rights. And it is also objected that the vote was inoperative, because the rights of other districts were affected by it, when the article in the warrant did not disclose such an intention. If this objection had come from any other school district complaining, that its rights had been infringed, or from any person aggrieved by an alteration of the limits of the districts, it might require a more serious consideration. But when it is perceived, that the "subject matter," has been sufficiently stated in the warrant to enable the inhabitants to know, what was designed by the dissolution of one school district and the establishment of two others, requiring that their limits should be defined; to determine, that they must be restricted in doing it to the exact limits of the old one, or that their proceedings would be wholly void, would not be acting upon the rule, that the proceedings of towns should receive a liberal construction, that they may if possible, be supported.

The south district No. 2, being considered as legally established, the inquiry arises, whether it was the owner of the old

schoolhouse, situate within its limits. A like question was presented in the case of the inhabitants of school district No. 1 in *Stoneham* v. *Richardson*, 23 Pick. 62. The Court finding that the legislation had been very defective, say, that "having no definite rule in legislative enactments, or adjudged cases, to guide us, we are compelled to settle the question by such lights as we may derive from analogy." The decision was, that when new districts are formed by abolishing old ones, "the legal title to the existing schoolhouses vests in those of the new districts within whose territory they may happen to fall." The legislation respecting the title to schoolhouses has been equally defective in this State, and it is not perceived, that a construction more satisfactory can be adopted. The manner in which the schoolhouse was originally built, inasmuch as it had been appropriated to and used for so long a time by the Parker district as to be considered its property, can make no difference. As by this construction, the schoolhouse, on the creation of the south district No. 2, became its property, the vote of the north district No. 2, respecting it, was wholly inoperative. A meeting of the south district No. 2, was called by a warrant from the selectmen on the 28th of May, 1836; but it is objected, that this was not a legal meeting, because the warrant does not appear to have issued on the application of three or more of the freeholders of the district. If this objection may be considered as a valid one, and as properly presented by the bill of exceptions, the vote of the district at the meeting on July 10, 1838, "to instruct the plaintiff to pursue the suit against Mr. Hogan in favor of the old schoolhouse," would amount to a ratification of the proceedings of the former meeting, so far as they related to the schoolhouse, and to an approval of the sale of it by their committee then chosen.

It is further insisted, that the school district had then no power to sell its schoolhouse. That it had not the power, as contended, to build schoolhouses for sale, or to sell the one existing for purposes of gain, or for any other purpose than to carry into effect the powers granted by the statute, may be ad-

mitted. But to deny to a district possessed of an old schoolhouse, of no use where it is situated, and too defective to be safely removed to a more central position, the right to sell it for the purpose of applying the proceeds of the sale to the erection of a new one, would be an unnecessary and burdensome restriction of the powers granted, to erect, remove, repair, or purchase a schoolhouse. The district is, by the act, entitled to hold any estate, real or personal, and to apply the same agreeably to the provisions of the act; and if it have personal estate and desire to apply it to the erection of a schoolhouse, it may use any proper means to effect the object. Could it have been the intention of the legislature, that an old and useless schoolhouse should stand in its ruinous and unsightly condition, for want of power to sell it, or even the materials composing it? In this instance the case finds, that the house had been occupied for more than forty years, and considering, that it was to be removed, if longer used, there does not appear to have been any unreasonable exercise or abuse of the powers granted. The jury have not found, that any improper practises were resorted to for the purpose of inducing the defendant to purchase, or that he was not in a condition to understand the contract into which he was entering. He appears to have given this note for the amount of the purchase money after he had an opportunity to reflect upon the whole proceedings for six months. The defence, that it was given without consideration, fails, and

The exceptions are overruled.

ISAAC JACKSON *versus* BARTLETT SHELDON.

It is not necessary to call more than one of two subscribing witnesses to a deed, before other testimony in relation to its execution and delivery may be legally admitted.

Delivery is essential to the operation of a deed as a valid instrument, and without it, the grantee cannot be bound by any recitals or covenants contained therein; and he is a competent witness, to prove that it was delivered to a third person on a condition to be performed, and had never been delivered to him.

Jackson *v.* Sheldon.

It is not necessary that there should be an express declaration that a deed is delivered to a third person as an escrow to make it such. If the delivery be conditional, so as not to constitute any present obligation, it is an escrow, and not a deed.

Where an instrument has not been delivered to the grantee, but to a third person, to be delivered to him upon the performance of a condition, which has never been performed, it is but an escrow, and not a deed, and no title passes thereby to the grantee.

WRIT of entry. The material facts are found in the opinion of the Court. After the evidence had all been given, it was agreed, that it should be reported by TENNEY J. presiding at the trial, and that a nonsuit or default should be entered, as the opinion of the Court should be.

Ruggles, for the demandant, argued in support of the following, among other positions.

The destruction of the deed after the demandant's title accrued, cannot defeat it. 2 Pick. 29. The facts relating to the execution and delivery of the deed can be shown by no other than the subscribing witness. The subscribing witnesses must be first called. The facts cannot be shown by the trustee. No delivery to Bartlett Sheldon was necessary. A delivery to the trustee instantly vests the estate in the *cestui que use*, and no further delivery is necessary. The deed itself furnishes proof that it was delivered to Robinson, for he accepts it and the trusts it imposes under his hand and seal, and enters into covenants to execute it. He cannot be admitted to contradict his own deed, or to repel the presumption that it was delivered to him. The condition testified to by Webb is void for uncertainty. It was said that money was to be paid at sometime to somebody, but when, to whom, or how much, Webb was not informed, nor did Robinson himself know. There is no evidence that the grantor made any condition, when he delivered the deed, excepting after declarations, which cannot be received to defeat the creditor's title. No proof can be given of a conditional delivery, the deed itself being unconditional and absolute. The deed was in the hands of the grantee, executed by him. The title passed, and it could not be revoked, and the deed delivered as an escrow. The destruction of the deed

afterwards, cannot revest the title. Possession is sufficient evidence of delivery. 1 Har. & J. 223; 2 Day, 280.

M. H. Smith, for the tenant.

A delivery is essential to the validity of a deed, and there can be no delivery without an acceptance by the grantee. 12 Johns. R. 418; Shep. Touchstone, article Deed.

The deed was merely an escrow, and was deposited with Webb only as such; and was to be delivered back, if Bartlett Sheldon failed to pay certain sums of money in a certain time. The condition was never performed, for the money has not yet been paid.

When a deed is deposited with a person not a party to it, the conversation at the time is admissible as a part of the *res gesta.* The terms on which a deed is left, are to be proved as matter of fact. *Wheelwright* v. *Wheelwright*, 2 Mass. R. 447.

A deed deposited with a third person, to be delivered upon the happening of an uncertain event, as the payment of a sum of money, or the doing of an act which may or may not be done, must be considered as an escrow merely, and as such, can be of no effect until the money is paid or the act is done. When the condition is performed, and the deed is delivered, it may then take effect back from its execution. *Wheelwright* v. *Wheelwright*, before cited; 2 Johns. R. 248.

Robinson did not accept the trust, but merely agreed that he would do so, if the condition was performed, and the deed should become operative.

The opinion of the Court was drawn up by

Shepley J. — It appears from the report of the case, that Arretta Bryant and others, on October 21, 1837, conveyed a farm in Newcastle to Nathan W. Sheldon and took back a mortgage of the premises to secure the payment of about one thousand dollars. That the tenant paid about thee hundred dollars, and the balance remained unpaid. That N. W. Sheldon on October 20, 1841, signed and sealed a deed of indenture of two parts between himself and Ebenezer D. Rob-

inson, purporting to convey the farm to Robinson in trust, to permit Bartlett Sheldon and Lucy H. his wife, and their heirs, to enjoy the use and occupation forever.

On the fifteenth of February following, the tenant, having this deed, called with Robinson upon Ebenezer Webb, and Robinson in his presence signed and sealed the deed, which was left with Webb till the tenant paid a sum of money, which Nathan was bound to pay, and if it was paid within a certain time, the deed was to be put on record, otherwise to be null and void and to be given up. In June following, this deed was, in the presence and by the consent of the tenant and Nathan and Robinson, given up to Nathan, upon a statement that the money had not been paid, and he cut his name out of it, and carried it away. Robinson was examined as a witness by the tenant, and testified, that the deed was never delivered to him. The demandant caused his execution to be levied on the estate as the property of the tenant, on February 17, 1842, two days after the deed had been signed and sealed by Robinson.

The counsel for the demandant contends, that the testimony of Robinson should not have been received to prove, that the deed was not delivered to him, because one of the subscribing witnesses had not been called to testify. Webb, who was the subscribing witness to the execution by Robinson, had before been examined by the demandant. If the other subscribing witness had any knowledge of the execution by him and of what then took place, it was not necessary to call more than one of the two subscribing witnesses, before other testimony might be legally admitted. 1 Stark. Ev. 323. It is also insisted, that the deed itself furnished proof, that it was delivered to Robinson; for he accepted the trust and covenanted to execute it, and cannot be permitted to contradict his own deed, and avoid his own covenants. Delivery is essential to the operation of a deed as a valid instrument; and whatever recitals or covenants it may contain, they cannot bind the parties without it. That testimony of Robinson did not contradict his covenants in the deed. It only proved, that those

covenants as expressed in the deed, never became binding upon him. At least this would have been the effect, if there had not been a delivery of the deed to a third person. The instrument could not have operated to convey the estate by the execution of one of the two intended parties, especially as the other could not be presumed to accept a conveyance imposing a burthen and conferring no benefit upon him. If it became operative to convey the estate, it must have been made so by the proceedings, when it was executed by Robinson.

The law, as stated in Com. Dig. Fait, A 3, is, "if it be delivered *as his deed* to a stranger to be delivered to the party upon performance of a condition, it shall be his deed presently; and if the party obtains it he may sue before the condition performed." The same doctrine is stated in the case of *Wheelwright* v. *Wheelwright*, 2 Mass. R. 452. It appears to have been denied in the case of *Johnson* v. *Baker*, 4 B. & A. 440. And to have been held, in the case of *Fairbanks* v. *Metcalf*, 8 Mass. R. 230, that where the deed was *in form* delivered to the grantee and immediately afterward, according to the agreement of the parties, delivered to a third person, it did not become the deed of the grantor until the delivery by the third person. The doctrine seems to have been again in substance admitted in the case of *Murray* v. *The Earl of Stair*, 2 B. & C. 82. A technical rule, which would operate so inequitably as to dispense with the performance of a condition, when the possession of the deed must be obtained by the grantee by a breach of trust, should be clearly established. But it is not necessary in this case to examine the cases, which are referred to as the foundation of it, or to decide, whether it can be clearly established or not; for there is no proof of a formal delivery of the instrument by the grantor as his deed. And the case last named shows that the intention of the parties respecting a delivery is to prevail, and that it is not necessary, that there should be an express declaration, that it was delivered as an escrow to make it such. That if the delivery was conditional so as not to constitute any

present obligation, it was an escrow and not a deed. The concurrent testimony of the witnesses, Webb and Robinson, proves that the deed was left with Webb, to become effectual as a conveyance of the estate only upon the condition, that the tenant should pay certain sums of money, which Nathan W. Sheldon was bound to pay. It is alleged, that this condition was void for uncertainty, because the witnesses could not state, to whom payment was to be made, nor the amount or time of the payment. These matters become sufficiently apparent, except as to the time of the payment, by the mortgage, which discloses the amount and the persons, to whom N. W. Sheldon was bound to make payment. And the time, if essential to the validity of the condition, is shown to have elapsed without payment, or a performance of the condition. It is also said, that there is no evidence, that the grantor annexed any such condition to the delivery. There is no proof of any delivery by him, except through the agency of the tenant, to whom the deed partly executed appears to have been entrusted, to have it executed by the trustee and deposited with Webb to secure the payment due on the mortgage. This is disclosed as well by the nature of the transaction as by the admission of the parties present at the time when the deed was cancelled.

The case presented is then, that of an instrument not delivered to the grantee, but to a third person to be delivered to him upon the performance of a condition, which never was performed, and it was but an escrow and not a deed. And although it might have been effectual, from the time of its delivery to Webb, to convey the title, if the condition had been performed, without such performance it conveyed no title to the grantee, and the demandant must fail to show any title in the tenant, on which his execution could be levied. *Fairbanks* v. *Metcalf*, 8 Mass. R. 230; *Graham* v. *Graham*, 1 Ves. Jr. 274; *Hooper* v. *Ramsbothom*, 6 Taunt. 12.

It is not perceived that the demandant, upon the testimony presented in this case, can maintain the action.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

ACTION.

See ATTACHMENT, 3. BILLS AND NOTES, 10. OFFICER, 3.

ACTION ON THE CASE.

1. In an action for malicious prosecution, or for a conspiracy to injure the plaintiff by a groundless criminal prosecution, the want of probable cause for prosecuting is essential to the maintenance of the suit, however malicious the defendant may have been. *Payson* v. *Caswell*, 212.
2. In an action for a malicious prosecution, if there be a conviction of the criminal offence charged before a magistrate, having jurisdiction of the subject matter, not obtained by undue means of the prosecutor, it will be conclusive evidence of probable cause. *Ib.*
3. Where the defendant, in an action of slander, has pleaded a special justification, admitting the speaking of the words, and averring that they were true, without pleading the general issue, the plaintiff may give evidence, other than what is furnished by the plea itself, of the extent and degree of malice, actuating the defendant, in traducing the plaintiff, to affect the question of damages. *Sawyer* v. *Hopkins*, 268.
4. And it may well be doubted whether the defendant, in such case, by relying upon his justification solely, and failing to sustain it, is precluded from giving evidence in mitigation of damages. *Ib.*
5. In such action of slander, where it appeared that the plaintiff, a minister of the Gospel, had been tried before a conference upon a charge of having made alterations in certain charges of immoral conduct, signed by others, against one of his brethren in the ministry, for the purpose of procuring an investigation thereof; and the present defendant, on such trial of the present plaintiff, had been active against him, and in connexion with which the charge of forgery had been made by the present defendant against the present plaintiff; and the truth of which had been set up as a special justification on the present trial; *it was held*, that the plaintiff might give in evidence the proceedings at the trial before the conference in aggravation of the damages. *Ib.*
6. The mere insertion of other matter in the charges against such third person in an additional specification, would not constitute the crime of forgery, unless it was done with the intent to defraud or deceive some one. *Ib.*
7. When the defendant, in an action of slander, has placed his defence upon the ground, that certain papers were the subjects of forgery and had been forged, he has no cause of complaint, if the presiding Judge suffers the cause to proceed to trial, and does not instruct the jury that the papers were not the subjects of forgery, even if they were not so; for if the instruction had been, that they were not the subjects of forgery, the plaintiff could not have been guilty of that offence, and the instruction must then have been, that the defence had not been made out. *Ib.*
8. If the plaintiff altered those charges, after they had been signed, with praiseworthy intentions, relying upon that confidence he had been accustomed to experience from the brethren of his church, while endeavoring, in pursuance of their instigations originally, to bring a member of the same denomination to an examination as to charges against him, supposed to be susceptible of proof, such alteration is not a forgery. *Ib.*

See INSPECTION LAWS, 1.

ACTION REAL.

If at the time the action was brought, the tenant was in possession of the premises only under a lease for one year, and the fact that he was not tenant of the freehold was put in issue, and there was no evidence tending to prove, that he ousted the demandant, or withheld the possession of the premises from him, the action cannot be maintained, under the provisions of the tenth and eleventh sections of the revised statutes, c. 145
Matthews v. *Demerritt*, 312.

ADMINISTRATOR.

By the St. 1821, c. 52, an administrator, on being duly licensed, was authorized to make sale of the real estate of the deceased for the payment of his debts which had been conveyed away by him in his lifetime, if the creditors of the estate were by law entitled to consider such conveyance fraudulent as to them, although there was no actual premeditated fraud.
Wescott v. *M'Donald*, 402.

See ACTION, 5. CONVEYANCE, 7. PROBATE.

AGENT AND FACTOR.

1. By the usage of trade agents and factors acting for persons resident in a foreign country, are held personally liable for contracts made by them for their employers, although they fully disclose at the time the character in which they act. *M'Kenzie* v. *Nevius*, 138.
2. As a general rule, insurance brokers have a lien upon all policies in their hands, procured by them for their principals, for the payment of the sums due to them for commissions, disbursements, advances and services, in and about the same. *Ib.*
3. It is also a general rule, that where agents employ sub-agents in the business of the agency, the latter are clothed with the same rights, and incur the same obligations, and are bound to the same duties in regard to their immediate employers, as if they were the sole and real principals. *Ib.*
4. But in such case neither the agent, nor the sub-agent, has a lien upon the policy of insurance for the payment of the balance of his general account, embracing items wholly disconnected with the business of the agency. *Ib.*
5. The mere fact, however, of intermixing the charges of the agent in that business with other items in general account, does not destroy his lien. *Ib.*

See ACTION, 2, 3, 4. BETTERMENT RIGHTS, 2, 3. BILLS AND NOTES, 18, 19.

ALIEN.

1. Where the domicil of one owning real estate here was in a foreign country at the time of his death, no law of the country of his domicil can control the descent and distribution of his lands in this State, or have the slightest influence here upon it. *Potter* v. *Titcomb*, 300.
2. A widow, who was an alien, and who with her husband, at the time of his death, was domiciled in a foreign country, cannot come into this State, and claim under our laws, by reason of her husband's having died without issue, the half of his real estate situated here. *Ib.*

See ACTION, 4.

APPEAL.

1. Under the provisions of the Revised Statutes, where an action of trespass, *quare clausum*, is originally commenced before a justice of the peace, and on soil and freehold being there pleaded, is removed, without trial, into the District Court, an appeal lies to the Supreme Judicial Court from the judgment of the District Court. *Barker* v. *Whittemore*, 556.
2. Where an action of replevin is commenced originally before a justice of the peace, and is carried by appeal to the District Court, and a verdict is given and a judgment rendered thereon in that Court, *no appeal* lies therefrom to the Supreme Judicial Court. *Seiders* v. *Creamer*, 558.

APPROPRIATION OF PAYMENT.

See PAYMENT, 2, 3.

ARBITRAMENT AND AWARD.

1. A submission to referees, under c. 138 of the Revised Statutes, of an action of trespass then pending, "and all other demands, and costs already accrued on, or growing out of said suit," is, it would seem, a reference of all demands between the parties. *Harmon* v. *Jennings*, 240.
2. When one party to a reference has made out a writ against the other, specifically setting forth his claim therein, and has indorsed his name on the back thereof, and such writ is annexed to the submission, it is a sufficient signing of the demand within the purview of the Rev. St. c. 138. *Ib.*
3. If one of the parties to a reference of a specific demand, entered into before a justice of the peace under the provisions of Rev. St. c. 138, makes out and signs his demand, and by agreement between them, at the request of the other party, it is omitted to be annexed until the close of the investigation before the referees, and it is then annexed, it is not competent for the opposing party to avail himself of this error, to prevent the acceptance of the report of the referees against him. *Ib.*

for the term of six years or more before entry, is such a possession as the tenant holds by virtue of a possession and improvement under the latter.
Comings v. *Stuart*, 110.

2. Where one was appointed the general agent of the owners of a half township of land, to take care of their interests thereon, it was his duty to protect and preserve their estate and its title, and to watch over and secure all their rights, and to keep them informed of his acts and proceedings; and while such agency continues, he cannot be permitted to deny his agency as to one particular lot, and he cannot acquire a right to betterments thereon by a possession thereof for six years or more. *Ib.*
3. And if such agent enters into the possession of a lot, and continues it for more than six years, and makes improvements, but does not inform the owners of the land thereof, and they, without any knowledge of such possession or improvements, convey the lot to another person, who had knowledge of the improvements, the agent cannot enforce his claim for betterments against such purchaser. *Ib.*
4. The St. 1821, c. 62, § 5, in relation to the recovery of *betterments by action*, provides only for the case of one who is entitled to the improvements, and upon whom, while in possession, an entry has been made by the owner of the land, and the actual possession taken and withheld from the proprietor of such betterments. An action, therefore, founded merely on a possessory title, brought by one who had become such only by purchase, and who had never been in the actual possession, cannot be maintained.
Chapman v. *Butler*, 191.
5. Where the occupant of land has a legal right to the possession thereof as tenant for life, he is to be considered as occupying according to his legal rights, and not as a wrongdoer, and he cannot establish any title therein by disseizin against the reversioner; his possession cannot be adverse; and he cannot, therefore, be entitled to "betterments" against the reversioner "by virtue of a possession and improvement" under the statute.
Varney v. *Stevens*, 331.

See Trespass. Trustee Process, 7.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The plaintiff received a note from Johnson & Co. as the consideration for the conveyance of certain land, the sale of which was procured by the fraud of the plaintiff. That note was put in suit, and the action was settled by paying a part thereof in cash, and by giving a draft for the balance, accepted by them and indorsed at their request by the defendants. Johnson & Co. sold and conveyed a part of the land to others, and made no conveyance thereof, or offer to convey, to the plaintiff. The plaintiff brought a suit against Johnson & Co. as acceptors of this draft, and recovered judgment against them, they then knowing the facts. The present suit was brought against the defendants as indorsers of the draft. *It was held*, that under such circumstances, the fraud of the plaintiff in the sale of the land furnished no sufficient ground of defence to this action.
Thayer v. *Jewett*, 19.
2. If the plaintiff brings his action as indorsee of a bill of exchange against the acceptor, and sets forth, in his declaration, an indorsement to certain copartners, by the name of their firm, and an indorsement by them, also in their partnership name, to himself; and on the trial, he produces the bill, and proves this indorsement to have been made by one of the partners by the name of the firm; this is *prima facie* evidence of that indorsement, and of the title of the plaintiff through them to the bill.
Davenport v. *Davis*, 24.
3. Where the plaintiff took a note of the then holder and paid the money for it, on the express promise of the maker to pay the amount thereof to him in sixty days, it is not competent for the maker, in a suit against him on the note, to set up a prior failure of consideration as a defence; although the plaintiff previously knew the facts in relation thereto.
Brown v. *Daggett*, 30.
4. And it can make no difference, if the money so paid for the note was appropriated at the time to the payment of a note on which the plaintiff was before liable as a surety for the holder. *Ib.*

5. An instruction to the jury, that an agreement by an indorsee of a note to give time of payment to the maker, in order to discharge the indorser from his liability, must be such, "*that the maker of said note could sustain an action against the indorsee, if he violates it,*" is incorrect. The rule seems to be, that if the holder, by an agreement with the maker, has incapacitated himself to proceed against him, the indorser will be discharged.
Pierce v. *Whitney*, 113.
6. To charge the drawer of a bill of exchange by putting a notice of non-payment into the mail, when he resides in a different State from that in which the demand on the acceptor was made, and when there is a town of the same name in at least two States, the direction of the notice should not only name the town in which the drawer resides, but also the State.
Beckwith v. *Smith*, 125.
7. There should be proof, on the part of the plaintiff, that the letter giving notice to the drawer was placed in the postoffice in season to be carried by the mail of the next day after the bill was dishonored. *Ib.*
8. Proof that the notice was put into the postoffice at nine o'clock in the forenoon of the next day after the demand, merely, without showing that it was in season to be carried by the mail of that day, is not sufficient. *Ib.*
9. If a note has been indorsed by partners in the name of their firm, a waiver of demand and notice, being but the modification of an existing liability by dispensing with certain testimony which would otherwise be required, may be made by one partner, after the dissolution of the firm and before the note became payable. *Darling* v. *March*, 184.
10. A note for value received and for a sum certain, payable to a person named or to his order at a fixed time and place, is a negotiable note, although the words, "the contents of this note to be appropriated to the payment of R. M. N. S. (a third person,) mortgage to the payee," were written upon the back thereof; and an action may be maintained thereon in the name of an indorsee. *Treat* v. *Cooper*, 203.
11. When a bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. *Dana* v. *Sawyer*, 244.
12. A presentment of a bill or note, in such case, however, for payment, a few minutes before twelve at night, is insufficient and unavailing, unless it should appear from an answer made to the demand, that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. *Ib.*
13. Such demand as is obligatory upon the maker of a note is a sufficient demand in reference to the liability of an indorser thereof.
Bank of Portland v. *Brown*, 295.
14. Where the drawer of a bill has no funds in the hands of the drawee, a demand and notice need not be proved, to charge the drawer; unless he had reasonable ground to expect that his draft would, nevertheless, be honored; and this, if relied upon by the drawer in his defence, should be shown by him. *Burnham* v. *Spring*, 495.
15. It was held, that if the patent right, which was the consideration of a note, was not wholly worthless, the consideration was sufficient to entitle the payee to recover the full amount of the note. *Clark* v. *Peabody*, 500.
16. If it appears on the face of a promissory note, that it was given "for value received," this is *prima facie* evidence of a sufficient consideration. *Ib.*
17. No action can be maintained by an indorsee of a note, unless it was indorsed by the payee before the commencement of the suit. *Ib.*
18. The ratification by the payee of a note of an indorsement thereof, made by one assuming to act as his agent without authority from him, can operate only as an indorsement made at the time of the ratification. *Ib.*
19. In an action by an indorsee against the maker of a note, the written admission by the payee, that one acting as his agent in indorsing it had authority from him for that purpose, is not competent evidence to prove the agency. *Ib.*

See CONSIDERATION, 4, 5, 6. EVIDENCE, 8, 9.

BOND.

See ACTION, 8. PAYMENT, 1. POOR DEBTORS.

CLERK OF THE COURTS.

1. The duties of clerk of the courts, holden by the County Commissioners, are a part of the duties of the clerk of the Judicial Courts of the county; and he is entitled to receive the fees therefor, and is required to render an account of the same in the same manner as for fees received as clerk of the Supreme Judicial Court and District Court. *White* v. *Fox*, 341.
2. A clerk of the Courts is required by law to perform many duties, as part of the duties of the office, for the performance of which no compensation is provided in the fee bill; but he is not entitled to be specifically paid for them, or for his attendance in the Courts; being compensated therefor only by the fees which are allowed in the fee bill for the performance of other duties. *Ib.*
3. But if the clerk does charge for duties performed for which no compensation is provided in the fee bill, such as attending in Court, making dockets, indexes, &c., and those charges are allowed by the County Commissioners and paid to him, he is bound by the statute to account for the money, thus received, in the same manner as for that received for services where the fee bill does provide compensation. *Ib.*
4. The term of office of the clerks of the Judicial Courts was not terminated, and new appointments made by law, when the Revised Statutes went into operation, but they continued as clerks under their previous appointments. *Ib.*
5. Nor are the sureties of a clerk discharged by the provisions of Revised Statutes, c. 100, § 7, "in case he shall neglect or refuse to pay over any sum, for which he is accountable" by virtue of the Statute provisions, nor by a change by law in some of the duties of the office. *Ib.*

CONSIDERATION.

1. While the common law doctrine is admitted, that there must be proof of a consideration to support an unsealed written contract, the position cannot be maintained without limitation, that a moral obligation is a sufficient consideration. There are many moral duties, which cannot be enforced at law, although a verbal or written promise may have been made to perform them. *Farnham* v. *O'Brien*, 475.
2. Where one person has voluntarily received a benefit from another, not gratuitously conferred, or has been the occasion, without sufficient excuse, of loss or injury to another, there arises a moral obligation to compensate him for the benefit received or the loss occasioned; and the law will enforce the performance of this duty, if some statute, or rule of public policy, providing for the general good even at the expense of individual loss, does not interpose. *Ib.*
3. A contract, void by the statute of frauds, from which a party might otherwise have derived a future benefit, is not a legal consideration for an express promise; but if one party, by such contract, has induced the other to perform in part, or to incur expense in preparations to perform, while he refuses him the future benefit of the contract, the loss and injury thereby occasioned is a valid consideration for a promise to make compensation therefor. *Ib.*
4. When part of the consideration of a promissory note is illegal, the whole note is void. *Deering* v. *Chapman*, 488.
5. If a part of the consideration of a note be spirituous liquors, sold by the payee in less quantities than twenty-eight gallons, without license therefor, in violation of the statute, such note is wholly void. *Ib.*
6. And where partial payments have been made, less than the amount charged for ardent spirits, thus sold without license, and a note has been given for the balance of the account, it will nevertheless be entirely void. *Ib.*

See BILLS AND NOTES, 3, 15, 16. CONTRACT, 2.

CONSPIRACY.

See ACTION ON THE CASE, 1.

CONTRACT.

1. Where one contracted with another, that his wife should, within six months, convey and release to the other party her right of dower in certain land

10. But if the particular recital be not so used, but be used by way of reiteration and affirmation only of the preceding general words, such recital will not diminish the grant made by the general words. *Ib.*
11. Thus, where the land conveyed was described as "one half of a tract of land formerly the estate of H. W. to wit, that part of said tract next to and adjoining Harrisicket river; said tract begins at a large rock by Little river, thence N. 45° W. to Harrisicket river, and bounded round by the shore to said rock," the land of H. W. extending to the river, in which the tide ebbed and flowed; *it was held*, that the land granted was not restricted to the shore, but extended to the river. *Ib.*
12. It is not necessary to call more than one of two subscribing witnesses to a deed, before other testimony in relation to its execution and delivery may be legally admitted. *Jackson* v. *Sheldon*. 569.
13. Delivery is essential to the operation of a deed as a valid instrument, and without it, the grantee cannot be bound by any recitals or covenants contained therein; and he is a competent witness, to prove that it was delivered to a third person on a condition to be performed, and had never been delivered to him. *Ib.*
14. It is not necessary that there should be an express declaration that a deed is delivered to a third person as an escrow to make it such. If the delivery be conditional, so as not to constitute any present obligation, it is an escrow, and not a deed. *Ib.*
15. Where an instrument has not been delivered to the grantee, but to a third person, to be delivered to him upon the performance of a condition, which has never been performed, it is but an escrow, and not a deed, and no title passes thereby to the grantee. *Ib.*

See LEVY ON LANDS, 2.

COSTS.

See EQUITY, 17. USURY.

COVENANT.

1. If land be conveyed by deed of warranty with the usual covenants, and the grantee enter into possession under his deed, and continue such possession for nearly twenty years, and then purchase in an outstanding paramount title, he cannot recover, for breach of the covenant of seizin, the consideration originally paid with interest; but is entitled to recover the amount last paid and interest thereon. *Spring* v. *Chase*, 505.
2. Where the grantee enters into the possession and actual occupation under his deed of warranty, and afterwards purchases in an incumbrance or outstanding paramount title, the amount he may recover is not affected by proof, that the rents and profits are more or less than the interest on the consideration originally paid. *Ib.*

DAMAGES.

See ACTION ON THE CASE, 5. COVENANT.
INSPECTION LAWS. POOR DEBTORS, 2, 5, 6, 7.

DEPOSITION.

1. It is not necessary that the notice to the adverse party that a deposition was to be taken, should be precisely in the form given in Rev. St. c. 133, § 11. It is sufficient, if it conforms thereto in substance.
Dorrance v. *Hutchinson*, 357.
2. Where the magistrate before whom a deposition is to be taken, adjourns the time of taking it because the deponent, although duly summoned, did not attend, under the provisions of Rev. St. c. 133, § 36, it is not necessary to give a new notice to the adverse party, where he had been duly notified of the time first appointed and did not attend. *Ib.*

See EVIDENCE, 1.

DECLARATION.

See EVIDENCE, 7.

DEED.

See Conveyance.

DESCENT.

See Alien. Husband and Wife, 5.

DEVISE.

See Will.

DISTRESS FOR RENT.

1. By the laws of the Province of New Brunswick, being in that respect the same as in England, a common warehouse, in the sense in which the word is used in relation to distress for rent in arrear, is a building, or an apartment in one, used and appropriated by the occupant, not for the deposit and safe keeping or selling of his own goods, but for the purpose of storing the goods of others, placed there in the regular course of commercial dealing and trade, to be again removed or reshipped. *Owen* v. *Boyle*, 47.
2. Where a quantity of his own salt was deposited in a warehouse of this description, within that Province, by a person other than the occupant thereof, in the regular course of trade, the duties being paid, to be stored and again removed or reshipped, *it was held*, that such salt was not liable in law to be taken by a warrant of distress for rent in arrear, due from the lessee of such warehouse to the owner thereof. *Ib.*
3. And if the salt of such depositor, not being liable therefor, should be taken by the landlord on a warrant of distress and sold for the payment of rent due from the tenant, and purchased by the landlord, the course of proceedings in the sale being in conformity to the laws of the Province, such sale would not have the effect so to transfer the property in the salt to the landlord, as to enable him to maintain replevin therefor against the depositor thereof. *Ib.*
4. In an action of replevin for the salt, brought after the sale, by the landlord against the person so depositing it in the warehouse, the tenant is a competent witness for the defendant. *Ib.*

DOWER.

See Action 5. Alien, 2. Contract, 1, 2.

EQUITY.

1. A Court of Equity will give full effect to the statute of limitations, as well as throw out stale demands and claims. But when it perceives, that the party complaining has equitable rights, and that the remedy at law, might have proved to be insufficient; that the answer admits, that they have never been relinquished, or compensation made for them, and that they still exist; and alleges that no resistance has been made to the enjoyment of them up to the time of filing the answer; it will not refuse to give relief, being a case proper for it, although the claim has been outstanding for a long time. *Chapman* v. *Butler*, 191.
2. Where it appeared that the improvements upon a tract of land had been conveyed by the defendant to the plaintiff in equity in the year 1818, and that an agreement had been then made between them, whereby the defendant was to retain the possession for two years, "and then quietly leave the possession, and put the plaintiff into possession of the same;" and where, before the expiration of the two years, the defendant held the possession under a title from the proprietor of the land, and within three years of the filing of the bill, procured a conveyance of the land to himself, and refused to relinquish the possession to the plaintiff; *it was held*, that the statute of limitations was not a bar to the relief sought for by the bill in equity. *Ib.*
3. Although in such case the defendant might legally purchase in the title of the owner of the land, yet if he makes use of it to defeat his own prior conveyance of the improvements, he does so in fraud of the rights of the plaintiff, and it is but just to prevent his making such use of that title. *Ib.*

garded or set aside, although the amount received may have been less than the party might justly have insisted upon. *Ib.*

14. If a party would avoid his contract on the ground of fraudulent misrepresentations respecting the property conveyed, he has his election to proceed by bill in equity, or by a defence before a jury, when the contract is attempted to be enforced by a suit at law; but if he proceeds by bill in equity, he must be governed by the rules of courts of equity. *Ib.*

15. Testimony which speaks of representations made by the defendant after the sale, is inadmissible to prove the fraud. *Ib.*

16. Testimony which states the representations made to other persons, and not to the plaintiff, can be used only to prove that the defendant had formed the design to commit frauds in that manner, as opportunities should be offered; and when such design has been established, that fact may be used, in connection with other testimony, to satisfy the mind, that it was acted upon in making the contract under consideration. *Ib.*

17. Where material misrepresentations, on the part of the defendant, were established, in a suit in equity, but the bill was dismissed for other causes, no costs were allowed. *Ib.*

18. Where a controversy existed among the claimants of a trust fund, both as to the persons entitled to receive it, and the respective proportions thereof; and a bill in equity was brought by one claimant against the trustee and other claimants, such trustee is entitled to be paid from the fund, in addition to compensation for care of the property, the expenses by him necessarily incurred in defending the suit. *Morton* v. *Barrett*, 257.

See Husband and Wife, 3.

ESCROW.

See Conveyance, 14, 15.

EVIDENCE.

1. Where there is no rule of Court requiring the clerk to enclose a commission to take depositions to the commissioner under seal, and where the commission contains no directions that the interrogatories should not be seen by the deponent; if they are shown to him before the commission is delivered to the commissioner, this furnishes no legal impediment to the admission of the deposition. *Amee* v. *Wilson*, 116.

2. In an action to recover the price of sails and rigging, where the plaintiff offers in evidence his original books of entry with his own suppletory oath, it is not competent for him to testify, that he was directed by the defendant to deliver the sails and rigging on board another vessel and that he did so deliver them. *Ib.*

3. The creditor is not entitled to recover interest on the amount of articles charged on account after the expiration of six months from the time of their delivery, by proof, "*that the usual term of credit on the purchase,*" *of such articles* at the place of the sale, "*was six months with interest after.*" The plaintiff would be entitled to such interest, only by proof of an agreement to pay it, or by proof of a demand of payment, anterior to the date of the writ. *Ib.*

4. A judgment of a court of record within the State, of general jurisdiction, and proceeding according to the course of the common law, where a want of jurisdiction is not apparent on the record, cannot be impeached by the parties to it, so long as it remains unreversed. *Granger* v. *Clark*, 128.

5. If in such case fraud, or want of jurisdiction actually existed, it must be made to appear in the appropriate process to obtain a reversal of the judgment; and until such process has been resorted to, and has proved effectual, the judgment is conclusive between the parties to it. *Ib.*

6. But when judgments are collusively procured between the parties, with a view to defraud some third person, the latter is not estopped to show the fraud. *Ib.*

7. In an action of debt to recover the penalty for "setting a net for the purpose of taking herring in any river, stream, harbor, creek or cove in the county of Washington," contrary to the provisions of the statute, an averment which limits the prior general language of the declaration to some one harbor or cove, is necessarily descriptive. And if such restrictive

averment might have been omitted, yet being a part of the declaration, it becomes necessary to prove it as laid, and it cannot be rejected as surplusage. *Ackley* v. *Dennison*, 168.

8. In an action by the indorsee against the indorser of a note for the accommodation of the maker, the latter, being released by the defendant from all claim for costs, is a competent witness for him.
Darling v. *March*, 184.

9 The rule that the maker of a negotiable note shall not be permitted to show illegality in its consideration by his testimony, does not apply to a case, where the note first became a valid contract in the hands of the plaintiff, an indorsee, and with whom the illegal and usurious contract was made. *Ib.*

10. If the witness called has a balance of interest against the party calling him, he is competent to testify. *Ib.*

11. Where the plaintiff knew at the time that one of the partners indorsed the partnership name on the note in suit as security for the maker, it is, according to the decisions in this country, incumbent on him to rebut the presumption created by law, that he received the firm name as surety for another in fraud of the partnership. *Ib.*

12. Such presumption, however, may be rebutted by proof of frequent interchanges of the partnership names between the makers and indorsers for a long time, without direct proof of the assent of each member. *Ib.*

13. What the record itself does declare, is to be made known to the Court by a duly authenticated copy of it; and the law does not permit a recording or certifying officer to make his own statement of what he pleases to say appears by the record. A mere certificate, therefore, that a certain fact appears of record, is not evidence of the existence of the fact.
McGuire v. *Sayward*, 230.

14. In an action by the manufacturer of an article against an officer for attaching and taking it as the property of another, where the plaintiff calls the debtor to prove that he had not purchased the article, and the defendant proves statements of the witness that he did purchase it, such declarations may discredit the witness, but are not competent to prove a sale by the plaintiff. *Gilbert* v. *Woodbury*, 246.

15. Where an individual attempts "to establish a common right in all the inhabitants of" a town, to enter upon the flats of another, and take therefrom "muscle-bed manure," an inhabitant of that town is not a competent witness to establish such right. *Moore* v. *Griffin*, 350.

16. If one party send a letter to their attorney, saying that, "in our proposal to Mr. G. (the other party) we engaged to give up his note, he paying $175, as interest, and conveying or transferring," certain real estate and bank-stock, and, "if he complies with the above, you will please settle the business;" and the other party acknowledges on the letter the receipt of the note, he "having complied with the requirements therein expressed;" the paper containing the *proposal*, may be received in evidence, as explanatory of the actual agreement of the parties, in an after controversy between them. *Goddard* v. *Putnam*, 363.

17. If a record be destroyed or irrecoverably lost, parol evidence is admissible to show, that it once existed, and the purport of it.
Gore v. *Elwell*, 442.

18. The writ, with the officer's return of his doings in virtue of it, is to be regarded as appertaining to, and indeed a part of the record. *Ib.*

19. It was held that the printed volume of Massachusetts Revised Statutes which went into effect on May 1, 1836, wherein was found a reference to a prior statute, as Stat. 1824, c. 130, and a repeal of Stat. c. 130, describing it as "an act to allow grace on bills of exchange and notes, according to the custom of merchants," was competent and sufficient evidence from which a jury might infer, that by the laws of Massachusetts, grace was allowed on promissory notes, on Feb. 6, 1836. *Goodwin* v. *Appleton*, 453.

20. It is not competent for the *defendant*, under the provisions of Rev. Stat. c. 69, § 3, to testify to any facts, but such as go to establish the defence of usury. *Ib.*

See ACTION ON THE CASE, 2, 3, 4, 5. BILLS AND NOTES, 7, 8, 14, 16, 19. CONSIDERATION, 1. CONVEYANCE, 12, 13. DEPOSITION. DISTRESS FOR RENT, 4. EQUITY, 15, 16. FENCES, 1. INDICTMENT, 1, 2. PLEADING, 1, 2. WILL, 17, 18.

EXCEPTIONS.

See PRACTICE, 8, 16, 18.

EXECUTION.

1. So far as it respects the rights of the creditor, the effect is the same, if the execution be placed in the hands of the sheriff, within thirty days after judgment, as it would have been if it had been placed in the hands of his deputy who made the attachment, for the law regards the sheriff and his deputy the same officer. *Humphreys* v. *Cobb*, 380.
2. When the sheriff has the execution in his hands for service, notice to his deputy who made the attachment, within the thirty days, that the attachment has been preserved and that the creditor claims to have the property attached applied to satisfy the execution, will be equivalent to a demand for the property. *Ib.*

See LEVY ON LANDS. OFFICER, 3, 4.

FENCES.

1. In an action brought to recover double the value of fence built by one occupant for the other on account of his neglect, under the provisions of St. 1821, c. 44, § 2, the plaintiff cannot, on the trial, give parol evidence of the contents of the writing given by the fence viewers to the defendant, directing him to repair or rebuild his part of the fence, without having given the regular previous notice to produce it. *Abbott* v. *Wood*, 541.
2. An action founded on St. 1821, c. 44, § 2, to recover double the value of fence built by order of the fence viewers cannot be sustained, unless the fence viewers adjudge that the fence, built by the plaintiff, is sufficient, and give notice thereof, and of the value of the fence, as ascertained by them, to the occupant so neglecting to repair or rebuild. *Ib.*

FLATS.

Neither the colonial ordinance of 1641, nor the common law, authorizes the taking of "muscle-bed manure" from the flats of another person between high and low water mark on tide waters.
Moore v. *Griffin*, 350.

See EVIDENCE, 15.

FORGERY.

See ACTION ON THE CASE, 5, 6, 7, 8.

FRAUD.

See ACTION, 2, 3. ADMINISTRATOR. BILLS AND NOTES, 1. CONTRACT, 5. EQUITY. EVIDENCE, 5, 6, 11. STATUTE OF FRAUDS.

GOODS WAREHOUSED.

See DISTRESS FOR RENT.

GUARANTY.

1. Cases of completed guaranty of existing demands are scarcely to be assimilated to those of indorsers, under the mercantile law of bills of exchange and promissory notes, in any of the rules as to demand and notice. Such guarantor may be, and generally is, liable without either, and is in many respects in the condition of a surety. *Skofield* v. *Hadley*, 164.
2. If the debtor was insolvent at the time the debt guarantied became payable, neither demand on him, nor notice to the guarantor would be necessary to charge the latter. *Ib.*
3. Where the defendant was liable to the plaintiff on a note, and by an agreement between them, made *bona fide*, the defendant was discharged from his liability on the note by giving to the plaintiff an order, drawn and accepted by others and guarantied by the defendant, *it was held*, that the amount of

the order, thus guarantied, might be recovered, although somewhat greater than the original liability on the note. *Ib.*

4. Where there is a guaranty of payment for goods, to be afterwards purchased by a third person, until otherwise ordered, the amount not to exceed a certain sum, the guarantor, to be made liable, must be apprised of the acceptance of the proposed guaranty; and must within a reasonable time be notified of the amount which may have been advanced, and of demand of payment, without effect, of the principal debtor. *Howe* v. *Nickels*, 175.
5. No definite rule, as to what constitutes reasonable time, seems to have been distinctly prescribed in such cases of guaranty; but if the want of notice, or the delay to give notice, has operated injuriously to the guarantor, he is to be relieved of his liability *pro tanto*, of such loss. *Ib.*
6. And if the debtor has become insolvent during the time the creditor had it in his power to have enforced payment against him, it is *prima facie* evidence of a loss *in toto*. *Ib.*

GUARDIAN.

See PROBATE, 3, 4.

HOUSE OF CORRECTION.

See POOR CONVICTS.

HUSBAND AND WIFE.

1. It is well settled at common law, that the choses in action of a female, upon her marriage, pass to the husband; so that he may, at any time thereafter, during the life of himself and wife, reduce the amount due on them to possession. *Thrasher* v. *Tuttle*, 335.
2. The wife cannot receive payment of the sums due on them, except as the agent of her husband; but if he knows of payments made to her, and does not object, he will be considered as authorizing them. *Ib.*
3. That a husband, when creditors will not thereby be defrauded, may voluntarily, and without pecuniary consideration, convey a portion of his estate in trust for the benefit of and by way of advancement to his wife, there can be no doubt in a court of equity. *Spring* v. *Hight*, 408.
4. And if he thinks proper to pay for an estate, and to direct the conveyance of it to be made to her, in the absence of any intention, manifested at the time to the contrary, it will be presumed to be for an advancement to her. *Ib.*
5. Where a conveyance of land was made to a third person, by order of one in trust for his wife, although not so expressed in the deed, and afterwards the estate was by the verbal direction of the husband transferred to the wife, *it was held*, that after the death of the wife, the estate could not be reclaimed from her heirs by the husband, or his heirs. *Ib.*

INDICTMENT.

1. In an indictment for larceny wherein the property charged to have been stolen was alleged to have been, "the property of one Eusebius Emerson of Addison," and the proof was, that there were, in that town, two men of that name, father and son, and that the property belonged to the son, who had usually written his name with *junior* attached to it; *it was held*, that *junior* was no part of the name, and that the ownership, as alleged in the indictment, was sufficiently proved. *State* v. *Grant*, 171.
2. On the trial of an indictment, to exclude confessions of guilt of the accused on the ground of their not having been voluntarily made, there must appear to have been held out some fear of personal injury, or hope of personal benefit of a temporal nature, unless the collateral inducement be so strong as to make it reasonable to believe, that it might have produced an untrue statement as a confession. *Ib.*
3. Where one has received money for himself and for another, for whom he acted as agent, and to whom he had given credit for his share, it is well alleged in the indictment for larceny that the money was the property of the person receiving it. *Ib.*

INSPECTION LAWS.

INTEREST ON ACCOUNTS.

JUDGMENT.

JURORS.

LEVY ON LANDS.

LIEN.

2. If by the contract of sale the vendor of standing trees has a lien on the trees for their price, it will not be lost, should the vendee cut them and convert them into mill logs in manner provided in the contract. *Ib.*
3. Where there is no fraud, the vendee can transfer no greater rights to a third person by a sale, than he had himself. *Ib.*

See ACTION, 4. AGENT AND FACTOR, 2, 3, 4, 5.
ATTORNEY AT LAW, 1, 2, 3. SET-OFF, 3, 4.

LIMITATIONS.

1. Before the Revised Statutes were in force, if the payee of a note, otherwise barred by the statute of limitations, "*promised to renew the note, and appointed a time to do it*" within six years next before the commencement of the suit, it was thereby taken out of the operation of that statute.
Peavey v *Brown*, 100.
2. A new promise, made by one of two joint and several promisors, before the Rev. Stat. went into effect, will take the case out of the operation of the statute of limitations as to both, although the new promise was made by a principal, when the other promisor was a surety.
Shepley v. *Waterhouse*, 497.

See EQUITY, 1, 2. POOR, 2.

MALICIOUS PROSECUTION.

See ACTON ON THE CASE, 1, 2.

MILITIA.

The provision in the militia act of 1834, § 19, (Rev. St. c. 16, § 14) which requires that, when any person shall enlist into any volunteer company, "the commanding officer of the company, into which such person may enlist, shall give notice thereof in writing to the commanding officer of the standing company, in which such person is liable to do duty, within five days," is not applicable to an enlistment by a petitioner for the volunteer company at its first formation prior to the choice of officers.
Allen v. *Humphrey*, 391.

MORTGAGE.

1. Where there is a conveyance by the mortgagee to one who had previously acquired a right in the equity of redemption, the rule is well established, that the mortgage will not be considered as extinguished, when it is for the interest of the grantee to have it upheld, unless the intention of the parties to extinguish it is apparent. *Pool* v. *Hathaway*, 85.
2. Where the conveyance from the mortgagee to the purchaser of the equity of redemption concluded thus; — "meaning and intending hereby to convey all the right, title and interest now vested in me by virtue of any and all conveyances heretofore made to me by I. & J. C. Pool," the mortgagors; *it was held*, that no intenion to discharge the mortgage appeared, but the reverse. *Ib.*
3. If personal property be transferred as security for becoming surety on a note, and the note is afterwards paid by the surety, and a new mortgage is then given to him of the same property to secure the repayment of the sum thus paid, within a stipulated time, any rights acquired by the first transfer, must be considered as waived by taking the mortgage. *Paul* v. *Hayford*, 234.
4. When property is mortgaged, and the mortgage is duly recorded, the statute of 1835, c. 188, does not authorize an officer to attach and *remove* the property on a writ against the mortgagor, without first paying, or tendering payment, of the amount secured by the mortgage. An attachment of the property, in such case, can only be made, when it can be effected without depriving the mortgagee of the actual possession, or of the right to take immediate possession. *Ib.*
5. The time when a mortgage of personal estate was received by the town clerk must be noted both "in the book" of records "and on the mortgage," in order that it should "be considered as recorded, when left as aforesaid, with the clerk," under the provisions of Rev. St. c. 125, § 32 and 33.
Handley v. *Howe*, 560.

NEW TRIAL.

See JURORS, 2. PRACTICE, 11, 17.

OFFICER.

1. When an officer attaches personal property, he should make a true, strict, minute and particular return of his doings. *Haynes* v. *Small*, 14.
2. If an officer returns on a writ, that he has "attached one hundred and seventy-five yards of broadcloth, the property of the within named defendant," it is not competent for him, in an action for not producing the property to be taken on the execution, to show that but thirty yards were in fact attached by him. *Ib.*
3. If an execution be delivered to an officer for collection, and he pays the amount thereof of his own money, to the creditor, and retains the execution in his own hands until it cannot be renewed, he cannot maintain an action for his own benefit on the judgment in the name of the creditor against the debtor. *Whittier* v. *Heminway*, 238.
4. Where the return of an officer sets forth, that by virtue of his precept he had made diligent search for the property of the debtor, and could find none, the return would be false, unless he had the execution in his hands before the return day; for he could do nothing *by virtue of it*, unless it was in force at the time. And therefore where an officer makes such return on an execution, under a date subsequent to the return day, it must be considered, that the execution was in his hands seasonably, and that his return of his doings had reference to the time when he could lawfully act by virtue of it. *M'Lellan* v. *Codman*, 308.

See ATTACHMENT. EXECUTION. RECEIPTER.

TRUSTEE PROCESS, 1.

OVER-PAYMENT.

See ACTION, 6.

PARTITION.

1. By the provisions of the Rev. St. c. 121, if a petitioner for partition choose to take an issue on the question of the respondent's interest, he may do so, and on its being determined in his favor, he is placed as he would have been, if the respondent had not appeared. *Marr* v. *Hobson*, 321.
2. But if the respondent shows himself to be interested, and so authorized to contest the claim to partition, the petitioner must prevail by the strength of his own title, and not by the weakness of the other party. *Ib.*

PARTNERSHIP.

See BILLS AND NOTES, 2, 9. EVIDENCE, 11, 12.

PAYMENT.

1. Where judgment was rendered against the principal and sureties on a note and execution issued against them; and by order of a surety, being one of the execution debtors, the principal was arrested on the execution, and gave a debtor's bond; and afterwards the surety, who ordered the arrest, paid the greater part of the demand to the creditor, and it was then agreed between the creditor and surety that a suit upon the bond should be prosecuted for the benefit of the latter; in the action on the bond, *it was held*, that the sum so paid by the surety should be taken as so much paid on the bond. *Morse* v. *Williams*, 17.
2. Where frequent settlements of accounts, with debt and credit, are made between the parties, and balances carried forward to new account, and no appropriations have been expressly made by the parties, the law will appropriate the credits to the extinguishment of the oldest charges. *McKenzie* v. *Nevius*, 138.
3. If there be no appropriation of a payment made by either of the parties, the law will appropriate it, other considerations being equal, in the first instance, to the payment of a note absolutely due to the creditor, rather than of one transferred to him as collateral security only. *Bank of Portland* v. *Brown*, 295.

See ACTION, 6.

PLEADING.

1. The statute providing that brief statements may be filed with the general issue, must be regarded as requiring a specification of matter relied upon in defence, aside from such as would come under the general issue, to be certain and precise to a common intent, as much so as if inserted in a special plea; and no proof is admissible, except in support thereof, or of the defence under the general issue. *Washburn* v. *Mosely*, 160.
2. Where the general issue is pleaded, and performance of the condition of the deed declared upon alone is specified in the brief statement as the defence relied upon, evidence to show an excuse for non-performance is inadmissible. *Ib.*
3. In *scire facias* against the indorser of a writ, the inability of the execution debtor to satisfy the execution, where that fact is relied upon to sustain the process, should be directly averred. If, however, this has not been done, but the plaintiff has averred, that his execution for costs has not been satisfied, and has recited the officer's return thereon, showing that the want of satisfaction arose from want of ability in the debtor to discharge the same, and has alleged, that for want of sufficient property of the debtor to satisfy the execution, the indorser became liable, the declaration will not, for that cause, be bad on general demurrer, under the provisions of Rev. st. c. 115, § 9. *McLellan* v. *Codman*, 308.

See ACTION ON THE CASE, 3. EVIDENCE, 7. TENANT IN COMMON, 3, 4.

POOR.

1. The Stat. 1821, c. 122, § 15, (Rev. Stat. c. 32, § 35) does not authorize the removal, to the place of their lawful settlements, of those persons who might be considered as likely to become chargeable as paupers at some future and as yet uncertain time; but authorizes their removal only, when the fact whether they were likely to become chargeable, would not depend upon a contingency, but upon an ascertained necessity. *Cornish* v. *Parsonsfield*, 433.
2. The right of the inhabitants of a town who have incurred expense for the support of a person as a pauper, given by Stat. 1821, c. 122, § 19, to recover the same against such person, is barred by the statute of limitations, unless an action for the recovery thereof shall have been commenced within six years from the time the cause of action accrued. *Kennebunkport* v. *Smith*, 445.

POOR CONVICTS.

1. In an action under the St. 1821, c. 111, to recover compensation for the support of a person lawfully confined in the *county house of correction* against the town wherein his settlement was, the plaintiff's claim accrues by virtue of his office as master, and proof of his having been such, is indispensable to the maintenance of the suit; but the indebtedness of the town is to the plaintiff for his individual benefit, and not in trust for others, and the suit should be in his name, whether he continues master or not. *Weymouth* v. *Gorham*, 385.
2. It is necessary that the account should first be allowed by the County Commissioners; but this is not in the nature of a judgment, so that the suit should be brought thereon, but the remedy is in assumpsit for the expenses incurred and services rendered. *Ib.*
3. It is no valid objection to the support of such action, that no account was kept of *the earnings* of the person committed, where it does not appear that there have been *earnings*. *Ib.*
4. Where the demand made is not such as the statute requires, yet if it be treated by the other party as a legal demand, and payment is refused for other causes, the right afterwards to make this objection is waived. *Ib.*
5. The limitation in Rev. St. in relation to houses of correction, c. 178, § 21, does not apply to cases under St. 1821, c. 111, on the same subject, where the cause of action had accrued before the Revised Statutes went into operation. *Ib.*

POOR DEBTORS.

1. Where a poor debtor's bond had been given, and the debtor appeared at the town wherein the jail was situated to surrender himself to the jailer on the last day of the six months, and the creditor then agreed in writing, that if the debtor would surrender himself at a certain subsequent day, every thing should be considered the same as if the surrender had then been made, and that all matters and things in regard to the bond should be done on the latter day, as if the bond had expired on that day, and have the same effect; *it was held*, that the agreement, without performance on the part of the debtor, or offer to perform, furnished no defence to an action on the bond. *Washburn* v. *Moseley*, 160.
2. In an action upon a poor debtor bond, where the proceedings were regular, and the condition of the bond would have been performed, if the justices before whom the oath had been taken had both been of the *quorum*, instead of *quorum unus*, and where there was no legal interest in the debtor which was of any value to the creditor or from which he could have obtained any thing to pay his debt; *it was held*, that there was nothing to warrant a jury, under the poor debtor act of 1839, c. 366, in finding that the creditor had sustained any damage. *Daggett* v. *Bartlett*, 227.
3. If the execution creditor, after the debtor has been arrested and given a poor debtor's bond, becomes a bankrupt, but the debtor has received no notice thereof, a citation to the creditor is good, without notice to his assignee. *Hayes* v. *Kingsbury*, 400.
4. After the Revised Statutes were in force, the oath to be taken by a debtor, arrested on mesne process before those statutes took effect and released on giving a debtor's bond, is that prescribed in Rev. Stat. c. 148. *Burbank* v. *Berry*, 483.
5. A bond taken to liberate a defendant from arrest on mesne process, is subject to chancery; and the damage actually sustained is the measure of the plaintiff's claim. *Ib.*
6. Since the act of 1842, c. 31, amendatory of the Revised Statutes, was in force, the damages in such cases are again to be assessed by the Court, and not by the jury. *Ib.*
7. In an action upon a bond given to procure the release of a debtor from arrest on mesne process, the condition of which has not been performed, where there was no evidence in relation to the amount of damages, excepting that the poor debtor's oath had been irregularly taken by the debtor before two magistrates who had certified that he was clearly entitled to have the oath administered after a disclosure of his affairs, it was held, that execution should issue for nominal damages only. *Waldron* v. *Berry*, 486.

[*Note.* — In vol. 21, there is an error in the abstract of the case of *Barrows* v. *Bridge*, p. 395, which is repeated in the index of the same volume, p. 594. It should read — "In a poor debtor's bond, given *before* the Revised Statutes went into effect," instead of "since," &c.]

PRACTICE.

1. If during the pendency of an action the parties make a written agreement, out of Court, under their hands and seals, that a default should be entered, if certain arbitrators, agreed upon between them to adjust the controversy, should make their award in favor of the plaintiff, and return it into Court; and it is done; still the Court cannot, without the assent of the defendant, legally order a default of the action. *Churchill* v. *Crane*, 22.
2. A memorandum made out of Court, of an agreement to refer an action by rule of Court, from which an entry to refer is afterwards put upon the docket but having no reference to the memorandum, is wholly superseded by such entry, and cannot affect the construction thereof. *Billington* v. *Sprague*, 34.
3. Where for many years such has been the understanding of the term, the word, "*referred*," simply, entered upon the docket, imports that a rule of reference is to be made out in common form, with power to the referees, to decide, in case of necessity, by a majority, and to proceed upon hearing one party, if the other, being duly notified, shall fail to be present. *Ib.*
4. If in making out the rule, the clerk changes the order of the names as entered upon the docket, placing the last name first, it is an irregularity which

might prevent the acceptance of the report, if objected to seasonably. But it may be waived, and it will be considered as waived by the parties, if knowing the fact, they proceed to the hearing without objection. It is too late in such case to make it, when the report is offered for acceptance. *Ib.*

5. If the referees, appointed by rule of Court, make their report, awarding a certain sum to the plaintiff as damages with costs of court to be taxed by the Court, but wholly omitting to state the amount of the costs of reference; and the plaintiff moves that the report be accepted; this omission will not furnish any valid objection, on the part of the defendant, to the acceptance of the report. *Ib.*

6. And if the reference has been entered into on the part of the defendant, not only by him, but also by his creditor, who had, by leave of Court, come in and given bond, under the provisions of the Rev. Stat. c. 115, the report will be accepted, notwithstanding the referees, after awarding damages and costs against the defendant of record, also add, and "do recover of the said L. (the creditor) such costs of reference and damages as he may be legally entitled to pay." *Ib.*

7. An instruction to the jury inapplicable to the facts of the case, and calculated to have an influence on the verdict, although correct when applied to other facts, is an error sufficient to cause the verdict to be set aside. *Pierce* v. *Whitney*, 113.

8. Where the remarks of a Judge, in his charge to the jury, are but the expression of an opinion upon the facts and testimony, they do not furnish ground for exceptions. *Gilbert* v. *Woodbury*, 246.

9. Where the whole testimony, if believed, will not in law establish a fact, the presiding Judge may express the legal effect of the testimony as matter of law. *Ib.*

10. The presiding Judge is not bound to give an instruction to the jury upon a mere speculative question of law, not relevant to the case on trial. *Ib.*

11. A new trial will not be granted on account of newly discovered evidence, where the motion does not state what the newly discovered evidence is, or where the same testimony was before the Court and the jury at the trial. *Ib.*

12. A verdict will not be set aside because the damages are excessive, where they appear to have been assessed neither at the highest nor the lowest estimate of the witnesses, and there is nothing indicating that the jury must have acted under the influence of passion or some undue bias upon their minds. *Ib.*

13. When a nonsuit is ordered, all the testimony is regarded as credible, and the facts stated in the testimony as proved. And when there is no longer any dispute respecting the facts; whether a party is entitled to recover upon such a state of facts, is a question of law; and as clearly so as it would be upon a special verdict finding the facts. *Davis* v. *Greene*, 254.

14. The rule of practice seems to be, that the plaintiff should have the opening and closing of his cause, whenever the damages are in dispute, unliquidated, and to be ascertained by the jury; and therefore in actions of slander, where the defendant, in pleading, admits the speaking of the words, and avers that they were true, and does not plead the general issue, the plaintiff is entitled to open and close. *Sawyer* v. *Hopkins*, 268.

15. A verdict may be put in form, and affirmed, after the jury have in substance found to the same effect. *Ib.*

16. It is not competent to bring the decisions of a Judge of the District Court into this Court for revision, when given in two distinct suits wherein the parties are not the same, by one bill of exceptions. *Codman* v. *Strout*, and *Strout* v. *Clements*, 292.

17. An erroneous decision of an immaterial point by a District Judge, is no sufficient cause for granting a new trial. *Blake* v. *Parlin*, 395.

18. Where the defendant is defaulted in the District Court, by his own consent, he cannot take exceptions to the ruling of the Judge. *Woodman* v. *Valentine*, 401.

19. Courts take notice of the local divisions of the State into counties, cities, and towns; but they are not bound to take judicial notice of the local situation and distances of places in counties from each other. *Goodwin* v. *Appleton*, 453.

See ACTION ON THE CASE, 7. VERDICT.

PRINCIPAL AND SURETY.

See PAYMENT.

PROBATE.

1. No notice is required by the Rev. St. c. 106, prior to the granting of administration on an intestate's estate if it be granted, "to the widow, husband, next of kin, or husband of the daughter of the deceased, or to two or more of them. *Bean* v. *Bumpus*, 549.
2. By the Rev. Stat. c. 105, the Judge of Probate has no jurisdiction, and cannot grant administration, if it does not appear to his satisfaction, "that there is personal estate of the deceased, amounting to at least twenty dollars, or that the debts due from him amount to that sum; and in the latter case, that he left that amount, in value, of real estate." *Ib.*
3. If a female, while under guardianship as a minor, marries, and afterwards dies, and the husband is appointed administrator of her estate, the guardian must pay over to the administrator the money of the minor which had remained in his hands until after her decease, even although he might be entitled to receive it, on a distribution, as her heir at law. *Ib.*
4. If a widow, entitled to dower in the real estate of her late husband, as guardian to her daughter, a minor, under license from Court, sells the right, title and interest of the minor in the same real estate, and the full value of the land is bid therefor, and received by the guardian, under the supposition that the right of dower passed by the deed, the Court of Probate cannot, on the settlement of the guardianship account, order the value of the dower to be deducted from the amount the guardian is to pay over to the minor or her representatives. *Ib.*

RECEIPTER.

1. If the attaching officer delivers the property to a third person, taking his receipt to re-deliver the same, and afterwards, before the expiration of thirty days after judgment, sends the receipt to the attorney of the creditor, without any request or agreement that it should be received as a substitute for the claim of the creditor upon the officer for a delivery of the property, and the attorney takes measures to obtain it from the receipter; this does not discharge the officer from his liability. *Humphreys* v. *Cobb*, 380.
2. This stipulation in a receipt to an officer for property attached, on the delivery thereof; "I further agree, that if no demand be made, I will, within thirty days from the rendition of judgment in the action aforesaid, re-deliver all the above described property as aforesaid at the above named place, and forthwith notify said officer of said delivery," appears to be a valid contract. *Ib.*

See ATTACHMENT, 3.

RECOGNIZANCE.

At common law, on forfeiture of the condition of a recognizance to prosecute an appeal, judgment is rendered for the whole penalty. By the Revised Statutes, c. 115, § 78, "in all actions in the Supreme Judicial Court on a recognizance entered into in the District Court to prosecute an appeal with effect," if the jury shall find the condition has been broken, "they shall estimate the damages the plaintiff has sustained," and execution is to issue for that sum and costs; but neither this, nor any similar provision, appears to have been found in relation to actions of the same description in the District Courts. *Welch* v. *Chesley*, 398.

REFERENCE.

See ARBITRAMENT AND AWARD. PRACTICE, 2, 3, 4, 5, 6.

REPLEVIN.

See APPEAL, 2. ATTACHMENT, 3. DISTRESS FOR RENT, 3, 4.

SCIRE FACIAS.

See ACTION, 5. PLEADING, 3.

SCHOOLS.

1. The Statute 1821, c. 117, being the "act to provide for the education of youth," made each school district a "body corporate;" as well those existing *de facto*, as those created by a legal vote of the town, the limits of such as were not already certain, to be defined by the town. *Whitmore* v. *Hogan*, 564.
2. If the town attempts to form two new school districts out of an existing one, and one of them be legally established by the proceedings of the town, its rights will not be affected by a failure to establish the other district in a legal manner at the same time. *Ib.*
3. Should the town, under an article in the warrant, for calling the meeting, "to see if the town will divide school district No. 2, in some convenient manner," include a portion of some other district in one of the new ones, if the proceedings would not be strictly legal on the objection of a person aggrieved, yet mere strangers cannot take the objection, to render the whole proceedings void. *Ib.*
4. When two new school districts are formed from one old one, the title to the existing schoolhouse is in that district within whose territory it falls on the division. *Ib.*
5. And if the schoolhouse was originally built by money furnished by voluntary subscription, it is the property of the district, where it has been appropriated to and used by the district as a schoolhouse for forty years. *Ib.*
6. Before school districts were specially authorized so to do by statute, a district might make sale of its old schoolhouse, which had become unfit for the use of the district. *Ib.*

SEIZIN AND DISSEIZIN.

See BETTERMENT RIGHTS, 5. CONVEYANCE, 7. TRESPASS, 1.

SET-OFF.

1. Where mutual demands exist between the parties, one of them cannot by an assignment of his cause of action, defeat the right of the other to set off the judgments rendered thereon. *Hooper* v. *Brundage*, 460.
2. And if one judgment is recovered in the Supreme Judicial Court, and the other in the District Court, this does not prevent the set-off. *Ib.*
3. But the attorney may have made advances for his client in the progress of the cause, and if he has, he should have his lien therefor; and the Court in the exercise of its discretion may require an exhibit on the part of the attorney, showing the extent to which his equitable lien goes, and protect him to that extent. But this cannot, in any event, extend further than to fees legally accruing, and advances made by way of disbursements for the accruing costs. *Ib.*
4. If money has been paid into Court, and taken out by the attorney in part satisfaction of the demand sued, and has been paid over to his client, without deducting his fees, this will not avoid the lien of the attorney. *Ib.*

SHERIFF.

See OFFICER.

SLANDER.

1. Where the defendant, in an action of slander, has pleaded a special justification, admitting the speaking of the words, and averring that they were true, without pleading the general issue, the plaintiff may give evidence, other than what is furnished by the plea itself, of the extent and degree of malice, actuating the defendant, in traducing the plaintiff, to affect the question of damages. *Sawyer* v. *Hopkins*, 268.
2. And it may well be doubted whether the defendant, in such case, by relying upon his justification solely, and failing to sustain it, is precluded from giving evidence in mitigation of damages. *Ib.*
3. In such action of slander, where it appeared that the plaintiff, a minister of the Gospel, had been tried before a conference upon a charge of having made alterations in certain charges of immoral conduct, signed by others against one of his brethren in the ministry, for the purpose of procuring an investigation thereof; and the present defendant, on such trial of the

present plaintiff, had been active against him, and in connexion with which, the charge of forgery had been made by the present defendant against the present plaintiff; and the truth of which had been set up as a special justification on the present trial; *it was held*, that the plaintiff might give in evidence the proceedings at the trial before the conference in aggravation of the damages. *Ib.*

4. The mere insertion of other matter in the charges against such third person in an additional specification, would not constitute the crime of forgery, unless it was done with the intent to defraud or deceive some one. *Ib.*

5. When the defendant, in an action of slander, has placed his defence upon the ground, that certain papers were the subjects of forgery and had been forged, he has no cause of complaint, if the presiding Judge suffers the cause to proceed to trial, and does not instruct the jury that the papers were not the subjects of forgery, even if they were not so; for if the instruction had been, that they were not the subjects of forgery, the plaintiff could not have been guilty of that offence, and the instruction must then have been, that the defence had not been made out. *Ib.*

6. If the plaintiff altered those charges, after they had been signed, with praiseworthy intentions, relying upon that confidence he had been accustomed to experience from the brethren of his church, while endeavoring, in pursuance of their instigations originally, to bring a member of the same denomination to an examination as to charges against him, supposed to be susceptible of proof, such alteration is not a forgery. *Ib.*

STATUTE.

If a statute be both penal and remedial, it should be construed strictly. *Abbott* v. *Wood*, 541.

STATUTE OF FRAUDS.

Where an agreement to pay rent is but collateral to a prior promise of another to pay the same rent, such agreement is void unless it be in writing. *Blake* v. *Parlin*, 395.

See ACTION, 7.

STATUTES CITED.

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SUBSCRIPTION PAPER.

See ACTION, 1.

TAXES.

1. The St. 1823, c. 229, authorized the sale of non-resident *improved land taxed to persons within the State*, for the payment of taxes thereon.
Wescott v. *McDonald*, 402.
2. But the St. of 1826, c. 337, does not provide that the return of the collector on the warrant, stating his proceedings in advertising and selling the estate, should be received as evidence that he had complied with the requisitions of the statute, when the sale is of improved land of proprietors living within the State. *Ib.*

See TENANT FOR LIFE.

TENANT FOR LIFE.

It is the duty of a tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid; and if he neglects it, and thereby subjects the land to be sold to pay such taxes, and afterwards receives a release of the title acquired under that sale, it will but extinguish that title, and can give him no rights to hold under it against the reversioner.
Varney v. *Stevens*, 331.

TENANT IN COMMON.

1. Where a trespass has been committed upon the land of tenants in common and a settlement has been made with the trespasser by one of such tenants, who released him from all liability for the trespass, as well for his co-tenant as for himself, such settlement and release binds both tenants in common. *Bradley* v. *Boynton*, 287.
2. A settlement and release of a trespass necessarily operates as a transfer of the property, severed from the freehold, to the trespasser; and when a release of one tenant in common discharges the cause of action, it must have a like effect. *Ib.*
3. Although one tenant in common of personal property can sell but his own share, and not that of his co-tenant, yet when they have both been deprived of the possession and enjoyment of it by a wrongdoer, their right to compensation for the injury is a joint one, and their remedy is by a joint action; and hence it is, that one of them may release and discharge both the joint right of action, and the action itself. *Ib.*
4. One tenant in common of a chattel cannot maintain trover against his original co-tenant, while he remains in possession of the property; nor can he maintain such action against the vendee of the original co-tenant, so long as he continues in possession of the property, although claiming it as sole owner. *Dain* v. *Cowing*, 347.

TRESPASS.

1. Where the owner of land had been disseized thereof for twelve years, and at the end of that time had made an entry thereon, and brought his writ of entry and recovered judgment therein for the land, and the tenant had put in his claim for betterments, and had the same allowed upon the trial; it was held, that an action of trespass *quare clausum*, commenced while that suit was pending, for cutting trees on the premises during its pendency, could not be maintained. *Chadbourn* v. *Straw*, 450.
2. And it would seem that an action of trespass *quare clausum* cannot be maintained against one who has become legally entitled to his improvements upon the premises, for cutting trees thereon, after he has become thus entitled. *Ib.*

See APPEAL, 1. TENANT IN COMMON, 1, 2.

TRUSTEE PROCESS.

1. An officer cannot be charged as trustee of the defendants, for his having attached goods, found by him in their possession, on writs against third persons, as the property of the latter on the ground that the goods had been fraudulently purchased by the former of the latter to delay and defraud their creditors; a question of fraud being involved in the issue which should be referred to a jury. *Rich* v. *Reed*, 28.
2. There must be a clear admission of goods, effects or credits, not disputed or controverted, by the supposed trustee, before he can be truly said to have them in deposit or trust. *Ib.*

3. If the assignee of a chose in action would render his claim available against the debtor, who has been summoned as trustee by a creditor of the assignor, the assignee must give notice of such assignment to the trustee before or at the time of the disclosure, that it may be stated therein as a fact. *M'Allister* v. *Brooks*, 80.
4. A judgment in a trustee process, having been rendered and duly recorded, must stand until reversed by due course of law; and is conclusive upon the creditor of the trustee to the extent of the judgment against him, unless he can question the correctness of the disclosure. *Ib.*
5. In a trustee process, where the Court had jurisdiction of the subject matter, and the parties were regularly in Court, and might have objected, in any stage of the proceedings, to whatever might have seemed to have been irregular, and where no objection was interposed, it is to be presumed, that if any ground existed therefor, it was waived. *Ib.*
6. When there is a subsisting judgment against a trustee, it constitutes a good defence for him in an action by his principal for the same cause of action, without proof of satisfaction. *Ib.*
7. Where the demandant in a writ of entry had recovered judgment, and had elected to pay to the tenant the amount of betterments allowed to him, and a person who had been one of the attorneys of the tenant had been appointed by the Court under the provisions of the betterment act, to receive the money; and the amount in bills was afterwards offered to him in his office, and left on his table, he protesting at the time that he had no right to receive the money, that it should be paid to the clerk, and that he had nothing to do with it; and immediately a process was served upon him as trustee of the party entitled to the betterments, and after the service the money was taken care of by him; the person summoned as trustee was adjudged to be chargeable. *Morse* v. *Holt*, 180.
8. The provision in the Rev. St. c. 119, § 63, that "no person shall be adjudged a trustee by reason of any amount due from him to the principal defendant, as wages for his personal labor, for a time not exceeding one month," is not restricted to the month immediately preceding the service of the process on the supposed trustee. *Parks* v. *Knox*, 494.

See ARBITRAMENT AND AWARD, 4.

TROVER.

See TENANT IN COMMON, 4.

USURY.

Where a note for three thousand dollars which included usury was paid by the note in suit, of two thousand dollars, and by a note of one thousand dollars, paid before the commencement of the action; and where it did not appear on the trial that the illegal interest was separated from the principal and wholly included in either of the two last mentioned notes; and where twelve per cent. interest had been paid on the $2000 note; *it was held*, that under the statute of this State, the illegal interest reserved in, and taken upon, the note in suit, should be deducted from the amount of it, and that the plaintiff should recover the balance, without costs, and should pay costs to the defendant. *Darling* v. *March*, 184.

VENDOR AND PURCHASER.

1. Where bills of a bank, which was in good credit at that time in that place, were received in exchange for other bills, when in fact the bank had previously failed, but the failure was unknown to both parties, and each supposed the bills to be current, the loss on the bills is to be borne by the payer, and not by the receiver. *Frontier Bank* v. *Morse*, 88.
2. The rule that where both parties are equally innocent or equally guilty, *potior est conditio defendentis*, does not apply to cases of money paid by mistake. *Ib.*
3. Where bills are thus received as currency, when the bank had failed, it is not necessary that the receiver should present the bills at the bank for payment. It is sufficient, if the payer was seasonably notified of the failure, and that the amount would be required of him, and that the bills, which had been sent to the place where the bank issuing them was located, would be returned to him as soon as practicable. *Ib.*

4. And if the payer of the bills is seasonably notified, and replies, that he will have nothing to do with the bills, it is not necessary that they should be returned by the earliest mail, or tendered to him. *Ib.*
5. Where a pair of oxen had been conditionally sold, but were to remain the property of the seller until paid for, and were delivered into the possession of the conditional purchaser, and before payment therefor were attached and taken as his property, all right of such purchaser to the possession was held to have been determined, when the owner informed him, that he should take back the oxen, and in his presence demanded them of the attaching officer. *Leighton* v. *Stevens*, 252.

See LIEN, 3. CONTRACT.

VERDICT.

1. The verdict of a jury is not valid and final until pronounced and recorded in open Court. *Goodwin* v *Appleton*, 453.
2. If the jury return a verdict into Court, which is not such as the issue requires, the Court may send them back to reconsider their verdict, with appropriate instructions, at any time before it is received and recorded as a verdict. *Ib.*

See JURORS, 2, 3. PRACTICE, 7, 12, 15.

WAYS.

1. If a committee be chosen by a town "to lay out and let the remainder of said road to the lowest bidder," their agency does not extend farther than to the making of a contract to make the road; and they have no authority to accept the work, in behalf of the town, as a road made according to the contract, or to waive performance of the contract according to its terms. *Allen* v. *Cooper*, 133.
2. And if a committee of three had the power, one of them, without authority from the others, cannot waive the performance of any of the terms of the contract. *Ib.*

WILL.

1. Where the testator, in his will, devises certain estate to a trustee, and directs that the income shall be paid to a son during life, and that on the son's death the principal shall be paid to certain other persons; the death of the son prior to the death of the testator, does not prevent the devise over from being effectual. *Morton* v. *Barrett*, 257.
2. Where the trustee cannot perform the duties imposed upon him by the will without having a legal title in the property devised to him in trust, he will be considered as taking the legal title. *Ib.*
3. If it clearly appears from the will, that the word *heir*, as used therein, means *heir apparent*, it will be so considered in giving a construction to it. *Ib.*
4. That the intention of the testator should be carried into effect, is the great and governing guide for the construction of wills; and the true interpretation of any one clause, is to be sought by considering it in connecton with all the others, and by an examination of the main designs of the testator, as manifested by the whole instrument. *Ib.*
5. And, therefore, where such general intent clearly appears, it should be carried into effect, although it should require some departure from a literal construction of a particular clause. *Ib.*
6. If a will be made in a foreign country by one domiciled there, and it be there duly established as his will, it can have no operation upon his real estate here, unless made and executed in conformity with the laws of this State. *Potter* v. *Titcomb*, 300.
7. But it would seem, that such will is sufficient to pass to a legatee personal property found here. *Ib.*
8. Where a testator in his will, after having said that, "as touchig my worldly estate, I give, devise and dispose of the same in the following manner and form," and after directing that his "debts and funeral charges be first paid," without stating by whom or from what fund, proceeded thus:— "My will is, that my said wife Dorothy Varney, shall have the whole of

my estate real and personal during her natural life," and made no other devise or bequest in his will; *it was held*, that Dorothy Varney took but an estate for life in the land. *Varney* v. *Stevens*, 331.

9 In the construction of wills, the rule that the general intent to dispose of the whole property should prevail in preference to any particular intent, applies to cases where there is an intention exhibited to make a certain disposition of the property, and the mode of executing that intention is erroneously, defectively, or illegally prescribed in the will, and not to cases where there is a clear intention to effect another purpose, distinct and differing from the more general object. *Pickering* v. *Langdon*, 413.

10. If the testator uses language which could be employed to carry the general intent and purpose into effect, it would be the duty of the Court to make use of it to accomplish that object; but the Court is not authorized to supply omissions by adding words, even for such purpose. The testator must execute his intentions, or by the use of some language, give the Court the power to execute them, to make them effectual. *Ib.*

11. And in these respects there is no distinction between the rules as to real and personal property. *Ib.*

12. Where a clause in an original will and one in a codicil thereto are entirely inconsistent, and both cannot be executed, the latter clause must prevail. *Ib.*

13. If the devisee, or legatee, have the absolute right to dispose of the property at pleasure, a devise over of the same property is inoperative. *Ib.*

14. A testatrix made a will, wherein after giving several legacies, she used these words. "The residue of my property, after paying my just debts, I give and bequeath to P. L. and E. L. constituting them residuary legatees to all my property not otherwise disposed of, whether real or personal, for their use and benefit, and after the death of E. L. what remains of her part to be put at interest for the benefit of E. S. L. and A. P." Afterwards she made a codicil, wherein she says, "Having made and executed my last will and testament, and now thinking it fit and expedient to make some alterations therein, additional or as amendments to my said original will. First, The one moiety or half of my estate which in said will I devised to P. L. I do by this codicil devise jointly to said P. L. and his wife A. S. L. as a life estate, to hold, possess and enjoy by them or either of them who may survive the other during his or her natural life. Second. The moiety or half of my estate which, in said original will, I devised to my niece E. L. by this codicil my will is, that after the decease of the said E. L. said moiety is to descend to E. S. L. and A. P. and W. L. G. equally." *It was held* that, as to the one moiety, P. L. and A. S. L. took but a life estate, in the real estate, and the income only of the personal estate, and that the reversionary interest was to be considered as undevised property of the testatrix, and to be distributed to her next of kin by the statute of distributions. *Ib.*

15. Although such request was specially made in the plaintiff's bill in equity, the Court declined to appoint trustees to take charge of the property, saying, that as to the real estate the law would determine the rights of the parties and protect them, and that as to the personal property the executors themselves became trustees for those entitled. *Ib.*

16. And as it respects the other moiety, *it was held*, that E. L. took an estate in fee in the real estate, and an absolute right to the personal property. *Ib.*

17. Where the will is not in the handwriting of the deceased, and the witnesses are present and competent to testify, it is incumbent on the party who would establish the will to satisfy the jury from the proof, that the testator knew, at the time of the execution of the instrument, that it was his will; and this must appear either from positive testimony, or from circumstances furnishing satisfactory proof of the fact.

Gerrish v. *Nason*, 438.

18. Where a will is to be proved, the law does not presume that the party signing it was sane at the time, as in the case of the making of other instruments; but the sanity is to be proved. *Ib.*

ERRATA.

Page 27, line 9, for *intrusted* read *interested.* Page 95, line 29, for *take* read *takes.* Page 312, last line of the abstract, read "*the tenth and eleventh sections of the Revised Statutes*, c. 145."

IN VOLUME XXI.

Page 398, first line of the abstract, in *Barrows* v. *Bridge*, for *since* read *before;* and make the same correction, near the bottom of page 594, in the Index.